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* AMERICAN INTELLECTUAL PROPERTY ASSOCIATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

This Court has held, as a matter of "public policy," that judicial opinions are not copyrightable. *Banks* v. *Manchester,* 128 U.S. 244, 253-254 (1888). Based on that precedent, lower courts have held that certain other "government edicts" having the force of law, such as state statutes, are not eligible for copyright protection.

The question presented is:

Whether the government edicts doctrine extends to—and thus renders uncopyrightable—works that lack the force of law, such as the annotations in the Official Code of Georgia Annotated.

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INTEREST OF THE *AMICUS CURIAE*[1]

The American Intellectual Property Law Association ("AIPLA") is a national bar association representing the interests of approximately 12,000 members engaged in private and corporate practice, government service, and academia. AIPLA's members represent a diverse spectrum of individuals, companies, and institutions involved directly or indirectly in the practice of patent, trademark, copyright, and unfair competition law, as well as other fields of law affecting intellectual property. Our members represent both owners and users of intellectual property. AIPLA's mission includes providing courts with objective analyses to promote an intellectual property system that stimulates and rewards invention, creativity, and investment while accommodating the public's interest in healthy competition, reasonable costs, and basic fairness. AIPLA has no stake in any of the parties to this litigation or in the result of this case. AIPLA's only interest is in seeking correct and consistent interpretation of the law as it relates to intellectual property issues.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

AIPLA respectfully urges the Court to affirm the decision of the Eleventh Circuit below. The work at

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[1] In accordance with this Court's Rule 37.6, *amicus curiae* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus curiae* and its counsel made a monetary contribution to the preparation or submission of this brief. All parties have been timely notified of the filing of this brief, and both parties have consented.

issue is "official" speech of a state to its citizens explaining what its law is.

ARGUMENT

Official Speech Explaining What the Law Is Should Not be Eligible for Copyright Protection

Like the Eleventh Circuit below, AIPLA is persuaded that the "official," law-like character of Petitioner's state-authored compilation of statutory annotations[2] removes that work from the otherwise broad range of expression that merits copyright protection. The Court should affirm that decision, while making it clear that its affirmance does not have broad practical or doctrinal implications adverse to the interests of state governments.

I. As a Work Made for Hire, the Official Code of Georgia Annotated Is Speech By the State.

The Official Code of Georgia Annotated is a classic work made for hire under the Copyright statute for which the state government of Georgia owns the copyright and is deemed the author. Arguments made in this litigation have obscured this critical fact by emphasizing the amount of time, energy, and discretion expended by the private contractor Petitioner hired to create the annotations—all of which are immaterial to its authorship.

The Copyright Act provides that "[a] 'work made for hire' is... a work specially ordered or commissioned

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[2] As Petitioner does, see Pet. Br. at 8 n.2, AIPLA uses the word "annotations" to encompass all non-statutory supplemental materials included in the Official Code of Georgia Annotated. These materials include citations to, and summaries of, case law, law reviews, attorney general opinions, advisory opinions of the state bar, and research references. JA 489-491 (users guide).

for use as [among other things] a contribution to a collective work [or] as a compilation, . . . if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire." 17 U.S.C. §101. The Official Code of Georgia Annotated satisfies both requirements. It most clearly fits the categories of "collective work" and "compilation." "A 'compilation' is a . . . collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term 'compilation' includes collective works, [which is a work] . . . in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole." *Ibid*. The Official Code of Georgia Annotated gathers citations to, and summaries of, such preexisting materials as judicial opinions, law reviews, attorney general opinions, advisory opinions of the state bar, and research references, JA 489-491, and cross-references them to relevant statutory provisions in a new, unified whole. Further, the written agreement between Georgia and its contractor for the creation of the annotations deems everything produced under it to be a "work made for hire," in which Georgia holds copyright ownership. JA 567.

"If the work is for hire, the employer or other person for whom the work was prepared is considered the author and owns the copyright. . . ." *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 737 (1989) (internal quotation omitted). For all purposes relevant to this litigation, therefore, the State of Georgia is the only cognizable author of the Official Code of Georgia Annotated, regardless of the fact that it chose to act through a private publisher to create the work.

II. The Official Code of Georgia Annotated's "Official" Public Pronouncement of Georgia Law Distinguishes the Work From Privately Authored Legal Commentary.

The fact that the annotations lack *binding* legal authority does not control, because the "official" character of the annotations certainly gives them *persuasive* authority. This Court has previously recognized the persuasive authority inherent in a governmental body's commentary on its own law. For example, although the Administrator of the Wage and Hour Division of the U.S. Department of Labor did not have the power to dictate a court's reading of the Fair Labor Standards Act, this Court nevertheless deemed his "rulings, interpretations and opinions of the Administrator under this Act ... a body of experience and informed judgment to which courts and litigants may properly resort for guidance ... [due to their] power to persuade." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944).

