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 INTERNET ASSOCIATION SUPPORTING RESPONDENT

JOSEPH C. GRATZ
Counsel of Record
DURIE TANGRI LLP
217 Leidesdorff Street
San Francisco, CA 94111
(415) 362-6666
jgratz@durietangri.com

Counsel for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTEREST OF THE AMICUS CURIAE[1]

Internet Association represents roughly forty leading technology companies. Its membership includes a broad range of Internet companies, from travel sites and online marketplaces to social networking services and search engines. Internet Association advances public policy solutions that strengthen and protect Internet freedoms, foster innovation and economic growth, and empower small businesses and the public. It respectfully submits this Brief of Amicus Curiae in Support of Respondent to encourage this Court to consider the importance of authoritative government data to the modern, innovative Internet and its users.

In particular, a number of Internet Association members make open government data available for public use.[2] Increased certainty regarding the types of government information whose dissemination can be controlled using copyright, and the types of government information that are available for public use, will

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[1] Counsel for the parties have consented in writing to the filing of this brief. Pursuant to Rule 37.6, no counsel for either party had any role in authoring this brief in whole or in part, and no party other than the named amicus or its members has made any monetary contribution toward the preparation and submission of this brief.

[2] *See*, *e.g.*, Google Cloud Public Datasets, *at* https://cloud.google.com/public-datasets/; Microsoft Azure Open Datasets, *at* https://azure.microsoft.com/en-us/services/open-datasets/; Amazon Web Services Open Data Registry, *at* https://registry.opendata.aws.

permit the members of the Internet Association and their customers to better serve and inform the public.

SUMMARY OF THE ARGUMENT

The Internet facilitates robust debate—and robust debate, in our democracy, should be informed debate. Authoritative sources, and especially authoritative government documents, are important inputs to an informed debate.

Granting exclusive rights to choose who may disseminate those documents, and how, effectively withdraws them from the public sphere where they are so critically needed. The Court should confirm that texts imbued with government authority that help the public to understand their legal obligations cannot be subject to copyright.

The OCGA presents a vivid example of the importance of this rule. The only official version of Georgia's statutes appears on only one website—that of the state's contractor, Lexis. But that version, because of technical choices made by that contractor, cannot be searched using Internet search engines, making it harder for citizens to find the official version of the law. Even worse, some of Georgia's legal rules are incorporated into the OCGA by reference, and the organization that promulgates those laws prevents citizens from copy-and-pasting or printing those laws without payment of a fee. With a clear rule against copyright in such authoritative legal documents, others will be able

to post the official version of the law on fully-functioning websites.

Clear and predictable rules regarding which texts may be copyrighted and which texts belong to the public will encourage innovators to make authoritative legal materials accessible to citizens in ways that help them find and analyze those texts and understand their legal obligations. Because copyright provides for massive statutory damages even for unintentional or unknowing infringement, uncertainty in this area prevents investment in the creation of those tools.

Limiting the "government edicts" doctrine to texts that themselves impose binding legal obligations does not provide a predictable or workable rule. Many texts that are important to understanding one's legal obligations do not fit that description. For that reason, the Court should hold that the "government edicts" doctrine allows unrestricted dissemination and use of texts imbued with government authority that help the public to understand their legal obligations.

Arguments made by other amici suggesting that the Supremacy Clause or the Takings Clause stand in the way are without merit. The Court should confirm that texts imbued with government authority that help the public to understand their legal obligations cannot be subject to copyright.

ARGUMENT

I. Unless parties other than Lexis are permitted to host the OCGA, the text of the OCGA cannot serve its proper role in informing the public.

In this case, this Court has its first opportunity since 1888 to address the scope of the "government edicts" limitation on copyright. Since the time of *Banks* and *Callaghan*, the way that people access the laws that govern them has evolved. Today, citizens are more likely to seek out information by searching on Bing or Google than by visiting a law library. Technology offers today's citizens unparalleled tools to gather, analyze, understand, and disseminate information. An essential input to those tools—and to citizens' resulting understanding—is authoritative information from trusted sources.

