No. 18-1150

In the Supreme Court of the United States

STATE OF GEORGIA, ET AL., PETITIONERS

v.

PUBLIC.RESOURCE.ORG, INC.

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

BRIEF OF THE CENTER FOR DEMOCRACY AND TECHNOLOGY AND CATO INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

The Center for Democracy and Technology (CDT) is a non-profit public interest organization. For almost 25 years, CDT has represented the public's interest in an open, decentralized internet and worked to ensure that the constitutional and democratic values of free expression and privacy are protected in the digital age. CDT's team has deep knowledge of issues pertaining to the internet, privacy, security, technology, and intellectual property, with backgrounds in academia, private enterprise, government, and civil society. This diversity of experience allows CDT to translate complex policy into action: it convenes stakeholders across the policy spectrum, advocates before legislatures and regulatory agencies, and helps educate courts.

The Cato Institute is a nonpartisan, nonprofit think tank dedicated to individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies promotes the principles of constitutionalism that are the foundation of liberty. To those ends, Cato conducts conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

Consistent with their values, CDT and Cato believe that the Constitution and sound public policy require that people have free, unmonitored access to edicts of

[1] Both parties have consented to the filing of this *amicus curiae* brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici curiae* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

government like the Official Code of Georgia Annotated (OCGA).

SUMMARY OF THE ARGUMENT

The OCGA rightfully belongs to the public. No one—not the government, and not a private contractor—should be granted a monopoly to exclude people from accessing the official version of the laws that bind them. Nor should individuals be forced to access the official version of the law through a private website that tracks what laws they view.

Copyright exists to benefit the public. The nation's founders allowed works to be removed, for a limited time, from the public domain only because the temporary harm to the public of doing so is ultimately outweighed by the public benefit. By granting authors a temporary monopoly, copyright gives them incentive to create works that otherwise would not exist and that will ultimately belong to the public.

That fundamental bargain of copyright is inapplicable here. Granting the government a copyright monopoly over the official version of the law harms the public with no countervailing benefit. The government does not need copyright to incentivize it to publish the official version of the law, or annotations that explain the law. That is the government's basic function.

An engaged and informed public is essential to a thriving democracy: participants must be able to easily access and engage with the laws governing society. They should not be charged to access the official codes they paid the government to write. And people must have access to the laws that bind them, as well as the

ability to redistribute the official version of the law freely. If only certain portions of the official annotated codes are subject to copyright, ordinary people are likely to be confused about what they are permitted to share, imposing not only financial costs on individuals, but also civic costs by hampering their ability to speak freely about the law.

Finally, allowing a private contractor to be the only entity licensed to distribute the official version of the law harms people by hampering their ability to view the law anonymously. This exclusive license arrangement forces people to disclose deeply sensitive information—including the laws that individuals view and the search terms they use—to a private party. This data could be disclosed to third parties—including the government—and the mere fact that users are monitored could have a chilling effect, dissuading them from viewing and understanding the law. Moreover, granting a copyright monopoly that allows only licensed entities to display works like the OCGA eliminates competition that could lead to better terms for users.

This Court should affirm that the OCGA—an authoritative government text that aids people in understanding their legal obligations—is a government edict that cannot be wrested from the public domain.

ARGUMENT

I. GRANTING A COPYRIGHT MONOPOLY OVER OFFICIAL CODES UNDERMINES THE CONSTITUTIONAL PURPOSE OF COPYRIGHT

The nation's founders intended that, by default, human knowledge would be "free as the air to common use." *International News Serv.* v. *Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting). As Justice Brandeis explained, "the noblest of human productions" may take on the "legal attribute of property * * * only in certain classes of cases where public policy has seemed to demand it." *Ibid.*

Copyright exists as a limited exception to that "general rule of law," 248 U.S. at 250 (Brandeis, J., dissenting), because it benefits the public by inducing authors to create works that otherwise would not exist and that will ultimately belong to the public. That is, copyright takes works out of the public domain for a limited time only because doing so will ultimately benefit the public more than the public is harmed by that temporary removal.

But the government does not need any incentive to write official codes. That is the government's job. Without the need for this incentive, the fundamental bargain of copyright is inapplicable: there is no reason to wrest official codes from the public domain when doing so is not necessary to motivate their creation. Furthermore, because the works removed from the public domain are official codes—as opposed to, for example, artistic works—the harm to the public is particularly acute. Extending

copyright protection to official codes therefore undermines the fundamental purpose of copyright: to benefit the public.

