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 CURRENT AND FORMER GOVERNMENT OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are current and former government officials. In their roles as government officials, *amici* have authored and published a broad range of government works in several different jurisdictions. *Amici* thus offer a unique perspective on the nature of government works, the incentives that underlie their formation, and the importance of public access to them. A complete list of signatories to this brief is attached in the Appendix hereto.

INTRODUCTION AND SUMMARY OF ARGUMENT

Americans today are subject to a dizzying array of laws, issued by all levels of government—federal, state, county, municipal. These binding legal rules are not the product of legislatures and the courts alone, but are promulgated by a wide assortment of government entities: administrative agencies, water districts, city councils, school boards, zoning commissions, and on and on. In contemporary society, there are few activities that a person can engage in without implicating one legal regime or another.

Given the legal complexity of modern life, it is impossible to expect a citizen lacking legal training

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

to simply read the text of relevant statutes, regulations, or court decisions, and know with certainty how to remain on the right side of the law. Recognizing this fact, governments publish a wealth of material that is not technically or precisely "the law" but is nevertheless important to explain and provide guidance about what the law means—regulatory guidance documents, legislative committee reports, attorney general opinion letters, summaries of court decisions, and, most relevant to the present proceeding, official annotations to legislative enactments.

Public availability of such government works also furthers the ability of the electorate to engage in democratic self-government. For instance, this Court and others publish dissenting opinions—despite their nonbinding nature—for a variety of public purposes: to foster "the transparency of the judicial process," "to attract immediate public attention and, thereby, to propel legislative change," or simply to "'appeal . . . to the intelligence of a future day.'" Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 Minn. L. Rev. 1, 3-6 (2010) (alteration in original) (quoting Charles Hughes, *The Supreme Court of the United States* 68 (1936)).

The question presented in this case is whether state and local governments should be permitted to claim a copyright in these works—and place them behind paywalls—merely because they "lack the force of law." Pet. I. The answer is "no." Granting the government the right to exclude the public from freely accessing such content serves neither the purposes of copyright nor the interests of our constitutional democracy. Far from requiring such a senseless result, the Copyright Act—properly

understood in light of prevailing precedent and constitutional constraints—precludes it.

In the American constitutional tradition, copyright exists to provide incentives for authors to create original works to benefit society. Public officials do not need these incentives, nor would the works they produce be *better* if produced with an eye toward profit. But such works are often of critical importance, and have few if any substitutes, so permitting the monopoly pricing afforded by copyright would yield significant social costs. Allowing state and local governments to use copyright to leverage their lawmaking authority to raise funds is inimical to principles of sound government and, especially if Petitioner's argument is accepted, would mark a sea change in the ability of the people to access the works of their own representatives—works that describe the legal obligations under which the People themselves must operate.

Recognizing that copyright is an ill fit for works created by the government, this Court more than a century ago established the "government edicts" doctrine, a public policy-based exception to copyright. The annotations to the legislative enactments at issue in this case fall squarely in this ancient category.

The suit concerns, of course, official, state-sanctioned annotations to the text of Georgia law. While Georgia hired a contractor to draft those annotations, the State itself claims initial authorship under the work-for-hire doctrine, controls the content of the annotations through statute and contract alike, and identifies them as "official" in a number of ways. These are

pronouncements, by the government, about what the law means. The People have every right to read and share them.

Accordingly, this Court should affirm that the government edicts doctrine applies here—as it does to all material that is produced by state and local governments in the exercise of their distinctly governmental functions, whether or not it possesses the force of law.

ARGUMENT

I. A BROAD RANGE OF GOVERNMENT WORKS ARE AND SHOULD BE EXCLUDED FROM COPYRIGHT PROTECTION.

A. Governments Produce A Broad Range Of Works That Are Not "Law," But Nonetheless Are Authoritative And Essential To The People's Understanding Of Their Legal Obligations And To Their Ability To Engage In Self-Government.

In the one-hundred-and-thirty-one years since this Court last addressed the issues presented by this case, the scale and breadth of government has expanded exponentially to meet the challenges of our ever-more complex society.[2] For better or

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[2] For instance, the District of Columbia—a municipality with approximately 700,000 residents—has 90 separate local agencies, many of which have their own regulatory authority *See generally* DC.gov, Agency Directory, https://dc.gov/directory?tid=All (last visited Oct. 11, 2019).

worse, government regulation fills every nook and cranny of our lives.