The Internet empowers individuals to "become a town crier with a voice that resonates farther than it could from any soapbox," *Reno* v. *Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997). But just as important as the potential to lift up the voices of the citizenry is the Internet's potential to facilitate those citizens' access to authoritative, trustworthy information. Ready access to trustworthy information provides the grounding for an informed "marketplace of ideas" that can yield more of the benefits, and fewer of the drawbacks, that come with "encouraging freedom of expression in a democratic society." *Id.* at 885. And ready access to trustworthy information can help to douse

flare-ups of incorrect or untrustworthy information more quickly and more effectively.

Authoritative government documents play an important role as a source of authoritative information—both about the law and about other matters of public concern. Granting exclusive rights to decide who may disseminate that authoritative information, and how, effectively withdraws that information from the sphere where it is perhaps most needed: the uninhibited, robust, and wide-open debate on public issues that occurs, in venues both lofty and lowly, on today's Internet.

And that brings us to the question before the Court in this case: whether the only official version of Georgia's statutes may be subject to the power that copyright law gives a copyright holder to control whether and how a copyrighted work may be disseminated. Wielding that power, Georgia and its contractor, Lexis, have made choices that effectively withdraw the official version of those statutes from being meaningfully accessible on the Internet: the text of the only official version of Georgia's statutes is not searchable through tools like Bing or Google, simply because of the technical choices that Georgia's contractor made.[3]

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[3] For example, the text of OCGA § 1-1-1 cannot be found by a search engine on the site that hosts the OCGA. *See*, *e.g.*, https://perma.cc/QU7B-YBLA (Bing search for the phrase "codification shall be merged with annotations" on the advance.lexis.com site that hosts the OCGA); https://perma.cc/RDN3-HZL3 (same search on Google).

There is *no* official version of Georgia's statutes that can be searched through the most popular search engines, since Lexis has chosen to host that version in a way that effectively excludes it from searches. But more critically, that is because nobody other than Lexis is permitted to post the official version of Georgia's statutes; even the state of Georgia itself doesn't host a copy on its own website. According to Georgia, copyright prevents anyone else from posting a version of the OCGA that *can* be located through search engines.

To be sure, others may have posted many of the same words—but those versions are not the official version privileged under Georgia law. They are not the authoritative version; only the OCGA is. And the OCGA provides that "any citation in any public or private document, writing, or other instrument to a law of the State of Georgia which has been codified in the Official Code of Georgia Annotated shall be construed to be a reference to such law *as contained in the Official Code of Georgia Annotated*." OCGA § 1-1-8(d) (emphasis added).

Because federal legal materials are unambiguously free from copyright, there is a wide variety of ways to access authoritative copies: through the Cornell Legal Information Institute, on FindLaw, or on a variety of websites operated by the federal government. But state and local materials—even those that unambiguously carry the force of law—are frequently found only on a single contractor's website. This places the public's access to the only website that hosts the official version of the law at the mercy of business and

technical choices made by a contractor like Lexis for its own commercial reasons.

Some technical choices made by such contractors impose even more serious fetters on the public's ability to access and effectively use legal texts than exclusion from search engines. For example, Georgia's laws governing buildings are not contained in the OCGA *in haec verba*; instead, the OCGA enacts those laws by adopting model codes. One such law is the International Building Code, a model code published by the International Code Council ("ICC").[4] The State of Georgia does not make those laws available to its citizens on its website; instead, it directs citizens to the ICC for copies.

And while the ICC hosts a copy of the International Building Code on its website, it goes even farther than excluding the law from being found using search engines: ICC takes special technical measures to prevent Georgia's citizens from copying-and-pasting the text of their laws or printing out a copy of any portion of those laws. Instead, ICC chooses to charge for the privilege. For example, the text of Georgia's law governing how many stories tall one may build a particular type of building appears not on any website

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[4] OCGA § 8-2-25(a) ("On and after July 1, 2004, the state minimum standard codes enumerated in subdivisions . . . (9)(B)(i)(I) through (9)(B)(i)(VIII) of Code Section 8-2-20 shall have state-wide application and shall not require adoption by a municipality or county."); OCGA § 8-2-20(9)(B)(i)(I) (listing "International Building Code (ICC)" among the "state minimum standard codes").