A. Copyright Takes Works Out of the Public Domain Only Because Doing So Ultimately Benefits the Public

The Constitution establishes that the purpose of copyright is "[t]o promote the progress of science and useful arts, by securing for limited times to authors * * * the exclusive right to their * * * writings." U.S. Const. Art. 1, § 8, Cl. 8. Providing a limited copyright monopoly is supposed to promote progress because it gives authors the incentive to engage in creative work by allowing them to financially benefit from those works and to control the way those works are used. The purpose of granting this monopoly is to benefit the public. As this Court has explained, "[t]he sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors." *Fox Film Corp.* v. *Doyal*, 286 U.S. 123, 127-128 (1932). That is, "[t]he 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." *Twentieth Century Music Corp.* v. *Aiken*, 422 U.S. 151, 156 (1975).

This monopoly temporarily harms the public in order to ultimately bestow greater benefits to the public. As Justice Breyer has articulated, copyright "imposes upon the public certain expression-related costs in the form of (1) royalties that may be higher than necessary

to evoke creation of the relevant work, and (2) a requirement that one seeking to reproduce a copyrighted work must obtain the copyright holder's permission." *Eldred* v. *Ashcroft*, 537 U.S. 186, 248 (2003) (Breyer, J., dissenting). Justice Breyer explained that, "[t]he first of these costs translates into higher prices that will potentially restrict a work's dissemination. The second means search costs that themselves may prevent reproduction even where the author has no objection." *Ibid.*

The founders warned against monopolies and intended for the harms imposed by the copyright monopoly to be outweighed by the ultimate benefits to the public. See *Eldred*, 537 U.S. at 246 (Breyer, J., dissenting). James Madison wrote that "[m]onopolies * * * ought to be granted with caution, and guarded with strictness [against] Abuse," noting that the Constitution "limited [monopolies] to two cases, the authors of Books, and of useful inventions, in both which they are considered as a compensation for a benefit actually gained to the community, as a purchase of property which the owner might otherwise with[h]old from public use." Monopolies. Perpetuities. Corporations. Ecclesiastical Endowments *in* J. Madison, *Writings* 756 (J. Rakove ed. 1999) (Madison). Thomas Jefferson warned against even copyright monopolies. Letter from Thomas Jefferson to James Madison (July 31, 1788), *in* 13 *Papers of Thomas Jefferson* 443 (J. Boyd ed. 1956) ("The saying there shall be no monopolies lessens the incitements to ingenuity, which is spurred on by the hope of a monopoly for a limited time, as of 14 years; but the benefit even of limited monopolies is too doubtful to be opposed to that of their general suppression"); see also Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813).

These writings demonstrate that the founders imposed the harms of copyright on the public only to ultimately secure even greater benefits for the public. In other words, "the Copyright Clause [is] a grant of legislative authority empowering Congress 'to secure a bargain—this for that.'" *Eldred*, 537 U.S. at 214 (citation omitted). Under the terms of this bargain, the benefits to the public must ultimately outweigh the temporary harms to the public. That is why the scope and duration of copyright protection are limited: to balance the effect on the public so that the public ultimately benefits more than it is harmed. Madison 756; *Eldred*, 537 U.S. at 245-248 (Breyer, J., dissenting) ("The 'reward' is a means, not an end. And that is why the copyright term is limited. It is limited so that its beneficiaries—the public—'will not be permanently deprived of the fruits of an artist's labors'" (quoting *Stewart* v. *Abend*, 495 U.S. 207 (1990))); see also *Twentieth Century*, 422 U.S. at 156 ("The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts."); *Eldred*, 537 U.S. at 214 ("The 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" (quoting *Mazer* v. *Stein*, 347 U.S. 201, 219 (1954)) (internal quotation marks omitted)); H.R. Rep. No. 609, 100th Cong., 2d Sess. 17 (1988) ("Under the U.S. Constitution, the primary objective of copyright

law is not to reward the author, but rather to secure for the public the benefits derived from the authors' labors. By giving authors an incentive to create, the public benefits in two ways: when the original expression is created and * * * when the limited term * * * expires and the creation is added to the public domain.").