As part of the work of generating and implementing this elaborate web of legal rules, government entities across the country produce a tremendous volume of material that, while technically not "the law," nonetheless serves a vital role in our democracy. While this case addresses a specific kind of government work, it is important to keep in mind the breadth of works to which this Court's holding will be applied.

For instance, legislative bodies at all levels keep official records of their proceedings. The Framers themselves recognized the importance of keeping such records and making them available to the public, enshrining in the Constitution a specific command: "Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the desire of one fifth of those Present, be entered on the Journal." U.S. Const. art. I, § 5, cl. 3.[3] These Journals—and other similar records of legislative actions from state and local legislative bodies around the country—lack the "force of law," yet are critical to understanding and tracking the actions of government.

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[3] *See also* U.S. Const. art. I, § 7, cl. 2 (requiring that the originating legislative chamber "enter" the President's "Objections" to a vetoed bill "at large on their Journal" and requiring votes to override a veto "be entered on the Journal of each House respectively."

Legislatures produce other records that are equally important. Committee reports, floor debates, and the prior, unenacted versions of legislation also lack the force of law. Yet these materials are routinely consulted by courts and executive agencies when interpreting the law and evaluating people's legal rights and obligations. Committee hearings and testimony, too, are not "the law." Yet we record and publish that testimony, and we record and publish our debates, because those testimonies and debates are part of the vital work of our government. These records educate the public on matters critical to the conduct of their personal and professional lives, and shape both the works of our legislators and the opinions of our courts.

Those judicial opinions, in turn, themselves often lack the force of law. A dissenting opinion, for example, by its terms has no controlling effect, though it may nonetheless serve important public purposes in our American democracy. *See generally* Ginsburg, *supra*, 95 Minn. L. Rev. 1; Antonin Scalia, Lecture, *The Dissenting Opinion*, 1994 J. Sup. Ct. Hist. 33 (1994). And a number of states—including Alabama, Colorado, Delaware, Florida, Maine, Massachusetts, Michigan, New Hampshire, Oklahoma, Rhode Island, and South Dakota—authorize courts to issue purely "advisory" opinions, which are almost invariably deemed non-binding as matter of law.[4]

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[4] *See* Lucas Moench, Note, *State Court Advisory Opinions: Implications for Legislative Power and Prerogatives*, 97 B.U. L. Rev. 2243, 2246, 2266 (2017).

Most executive materials, too—though often critical to the sound functioning of a democratic government—do not have the force of law. Interpretive rules, guidance documents, and policy statements by definition lack the force and effect of law, yet many regulated parties (rightly) understand such material to be nearly as important as the law itself in ascertaining their obligations.[5] Attorney general opinion letters likewise lack the force of law, but businesses and individuals consider them crucially important in complying with the law.[6] The same is true for all stages of agency rulemaking prior to the final rule—proposed rules, comments, statements of basis and purpose, preambles, environmental impact statements, cost-benefit analyses and much else.

As authors and publishers of these types of government works, we can say with authority that the reason for their creation is not private benefit or profit. Rather, government officials create and publish these non-binding analyses and related

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[5] *See generally* Michael Asimow, *Guidance Documents in the States: Toward a Safe Harbor*, 54 Admin L. Rev. 631 (2002); *see also, e.g.*, *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015) (Fair Labor Standards Act applicability to mortgage loan officers turned on interpretive rule).

[6] For example, ESPN maintains a tracker of where fantasy sports are legal, which references attorney general opinion letters together with laws. *See* Ryan Rodenberg, *Daily fantasy sports state-by-state tracker*, ESPN (Feb. 18, 2016), https://www.espn.com/chalk/story/_/id/14799449/daily-fantasy-dfs-legal-your-state-state-state-look. Both esports companies and casual players have an obvious need to know their government's views on whether their activity is legal or illegal.

materials for two separate, equally important reasons:

First, these works provide the governed with vital information *about* the laws that govern them. In a nation consisting of a patchwork of federal, state, and local authorities, these works enable the People to access, fully understand, and thereby to comply with—or challenge—the laws to which they are subject. As one commentator has pointed out, the requirement of notice of the law "has a long history":

> The Greeks did it; the Romans famously practiced it by posting the Twelve Tables of Law in the forum, in response to the demands of the *plebs*. In the Middle Ages, Thomas Aquinas spent considerable space questioning whether "law" was actually "law" at all if not published for the notice of the governed. Modern commentators have even proposed that public access to legal information deserves universal recognition as a human right. In America, the basic principle of notice is embodied in the Constitution through its *ex post facto* clauses and prohibition on vague laws.