operated by the State of Georgia, but on the website operated by the ICC, to which the state directs citizens seeking that law.[5] When one presses the "Print" button on the ICC's web page containing that provision, one's printer spits out not the text of the law, but the following text:

> You must own a premiumACCESS subscription to this title in order to print the content and use enhanced features. Please login if you own this title and are seeing this message.[6]

A softcover copy of the law in question costs $147.00, and a "premiumACCESS" subscription to it costs $9.83 per month.[7]

This is not how the law is supposed to work. The public's access to the official versions of the laws that govern them should not depend on technical choices made by third-party contractors for their own commercial reasons. A citizen's ability to search for the official

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[5] International Building Code § 503.1 (2012), *adopted by* OCGA § 8-2-25(a); *see* Georgia State Amendments to the International Building Code (2012 Edition), *at* https://www.dca.ga.gov/sites/default/files/2018_ibcamendments.pdf (identifying "Building Construction Types including allowable height" as an area on which "The INTERNATIONAL BUILDING CODE, 2012 Edition, published by the International Code Council . . . shall constitute the official Georgia State Minimum Standard Building Code.").

[6] https://codes.iccsafe.org/content/IBC2012P13/chapter-5-general-building-heights-and-areas#IBC2012P13_Ch05_Sec503 (after "Print" function invoked).

[7] https://shop.iccsafe.org/codes/2012-international-codes/2012-international-building-code-1.html.

version of the law should not depend on whether Lexis has chosen to exclude the law from search engines. A citizen's ability to copy-and-paste the law into a legal brief should not depend on whether a private company has decided to disable that functionality. And a citizen's ability to print the citizen's own copy of a legal provision should not depend on whether a citizen has paid a particular private party the monthly fee they have chosen to demand.

The way to vindicate every citizen's right to access and use the official version of the law is to confirm every citizen's right to *speak* the official version of the law. By securing the public's right to speak the law, this Court can ensure that any private party's attempt to limit the free access to and use of the law is neutered by competition. If Lexis or the ICC or any other private party chooses to place technological manacles upon the law, competitors will be able to unlock them.

II. Businesses need certainty regarding which sources of government data may be subject to copyright.

"Because copyright law ultimately serves the purpose of enriching the general public through access to creative works, it is peculiarly important that the law's boundaries be demarcated as clearly as possible." *Fogerty* v. *Fantasy, Inc.*, 510 U.S. 517, 517–18 (1994). And that is particularly true because copyright law provides for statutory damages of up to $30,000 per

work even in the case of inadvertent or unknowing infringement. 17 U.S.C. § 504(c)(1).

Where many works are involved, the damages can quickly become astronomical. For example, someone who published each of the Unofficial Advisory Opinions on points of Georgia law issued by the Georgia Attorney General since 1992 could be liable for up to $6,060,000 in statutory damages if those works are subject to copyright, even if they reasonably believed that their acts were not infringing.[8] In the absence of a clear rule that addresses the full range of texts imbued with government authority that help the public to understand their legal obligations, businesses will not invest in making those texts more available to citizens.

While the work of Public Resource in making legal texts freely available has been impressive, there is more that can be done to make those texts accessible and understandable to the public. Legal certainty will permit other enterprises to provide even more robust tools and information. *See*, *e.g.*, Google Patents, *at* https://patents.google.com/ (providing free tools for searching and analyzing patents).

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[8] There are 202 such unofficial advisory opinions. *See* Georgia Attorney General, Unofficial Opinions, *at* https://law.georgia.gov/opinions/unofficial.

III. Respondent's proposed rule should be adopted because petitioners' "force of law" rule is underinclusive and difficult to administer.

This case is in some ways remarkable for how much the parties agree upon. Everyone appears to agree that, at minimum, "works which *in and of themselves* set forth binding legal obligations," SIIA Br. at 10, cannot be subject to copyright. Everyone appears to agree that *Banks* and *Callaghan* do not announce a clear and administrable rule for when works cannot be subject to copyright. And everyone appears to agree that this Court should take the opportunity to announce such a clear and administrable rule.