The "principal responsibility in this area of the law" is "to protect the public interest in free access to the products of inventive and artistic genius." *Eldred*, 537 U.S. at 242 (Breyer, J., dissenting). Justice Breyer has noted—quoting the legislators who wrote the U.S. House of Representatives Report on the landmark Copyright Act of 1909—that "were a copyright statute not 'believed, in fact, to accomplish' the basic constitutional objective of advancing learning, that statute 'would be beyond the power of Congress' to enact." *Id.* at 247 (Breyer, J., dissenting) (quoting H.R. Rep. No. 2222, 60th Cong., 2d Sess. 6-7 (1909)). That is why Justice Breyer urged, in *Eldred*, that the Court "examine the statute's effects in light of these well-established constitutional purposes" to see whether "copyright's traditional economic rationale applie[d]" in that case and whether the statute at issue there would "act as an economic spur encouraging authors to create new works." *Id.* at 247, 254 (Breyer, J., dissenting).

B. The Government Does Not Need Copyright Incentives to Publish the Official Annotated Code

Here, the fundamental bargain of copyright is inapplicable because the government does not need the financial incentives of copyright to produce the official version of the law. There is no reason to remove the

OCGA from the public domain; doing so prejudices the public without providing any counterbalancing benefit to the public.

The creation and dissemination of the law is the government's sole and exclusive province. Indeed, elected and appointed officials are given salaries. The government should need no additional incentive to produce the official version of the law, or official annotations that explain the law. The government *must* produce the law; failure to do so is not the result of insufficient incentive, but rather dereliction of duty.

This Court has declined to grant copyright protection to the works of government officials who are paid a salary by the public, because such a salary serves as sufficient incentive. In *Banks* v. *Manchester*, this Court held that a judge cannot, for the purposes of copyright, be regarded as the author of an opinion, decision, statement of the case, syllabus, or headnote. 128 U.S. 244, 253 (1888). In its reasoning, the Court pointed to the judge's salary, paid for by the public: "Judges, as is well understood, receive from the public treasury a stated annual salary, fixed by law, and can themselves have no pecuniary interest or proprietorship, as against the public at large, in the fruits of their judicial labors." *Ibid.* The Court noted that "[t]he question is one of public policy, and there has always been a judicial consensus * * * that no copyright could, under the statutes passed by Congress, be secured in the products of the labor done by judicial officers in the discharge of their judicial duties." *Ibid.*

The works-for-hire doctrine exists for the same reason: authors do not need copyright incentives to create

when they are being paid a salary to do so. Under the doctrine, copyright ownership of works for hire vests in the employer or other person for whom the work is prepared. See *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 730 (1989). That is because, in the employment context, copyright "directs its incentives towards the person who initiates, funds and guides the creative activity, namely, the employer, but for whose patronage the creative work would never have been made." *Siegel* v. *Time Warner Inc.*, 496 F. Supp. 2d 1111, 1136 (C.D. Cal. 2007); *Estate of Hogarth* v. *Edgar Rice Burroughs, Inc.*, No. 00 CIV. 9569 (DLC), 2002 WL 398696, at *19 (S.D.N.Y. Mar. 15, 2002).

Official government works like the OCGA can be analogized to a "work for hire" where the copyright should vest in the citizens who employ the government to create such works. Indeed, under the doctrine of popular sovereignty, where the government exercises any sovereign powers, it acts through authority delegated from the people. *McCulloch* v. *Maryland*, 17 U.S. 316, 404-405 (1819). The Eleventh Circuit correctly held here that "lawmakers and judges are draftsmen of the law, exercising delegated authority, and acting as servants of the People, and whatever they produce the People are the true authors. When the legislative or judicial chords are plucked it is in fact the People's voice that is heard." Pet. App. 19a; see also *Veeck* v. *S. Bldg. Code Cong. Int'l, Inc.*, 293 F.3d 791, 799 (5th Cir. 2002) (en banc) ("In performing their function, the lawmakers represent the public will, and the public are the final 'authors' of the law."), cert. denied, 539 U.S. 969 (2003); *Building Officials & Code Adm'rs* v. *Code Tech., Inc.*, 628 F.2d 730, 734 (1st Cir. 1980) ("The citizens are the authors of the

law, and therefore its owners, regardless of who actually drafts the provisions."). Just as an employee hired to draft a work does not need additional copyright incentives to do so, copyright is not needed to move the government to create works like the OCGA because the government exists to serve the people by drafting such works.