Here, the Official Code of Georgia Annotated is prepared "under the direct supervision and subject to the approval of the Code Revision Commission," JA 132-135 ¶¶4, 5, 11, 15, 19, 27, which acts "on behalf of and for the benefit of the General Assembly of Georgia." JA 131. A state legislature's own "official" commentary on its own law will carry more "power to persuade" than anyone else's. Federal case law is replete with examples of *Skidmore*-like deference to state entities' interpretations of their own law,[3] and

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[3] See, *e.g.*, *Bldg. Trades Emp'rs' Educ. Ass'n* v. *McGowan*, 311 F.3d 501, 507 (2d Cir. 2002) ("We defer to a state agency's interpretation of its own regulations, unless the interpretation is arbitrary or capricious"); *City of Bangor* v. *Citizens Commc'ns.*

the Eleventh Circuit ably collected examples of federal courts deferring to the official commentary published with various federal rules and regulations.[4]

The state-mandated Users Guide[5] that accompanies the Official Code of Georgia Annotated repeatedly informs readers that it includes "appropriate" annotations describing case law, articles, attorney general opinions, state bar opinions, and research references. JA 489-491. Editorial notes are included "[i]f the editorial staff of LexisNexis®, the [Georgia] Code Revision Commission, or the commission's staff felt that an explanatory note would be helpful to users of the Code." *Ibid.* at 490. Collectively, this conveys to readers that intentional decision-making helped determine which external citations were "appropriate" to consider in order to properly understand the statute, what points are necessary to draw from those citations, and which citations were not necessary to include. Because the annotations are a work made for hire, the State of Georgia is the author of these annotations.[6]

Co., 532 F.3d 70, 94 (1st Cir. 2008) ("Federal courts generally defer to a state agency's interpretation of those statutes it is charged with enforcing"); *Arizona* v. *City of Tucson*, 761 F.3d 1005, 1026 (9th Cir. 2014) (following *City of Bangor*).

[4] *State of Georgia* v. *Public.Resource.Org, Inc.*, 906 F.3d 1229, 1250 (11th Cir. 2018).

[5] JA 538.

[6] External sources bear out this understanding. A law review article quotes two Georgia legislators as explaining they "wanted control over the annotations to ensure that the explanations of the law reflected what the General Assembly, as the entity that had the constitutional authority to enact the law, actually meant." Elizabeth Holland, *Will You Have to Pay for the*

III. The Issue Presented by this Case Does Not Extend Beyond the Narrow Issue Concerning State Authored, Official Statutory Annotations.

The record establishes that Petitioner's approach to publishing official statutory annotations is, at best, in the minority among the states. Further, the propriety of copyright protection for state-authored, official annotations is not addressed by the trio of Nineteenth Century decisions that the parties and courts below have repeatedly invoked.[7] Nor does this case raise the same issues as those in which a state has incorporated third-party works into the law—such as when a state's building code incorporates third-party standards by reference,[8] or when a state adopts a model statute,[9] or when a state officially endorses a privately authored and copyrighted compilation after it is published.[10] Those cases raise important issues, but those issues are distinct from

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O.C.G.A.?: Copyrighting the Official Code of Georgia Annotated, 26 J. Intell. Prop. L. 99, 111-112 (2019).

[7] The annotations at issue in *Wheaton* v. *Peters*, 33 U.S. 591, 8 Pet. 591 (1834) and *Callaghan v. Myers*, 128 U.S. 617 (1888) were each authored and purported to be owned by *individuals* in their personal capacities, while the Court in *Banks* v. *Manchester*, 128 U.S. 244 (1888) expressly declined to consider the propriety of state ownership in such annotations.

[8] See, *e.g.*, *CCC Information Services, Inc.* v. *Maclean Hunter Market Reports, Inc.*, 44 F.3d 61 (2d Cir. 1994).

[9] See, *e.g.*, *Bldg. Officials & Code Adm.* v. *Code Tech., Inc.*, 628 F. 2d 730 (1st Cir. 1980).

[10] These are the fact of *Howell* v. *Miller*, 91 F. 129 (6th Cir. 1898). Howell's annotations were privately authored on his own initiative, and only later endorsed by the Michigan legislature. *Ibid*. at 131.

the facts of the instant case and should not be ruled on in deciding this case.

Similarly, nothing about this case necessarily implicates the state's ability to own copyrights in works that do not provide "official" insight into the law. State-authored works such as tourism publications are not "government edicts" and do not even arguably convey to citizens what the law is, and therefore do not raise the same concerns as the Official Code of Georgia Annotated. By the same token, arguments concerning a state's ability to own copyrights in general are not sufficiently specific to the circumstances of this case to have a bearing on its outcome.

CONCLUSION

For all of the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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