But we part with the petitioners (and with the SIIA) when it comes to what rule best serves that end while preventing the law from, in fact or in effect, being subject to copyright. The SIIA argues that only "works which *in and of themselves* set forth binding legal obligations" should be uncopyrightable. This rule is neither as straightforward nor as reasonable as it might appear.

Not all sources of legal authority set forth binding legal obligations. Some (like unofficial advisory opinions of the Georgia attorney general) set forth *nonbinding* statements of legal obligations. Others (like nonprecedential appellate opinions) help the public to understand their legal obligations even though they may not define what those obligations are. And regardless of one's views on the utility of legislative history

in determining those obligations, it is difficult to see why legislators or governments should be able to use copyright to control who is permitted to disseminate materials that could reasonably form the basis for arguments about statutory interpretation.

That is why this Court should adopt respondent's proposed rule: texts imbued with government authority that help the public to understand their legal obligations cannot be subject to copyright. That rule cleanly, predictably, and correctly resolves the full range of likely scenarios.

Text that carries the force of law is thereby imbued with government authority and is the first and best source for understanding legal obligations. That is true whether the text was written by a legislator or a staffer or a lobbyist or an industry group, and it is true whether the text appears in the statute verbatim or is incorporated by reference.

For example, Georgia's laws governing secured transactions provide that an initial financing statement is to be set forth "in the form and format set forth in the final official text of the 2010 amendments to Article 9 of the Uniform Commercial Code promulgated by the American Law Institute and the National Conference of Commissioners on Uniform State Laws, and such form and format are incorporated into this subsection by reference." OCGA § 11-9-521(a). The form and format specifications set forth in the referenced

document are imbued with legal authority by that statutory text, just as if they were set forth verbatim.[9]

At the same time, respondent's rule clearly permits copyright in private treatises and annotations (since they are not imbued with government authority) and in state-government works like park maps and guidebooks (since they do not help the public to understand their legal obligations).

And respondent's rule prevents the confusion that we see in this case about the role of the annotations in question in Georgia's legal regime. Whether or not the legislature intends them to be binding, it's clear that at least some Georgia courts give them special weight. *See*, *e.g.*, *Allen* v. *Jones*, 269 Ga. App. 607, 609 n.6 (2004) ("See Notes to OCGA § 10-5-2(a)(26).").[10] And those who are subject to the jurisdiction of those Georgia courts will need to refer to those annotations in order to understand what those prior decisions mean in practice.

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[9] Indeed, other states set forth the specifications verbatim rather than incorporating them by reference. *See*, *e.g.*, Nebraska Uniform Commercial Code § 9-521(a), *at* https://nebraskalegislature.gov/laws/ucc.php?code=9-521 (setting forth form and format specifications verbatim).

[10] The case relates to whether Georgia's revision of the definition of "security" in 2002 to include viatical investments meant that viatical investments were not "securities" under Georgia law in 1998, at the time of the alleged wrongdoing. The opinion uses this citation for the defense's central proposition—that "Effective July 1, 2002, the General Assembly amended the act to include the term 'viatical investment' in the list of instruments that constitute securities." *Id.*

IV. Neither the Supremacy Clause nor the Takings Clause is relevant here.

In its amicus brief, the International Code Council raises the Supremacy Clause and the Takings Clause as reasons this Court "should steer well clear of any ruling that would carry negative implications for the rights of private copyright owners." ICC Br. at 9. As discussed above, this Court should take the opportunity to establish a clear standard for when laws and related official legal materials can be subject to copyright, and when they cannot. Concerns about the Supremacy Clause and the Takings Clause need not detain the Court in that task.

A. The Supremacy Clause is irrelevant because the question is entirely one of federal copyright law.

ICC is, of course, correct that federal copyright and patent statutes are the supreme law of the land, and "[w]hen state law touches upon the area of these federal statutes, it is 'familiar doctrine' that the federal policy 'may not be set at naught, or its benefits denied' by the state law." *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. 225, 229 (1964) (quoting *Sola Elec. Co*. v. *Jefferson Elec. Co.*, 317 U.S. 173, 176 (1942)).