The government already has the incentive to create works like the OCGA to further its constituents' understanding and knowledge of the law so that those constituents can obey the law. The government has an interest in the laws being followed—and in order for laws to be followed, laws must be publicly promulgated and understood. See John Locke, *The Second Treatise of Civil Government* § 137 (1690), https://www.gutenberg.org/files/7370/7370-h/7370-h.htm ("[F]or all the power the government has, being only for the good of the society, as it ought not to be arbitrary and at pleasure, so it ought to be exercised by established and promulgated laws; that both the people may know their duty, and be safe and secure within the limits of the law; and the rulers too kept within their bounds."). Thus, the government is inherently incentivized to create works like the OCGA, which both serves as the only official version of the law and also explains the laws by providing annotations that include statutory history, administrative guidance, and summaries of judicial histories. Creating the law and promulgating it so that people can understand and follow it is an incentive in and of itself. Copyright protection is not—and should not be—necessary to induce lawmakers to create works like the OCGA.

Because no incentive is necessary for the government to create works like the OCGA, granting copyright

protection of such works ignores half of the bargain that copyright law strikes: it removes the official codes from the public domain, but provides none of the incentives promised in return. And, because of the nature of the work, the work's return to the public domain upon expiration of its term of copyright protection is unlikely to provide much benefit to the public; by that time, most annotations will likely be irrelevant, as many laws and their interpretations will have evolved.

In the case of the OCGA and similar works, the bargain is backwards: not only does the public fail to reap any benefits from the removal of such documents from the public domain, but the harm to the public of that removal is particularly significant given the nature of the works.

Removing the official version of the law from the public domain is particularly concerning. As discussed below (p. 15, *infra*), the OCGA is designated as the authoritative source of the meaning of the law. Removing such a work imposes harms beyond those typically imposed by copyright—the public is deprived not of a creative work, but rather the official version of the law, including explanations as to what the law means and what actions could result in civil or criminal liability.

The OCGA's annotations are crucial for understanding the law. For example, the OCGA includes annotations that inform people of legislation that the judiciary either limited (OCGA § 16-12-80 (explaining that private possession—but not distribution—of obscene materials is protected under the Constitution)) or entirely struck down as unconstitutional (OCGA § 16-6-2 (explaining that Georgia's anti-sodomy law is unconstitutional to the

extent it criminalizes private acts between consenting adults)). Even after courts have struck down these statutes as unconstitutional, they nevertheless remain in the unannotated code. Restricting access to the annotated code—which provides notice that such statutes are unconstitutional—causes harm to the public.[2]

Copyright strikes a balance: the harm resulting from a work's removal from the public domain is intended to be outweighed by the benefit of the work's creation. Here, however, there is weight on only one side of the scale: the harm to the public. Because of the nature of the work, the weight on that side of the scale is unusually heavy—but, on the other side of the scale, there is no countervailing benefit to the public at all.

II. The Official Version Of The Law Should Not Be Behind A Paywall

A. People Should Not Be Charged to Access the Laws They Pay the Government to Write

All people must be granted access to the laws that bind them, and they should not be charged multiple times for the privilege. Individuals already pay the government, with their taxes, to write works like the OCGA. They should not be charged a second time by the

[2] Permitting copyright over works like the OCGA is at odds with the principles behind the separation of powers that is inherent to our democracy. See *Nixon* v. *Adm'r of Gen. Servs.*, 433 U.S. 425, 441-446 (1977); *Buckley* v. *Valeo*, 424 U.S. 1, 118-124 (1976) (per curiam). When the legislative branch restricts the distribution of the annotations that explain which statutes have been held unconstitutional or otherwise abrogated by courts, it undermines the power of the judiciary.

government, or by a government contractor, to access those works—particularly at monopoly prices.

Until the Eleventh Circuit's ruling in this case, Lexis—as the government's exclusive licensee—was able to charge monopoly prices for the OCGA, and a hard copy cost $400 (not including tax or shipping). Official Code of Georgia Annotated, LexisNexis (Oct. 13, 2018), retrieved from Internet Archive Wayback Machine, https://web.archive.org/web/20181013091438/https://store.lexisnexis.com/categories/content-type/statutory-codes-175/official-code-of-georgia-annotated-skuSKU6647/details. That $400 is the equivalent of two weeks of groceries for a family of four. USDA, Official USDA Food Plans: Cost of Food at Home at Four Levels, U.S. Average, July 2019, https://fns-prod.azureedge.net/sites/default/files/media/file/CostofFoodJul2019.pdf. For documents requiring a subscription to LexisNexis, a monthly "State Enhanced with Full Federal" subscription costs $125 each month—a "special promotional price." LexisNexis, *Lexis Advanced Packages for Online Legal Research* (2019), https://www.lexisnexis.com/en-us/SmallLaweCommerce.