Leslie A. Street & David R. Hansen, *Who Owns The Law? Why We Must Restore Public Ownership of Legal Publishing*, 26 J. Intell. Prop. L. 205, 207 (2019) (footnotes omitted). Residents of the United States, and of each individual state, county, city, township, and other governing district have an obligation to understand and comply with the law—an obligation they cannot meet if they do not know the law.

Second, and equally importantly, these works give the public access to the actions of their government. In our democracy, where our officials are ultimately responsible to the People who elected them, it is vitally important for citizens to be able to see, and assess, the work of their elected officials. Legislative records and hearings allow the millions of people who cannot be present to know what lawmakers are doing, and what their reasons are. Agency records and statements of policy likewise turn otherwise opaque enforcement decisions into something more accountable. Knowledge is power, and the works of public servants give the People the knowledge they need to vote, petition, protest, sue, or participate in other ways.

Open access to government works is thus critical to allow the public to understand the laws that govern them, and so that they can hold us, their government, accountable.

B. The Constitutional Purpose Of Copyright Law Is Ill-Served By Extending Copyright Protection To Government Works.

"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 through the talents of authors and inventors in 'Science and useful Arts.'" *Mazer v. Stein*, 347 U.S. 201, 219 (1954). The benefits and costs of copyright in the private sector are well-documented. Copyright creates higher prices for consumers, in exchange for the incentives

for creation generated by the promise of exclusive rights for authors. But part of that bargain is a well-recognized form of "deadweight loss": some consumers elect not to purchase a copyrighted work rather than paying the higher rates that can be profitably charged by an owner of exclusive rights. As a result, though the author winds up better off than she would otherwise be, her work reaches fewer people.

In the private sector, the benefits of enticing new authors to write original works make these costs worthwhile. Exclusive rights are the necessary price for "promot[ing] the Progress of Science." U.S. Const. art. I, § 8, cl. 8. But granting copyright for copyright's sake is antithetical to the American constitutional tradition. As this Court has recognized, "[t]he monopoly privileges that Congress may authorize are n[ot] . . . designed to provide a special private benefit." *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). To the contrary, they are "intended to motivate the creative activity of authors and inventors by the provision of a special reward." *Id.*

The logic of copyright's bargain—the right to limit distribution and increase price, in exchange for enhanced incentives for creation—has no application to the type of government works at issue in this case. The economic incentives are (or should be, if governments are acting as governments ought) entirely different—and indeed perfectly sufficient to optimize output *without the burdens of copyright's restrictions*.

Unlike private authors who often require the promise of exclusive rights as an incentive to create works, states do not need the financial

remuneration of copyright to motivate them to create. Well-functioning governments serve the public, and they act on behalf of the People in their creation and interpretation of laws. Government authors do not create their works for profit. Even the most cynical view of a punch-the-clock bureaucrat does not imagine him writing documents with an eye to how many readers will purchase them. Most public officials—including *amici*—want their work to be widely disseminated; indeed, they create it for this very purpose. And regardless of their subjective preferences, copyright is simply an inappropriate tool for governments to pay for public priorities. Unlike a private author, for whom it is decidedly unproblematic to publish works with access restricted to those who can pay the market-clearing price, it is quite literally undemocratic for the state to pursue the same gambit with respect to official works that comprise an essential element of the enterprise of government.

Put differently, the public costs of copyright are radically higher for works of the latter category. They have few or no substitutes: one can read a different novel and enjoy it as much, but reading a different jurisdiction's tax guidance documents is useless. Consumers do not have the luxury of refusing the works of state courts and legislatures, because their liberty and property interests are directly impacted by the content of that material.

C. This Court Long Ago Recognized The Need For An Exception To Copyright For Government Works.

This Court recognized over a century ago the need for a judicially created exception to the copyright laws to prevent the invocation of exclusive rights in governmental works. In *Wheaton v. Peters*, the Court had recognized, albeit in dicta, that "the court are unanimously of opinion, that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right." 33 U.S. (8 Pet.) 591, 668 (1834). In *Banks v. Manchester*, this Court reinforced *Wheaton*'s observation with an equally forceful holding: "In no proper sense can the judge who, in his judicial capacity, prepares the opinion or decision, the statement of the case, and the syllabus, or head-note, be regarded as their author or their proprietor, in the sense of [copyright law] . . . ." 128 U.S. 244, 253 (1888).