But ICC is wrong that this has anything to do with the rule that the law cannot be subject to copyright. When particular text is imbued with government authority, it is *federal* copyright law, interpreted in light of *federal* constitutional principles, that denies

copyright protection to that text. A state enactment purporting to deny copyright to a particular federally-copyrighted text would be preempted, to be sure, just as would a state enactment purporting to grant copyright to a text that was in the public domain under federal copyright law. But by enacting the OCGA as the only official version of Georgia's statutes, Georgia did not make a pronouncement of copyright law. Instead, it made a pronouncement of Georgia law that has the effect, by operation of *federal* copyright rules, of placing that text beyond the reach of copyright.

Neither of the cases ICC cites support its argument. In *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 710 (1984), this Court held that a state-law requirement to delete certain commercials from rebroadcasts of television programming conflicted with a Copyright Act requirement that commercials in those rebroadcasts be left intact. And in *Sperry* v. *Florida ex rel. Fla. Bar*, 373 U.S. 379, 404 (1963), this Court held that a Florida law requiring a state law license in order to practice before the United States Patent and Trademark Office conflicted with the federal law expressly permitting certain qualified non-lawyers to do so. Neither of those cases has anything to do with a situation where a provision of state law has a collateral consequence, by application of federal law, on the copyright status of a text.

Nor does ICC's reference to section 201(e) of the Copyright Act withstand even the lightest scrutiny. That section provides:

> When an individual author's ownership of a copyright, or of any of the exclusive rights under a copyright, has not previously been transferred voluntarily by that individual author, no action by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright, or any of the exclusive rights under a copyright, shall be given effect under this title, except as provided under title 11.

This provision was enacted to prevent totalitarian governments from suppressing dissent by expropriating and then exercising the copyrights in dissident citizens' writings.[11] It is triply irrelevant to any question about the copyrightability of the law: there is no "individual author" at issue (but instead a government or private entity that has written a text that has been adopted as an official legal document); the copyrights at issue *have* been "previously transferred" (here, to the State of Georgia; in ICC's case, to ICC); and there is no attempt to "seize, expropriate, transfer, or exercise rights of ownership" in a copyright (but instead the conclusion that copyright does not extend to certain documents). Section 201(e) is no impediment to recognition that texts imbued with government authority that help the public to understand their legal obligations cannot be subject to copyright.

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[11] *See* Francis M. Nevins, Jr., *When an Author's Marriage Dies: The Copyright-Divorce Connection*, 37 J. Copyright Soc'y U.S.A. 382, 383 (1990) (discussing history of and impetus for § 201(e)).

B. The Takings Clause is far afield from the questions here.

ICC argues that the Court should shrink from a bright-line rule regarding whether authoritative legal materials can be subject to copyright on the ground that such a holding may raise Takings Clause issues. It will not, for two reasons.

First, the question whether authoritative legal materials can be subject to copyright does not depend on whether the government is obligated to compensate private parties whose texts are adopted. That is simply a separate question. It can both be true that government adoption of a text as law extinguishes copyright and that the prior copyright holder of that text is due compensation as a result of that adoption.

Second, the government is *not*, in fact, obligated to compensate private parties whose texts are adopted, at least where those private parties sought out the adoption. Having "come to the nuisance," and having known that the consequence of such adoption was that their work would become "free for publication to all," *Banks* v. *Manchester*, 128 U.S. 244, 253 (1888), they cannot be heard to demand compensation on the ground that the government did what they asked the government to do. *See*, *e.g.*, *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1006 (1984) (no takings claim where party was "on notice" of the consequences of a government submission for its intellectual-property rights).

CONCLUSION

The judgment of the court of appeals should be affirmed, and this Court should confirm that texts imbued with government authority that help the public to understand their legal obligations cannot be subject to copyright.

Respectfully submitted,

JOSEPH C. GRATZ
Counsel of Record
DURIE TANGRI LLP
217 Leidesdorff Street
San Francisco, CA 94111
(415) 362-6666

Counsel for Amicus Curiae