Even worse, these subscription fees and hard copies are themselves taxed—so individuals pay the government to write these official documents, pay the government's licensee to access these documents, and then pay the government more taxes on top of those access fees. LexisNexis, *Taxes*, https://store.lexisnexis.com/help/taxes ("[W]e are required by law to charge applicable sales tax to all customers located in the United States.").

While Lexis ostensibly provides a version of the OCGA online for free, this version does not include many

important aspects of the OCGA—such as judicial summaries, code revision commission notes, and attorney general opinions—and must be accessed through a private party. J.A. 122, 145. Other states' official annotated codes, as well as other official government documents, have similar restrictions on access. Nat'l Conference of State Legislatures, *State Statutes/Code: Holder of Copyright* (2011), http://www.ncsl.org/documents/lsss/Copyright_Statutes.pdf; see, *e.g.*, Tennessee Courts System, Tennessee Code—Lexis Law Link, http://www.tsc.state.tn.us/Tennessee%20Code (providing access to only the unannotated code, and stating, "[b]efore you can view the content, you must click a button that says you agree to [Lexis's] terms and conditions"); Idaho Code, LexisNexis, https://store.lexisnexis.com/products/idaho-code-skuusSku6981 (selling for $515.00 a print copy of the Idaho Code, which is advertised as "the only official source in Idaho for primary law").

B. People Must Have Access to the Laws that Bind Them

It is both unconstitutional and absurd for the government to require people to follow—and indeed, to know—the official codes and also to restrict access to those codes through a copyright monopoly.

As an authoritative government text that explains the law, the OCGA is an edict of government that people are effectively required to use. As the Eleventh Circuit observed below, the OCGA is designated as the authoritative source of the meaning of the law, and comprises information that residents of the state of Georgia are expected to know in order to comply with the law. See Pet.

App. 26a-32a, 40a-43a. The OCGA controls in the case of conflict with any other source. See *Georgia* v. *Harrison Co.*, 548 F. Supp. 110, 115 (N.D. Ga. 1982), vacated by 559 F. Supp. 37 (N.D. Ga. 1983) ("[A]nyone citing [any other compilation of Georgia law] will do so at his peril."). The state of Georgia's website, under the page entitled "Georgia Law," links to the OCGA on Lexis's website. See Georgia Law, https://georgia.gov/popular-topic/georgia-law. Indeed, individuals are expected to rely on the OCGA for *any* citation to codified Georgia laws: "*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 (emphasis added). And, as noted above (pp. 12-13, *supra*), the OCGA states that certain statutes have been held unconstitutional or otherwise abrogated, whereas the unannotated code does not. Accessing the annotated code via Lexis is thus the only meaningful option for individuals, other than remaining ignorant of the law.

Of course, in both criminal and civil matters, it is well established that ignorance of the law is no excuse for failure to comply with the law. *Barlow* v. *United States*, 32 U.S. 404, 411 (1833). This responsibility imposed on individuals is impossible to reconcile with imposing financial barriers to accessing the official version of the law, and otherwise restricting its dissemination through copyright. Doing so undermines the fundamental due process principle "that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC* v. *Fox Television Stations*,

Inc., 132 S. Ct. 2307, 2317 (2012); *Connally* v. *Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (holding that the law cannot force "men of common intelligence [to] * * * guess at its meaning and * * * application"). See also ACLU C.A. *Amici* Br. 18-20 (arguing that allowing copyright protection of the official version of the law violates due process).

C. Forcing People to Access Official Codes through a Private Website Discourages Public Discourse

1. People Are Likely to Be Confused About What Material They Are Entitled to Share

It is undisputed that Georgia's statutes themselves are uncopyrightable under the government edicts doctrine. Pet. Br. 2. But, of course, the official law of Georgia—which Georgia's own website links to[3]—is the OCGA, which only Lexis may display digitally. In the Petitioner's view, some parts of Lexis's display of the OCGA are copyrightable—meaning users are prohibited from copying or distributing those portions of the OCGA—whereas users are entitled to copy and share other parts of what is displayed. This is likely to confuse users and discourage public discourse.

For example, Lexis's current display of the OCGA does not clearly identify which portions of the official code users are entitled to share. Before a user can view

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[3] For example, when a user visiting Georgia's website clicks on "Search the Official Code of Georgia," the user is automatically redirected to Lexis's display of the OCGA. Georgia Law, https://georgia.gov/popular-topic/georgia-law.

the OCGA, the user must click "I agree" on a popup, which says: "These Terms and Conditions do not apply to the Statutory Text and Numbering contained in the Content of the site. However, the State of Georgia reserves the right to claim and defend the copyright in any copyrightable portions of the site." This text does not clarify what constitutes the "copyrightable portions," and which portions of the code users are entitled to share. And, once a user has clicked "I agree" and can view the OCGA, the page makes no distinction between the allegedly copyrightable material (such as section titles) and non-copyrightable material (such as the statutory text itself). This is likely to confuse users and discourage them from sharing text from the official code—even the portions that they themselves, as taxpayers, undisputedly own.

2. Private Parties May Limit Users' Ability to Disseminate Content

Furthermore, terms and conditions imposed by private parties may limit users' ability to disseminate content. For example, those who agree to Lexis's Terms and Conditions in order to access the OCGA are subject to restrictions on how they can disseminate the official code. Lexis's Terms and Conditions state, for example, that a user may only "electronically display Materials retrieved from the Online Services for the Authorized User's individual use," with a limited exception allowing users to display a "de minimis amount * * * to other Authorized Users * * * in the same physical location." LexisNexis, *Terms & Conditions for Use of the Online Services* § 1.1(a) (May 23, 2018), https://www.lexisnexis.com/en-us/terms/general/default.page. Lexis also prohibits users from displaying documents to anonymous

third parties, defining "Authorized User" to mean only "an Eligible Person whom you have identified to LN for purposes of issuing a LN ID." *Id.* § 2.1.

Forcing users to access the OCGA—the official version of the law of Georgia—through Lexis therefore imposes a civil cost in addition to the financial cost. Doing so is likely to confuse users about what portions of the code they are entitled to distribute, and limits their ability to share the official code with others. This directly affects individuals' First Amendment rights by undermining their ability to participate in an informed "discussion of governmental affairs" as well as their ability to "effectively participate in and contribute to our republican system of self-government." *Globe Newspaper Co.* v. *Superior Court*, 457 U.S. 596, 604 (1982).

III. Forcing People To Access Official Codes Through A Private Website Kills Competition And Undermines Users' Privacy And Anonymity

A. Granting a Copyright Monopoly Undermines Competition

Copyright, by definition, grants the author of a work a monopoly that may lead to restrictions on the distribution of that work. U.S. Const. Art. I, § 8, Cl. 8; *Twentieth Century Music Corp.* v. *Aiken*, 422 U.S. 151, 156 (1975). A copyright holder may choose to distribute a work widely, or not to distribute the work at all. In this case, the government chose to license the OCGA *exclusively* to one contractor, Lexis. This exclusive license means that the government will not license the OCGA to any

other party "at any price." Next-Generation Legal Research Platforms and Databases and Digital Accessibility Advocate *Amici* Br. 22-23.

Giving one company a monopoly over distribution of the official version of the law eliminates beneficial market competition and harms the public. First, allowing only one company to display the OCGA allows Lexis to artificially inflate the price of the OCGA. That is why, as discussed above (p. 14, *supra*), a hard copy of the OCGA cost as much as two weeks of groceries for a family of four. Allowing other parties to display the OCGA—such as by eliminating copyright protection of such work—would create market competition that would drive down prices. The cost of a hard copy in such a market would be much closer to the actual cost of printing and shipping the book. Suzanne Scotchmer, Innovation and Incentives 105-106 (2004). And, thanks to Public.Resource.Org, we already know the price of a digital copy of the OCGA in a market that allows anyone to distribute it: free.

Lexis's monopoly over the OCGA also harms the public because it removes market pressure to improve features as well as the Terms and Conditions—which ultimately impacts users' privacy, security, and anonymity. Forcing users to access the OCGA through a single private website means that users have no choice but to disclose to that website sensitive data—such as search terms used and statutes viewed by a user. Allowing for competition, on the other hand, would enable users to

choose websites that do not collect sensitive data, or that promise not to misuse that data.[4]

B. Granting a Copyright Monopoly Forces Users to Agree to a Private Party's Terms and Conditions

Because Lexis is the exclusive licensee of the OCGA, people who wish to view the OCGA online—including the undisputedly uncopyrightable portions of the OCGA, such as the statutes themselves[5]—have no choice but to agree to Lexis's Terms and Conditions.

When a user visiting Georgia's website clicks on "Search the Official Code of Georgia," the user is automatically redirected to Lexis's display of the OCGA, and a popup appears. Georgia Law, https://georgia.gov/popular-topic/georgia-law. In order to view the OCGA, the user must click "I agree" in the popup to agree to Lexis's Terms and Conditions. Georgia General Assembly, Official Code of Georgia Annotated, LexisNexis, http://www.lexisnexis.com/hottopics/gacode/default.asp.
Those Terms and Conditions are around 4,500 words

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[4] For example, the Electronic Frontier Foundation prepares an annual report comparing technology companies' protection of user data. Rainey Reitman, *Who Has Your Back?*, Electronic Frontier Foundation (July 10, 2017), https://www.eff.org/who-has-your-back-2017.

[5] Users are subject to Lexis's Terms and Conditions even when accessing the portions of the OCGA that *cannot* be copyrighted—i.e., the statutory language itself. LexisNexis, *Terms & Conditions*, (Jan. 7, 2013), https://www.lexisnexis.com/terms/ ("This web site, including all of its features and content * * * may be used solely under the following terms and conditions.").

long and link to several other lengthy, binding documents, such as the privacy policy (which is 2,814 words long), the "General Terms and Conditions for Use of the LexisNexis Services" (which is 4,026 words long), and the "LexisNexis Services Supplemental Terms for Specific Materials" (which is 10,761 words long). LexisNexis, *Terms & Conditions* (Jan. 7, 2013), https://www.lexisnexis.com/terms/ (Terms & Conditions). In addition to these documents, there are fourteen links at the top of the main "Terms and Conditions" page leading to additional terms governing the use of Lexis's services, such as the "LexisNexis® Digital Library Terms and Conditions," "End User License Agreement," and "Professional Services Agreement." *Ibid.* Together, these additional agreements are 41,665 words long. Reading at 250 words per minute, it would take a user more than four hours to read through the contracts that they must enter into before being allowed to even view the OCGA.

Even if a user were to undertake this task, the terms and conditions state that Lexis "reserves the right to change these Terms of Use at any time," without notice and effective immediately—placing the burden on the user to "regularly review[] the Terms of Use" in order to understand these contractual obligations. Terms & Conditions § 26.

C. Forcing People to Access the Official Code through a Private Website Endangers Users' Anonymity and Privacy

Forcing individuals to agree to the terms and conditions of a private website in order to view works like the OCGA leaves individuals with no meaningful option for

browsing the official version of the law unmonitored. People seeking to understand the laws that govern them are forced to turn over sensitive information—such as which laws they view and what search terms they use—to a private party. That sensitive data could be sold to or otherwise accessed by additional third parties, including the government. But, regardless of who ultimately accesses the data, allowing a private party to monitor users as they search and view the law undermines individuals' anonymity and may have a chilling effect on their behavior.

1. Private Parties May Monitor Users as They Search and View the Law

Services like Lexis may closely monitor, track, and analyze—on an individually identifiable basis—which laws a user views and for how long. For example, Lexis's terms and conditions state that "[nothing] submitted to this Web Site [is] treated as confidential," and use of the website "is at your own risk." Terms & Conditions. Lexis's privacy policy—which Georgia's website links to—states that Lexis may automatically collect "[u]sage data, such as the features you used, the settings you selected, your URL click stream data, including date and time stamp and referring and exit pages, search terms you used, and pages you visited or searched for." Georgia Code – LexisNexis, Georgia Secretary of State (2018), https://sos.ga.gov/index.php/elections/georgia_code_-_lexisnexis; LexisNexis, *Privacy Policy* § 2.4, (May 25, 2018), https://www.lexisnexis.com/en-us/terms/privacy-policy.page.

Lexis also may report suspected unlawful activity to law enforcement; its privacy policy states that Lexis

may take "any action we deem appropriate including but not limited to reporting any suspected unlawful activity to law enforcement officials, regulators, or other third parties and disclosing any information necessary or appropriate to such persons or entities relating to user profiles, e-mail addresses, usage history, posted materials, IP addresses and traffic information." Terms & Conditions § 20.

2. The Laws a User Views and Searches for Can Reveal Sensitive Information

The copyright monopoly over the OCGA leaves Georgians without meaningful options for viewing the laws that govern them, unmonitored. This is particularly problematic because information about users' search histories can be sensitive and revealing.

Such information could reveal, for example, that someone is contemplating how to navigate around a law, or that someone has already broken a law. For example, in *United States* v. *Valle*, a policeman with a cannibalism fetish was indicted on federal charges, including conspiracy to commit kidnapping, based on his web activity, including online searches. 807 F.3d 508, 512-513 (2d Cir. 2015). Likewise, in *SEC* v. *Fei Yan & Rongxia Wu*, the defendant was charged with insider trading based on nonpublic merger information obtained from his wife, based in part on "internet searches for the phrases 'how sec detect unusual trade' and 'insider trading with international account.'" Compl. ¶¶ 1-2, 6, *SEC* v. *Fei Yan & Rongxia Wu*, No. 1:17-cv-05257, Dkt. 1 (S.D.N.Y. July 12, 2017).

Information about the laws someone searches for and views could also reveal additional sensitive information—such as mental health status, pregnancy, sexual orientation, crime victim status, or even that the user is contemplating having an affair, deciding whether to declare bankruptcy, or committing some other perfectly legal but unsavory act. Indeed, the OCGA touches on numerous topics that could reveal sensitive information about individuals searching for such laws, including laws involving the involuntary treatment of mental health patients (OCGA § 37-3), drug abuse (*id.* § 26-5), crime victims' rights (*id.* § 17-17), and abortion (*id.* §§ 31-9a to 9b). As another example, before this Court ruled that such laws were unconstitutional, the fact that someone searched for a state's sodomy laws—such as OCGA § 16-6-2—could reveal that individual's sexual proclivities.

In sum, granting a copyright monopoly in the official version of the law can leave individuals with no meaningful option other than to disclose deeply sensitive information to a private government contractor.[6]

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[6] Once collected, this data could be sold or otherwise disclosed to third parties, including the government. Many websites sell user data to third parties. Douglas MacMillan, *How to stop companies from selling your data*, Wash. Post (June 24, 2019). In fact, there is an entire "data broker" industry for monetizing user data. Federal Trade Commission, *Data Brokers: A Call for Transparency and Accountability* (May 2014), https://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databroker report.pdf. The data that is routinely compiled and sold online often includes sensitive information, including—for example—lists of rape survivors, "erectile dysfunction sufferers," and "AIDS/HIV sufferers." Kashmir Hill, *Data Broker Was Selling Lists of Rape Victims, Alcoholics, and "Erectile Dysfunction Sufferers,"* Forbes

3. Undermining Users' Anonymity Has a Chilling Effect

Depriving individuals of the ability to access the official version of the law anonymously not only puts deeply sensitive personal information at risk—it also results in a chilling effect that could dissuade them from viewing the law for fear of creating a lasting electronic record of their activities.

As this Court has held, "Anonymity * * * exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular." *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995); see also *Tattered Cover, Inc.* v. *City of Thornton*, 44 P.3d 1044, 1052 (Colo. 2002), as modified on denial of reh'g (Apr. 29, 2002) ("Anonymity is often essential to the successful and uninhibited exercise of First Amendment rights, precisely because of the chilling effects that can result from disclosure of identity.").

The specific case of the OCGA provides just one example of the potential harms of granting a copyright monopoly over a government edict. Its removal from the public domain harms the public without any countervailing benefit, and forces individuals to pay monopoly prices and agree to a private party's terms and conditions in order to view the official version of the law. Here, those terms and conditions explicitly say that a government contractor can collect deeply sensitive information and disclose it to third parties, including the government—foreclosing the possibility that people can

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(Dec. 19, 2013). Even if a private website does not seek to monetize user data, data breaches are a significant risk.

view and search online the official version of the law anonymously.

These harms vastly outweigh any potential benefit of granting a copyright monopoly to the government for simply doing its job. Given the founders' intent that copyright should ultimately benefit the public, this Court should find that works like the OCGA belong to the people.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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