The reasoning of these cases applies squarely to the present dispute. As the *Banks* Court explained, judges neither need copyright incentives, since they receive a salary, nor should they be subject to them, since it would be inappropriate for judges to have a financial stake in the popularity of their work:

> 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.

Id.

Next, the Court ruled that this principle applied to *all* the work of judges, because the public had a vital interest in seeing the work of the courts:

> This extends to whatever work they perform in their capacity as judges, and as well to the statements of cases and headnotes prepared by them as such, as to the opinions and decisions themselves. The question is one of public policy, and there has always been a judicial *consensus*, from the time of the decision in the case of *Wheaton* v. *Peters*, 8 Pet. 591, 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. The whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all . . . .

Id. In other words, in *Banks* itself, the Court recognized that copyright does not extend to material like summaries, headnotes, and other matter authored by the government, notwithstanding the fact that they self-evidently lacked the force of law. Instead, the Court concluded that the "*whole work done*" by the judge must be "free for publication to all," because it represented the "authentic *exposition and interpretation* of the law." *Id.* (emphasis added).

D. The Government Edicts Doctrine Should Bar Copyright In All Government-Authored Works Created In The Exercise Of A Distinctly Governmental Function.

Recognizing the policies underlying the government edicts doctrine, Congress has imposed a broad prohibition on copyright protection for works created by the federal government, *see* 17 U.S.C. § 105.[7] The common law government edicts doctrine, however, continues to have force with respect to the works of states and their political subdivisions, and with respect to works that are incorporated into legislation and regulation by governments at all levels. Lower courts have thus grappled with how to apply the government edicts doctrine to works created or adopted by such

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[7] This principle was recognized as far back as 1857, when an artist working for the Navy under Commodore Perry was denied copyright in prints and illustrations he made during a trip to Japan. *See Heine v. Appleton*, 11 F. Cas. 1031, 1033 (S.D.N.Y. 1857) (No. 6324). Congress formalized the principle in the Printing Law of 1895, which allowed for the sale by the Government Printing Office of "duplicate stereotype or electrotype plates from which any Government publication is printed," provided that "no publication reprinted from such stereotype or electrotype plates and no other Government publication shall be copyrighted." Act of Jan. 12, 1895, ch. 23, § 52, 28 Stat. 601, 608 (1895). This was followed, in the Copyright Act of 1909, with a provision that "[n]o copyright shall subsist . . . in any publication of the United States Government, or any reprint, in whole or in part, thereof." Act of Mar. 4, 1909, ch. 320, § 7, 35 Stat. 1075, 1077(1909). These provisions were consolidated as part of the 1976 Copyright Act. *See also* Copyright Act of 1976, Pub. L. No. 94-553, § 105(a), 90 Stat. 2541.

government entities.[8] Those cases have failed to settle on a single articulation of the proper scope of the government edicts doctrine.

In our view, the government edicts doctrine should apply when (1) the government effectively authors the work or adopts it as its own; and (2) the work relates to a distinctly governmental function. This test directly implements the core purposes of the government edicts doctrine—ensuring access by the people to their government and the laws that govern them, and ensuring accountability of the government to the people.

The government "effectively authors" a work when it either directly writes it or hires others to do so, or adopts a work and clothes it so fully with authority that it must be viewed as the work of the government, and not of any private party. This requirement is rooted in the notion that, in our constitutional democracy, government is by, of, and for the people. Thus, when the state authors a work, in a sense that work is "authored" by the people of that state. As the First Circuit put it in *Building Officials & Code Administrators v. Code Technology, 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

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[8] *See Howell v. Miller*, 91 F. 129 (6th Cir. 1898); *Bldg. Officials & Code Adm'rs v. Code Tech., Inc.*, 628 F.2d 730 (1st Cir. 1980); *Cty. of Suffolk v. First Am. Real Estate Sols.*, 261 F.3d 179 (2d Cir. 2001); *Veeck v. S. Bldg. Code Cong. Int'l, Inc.*, 293 F.3d 791 (5th Cir. 2002) (en banc); *Am. Soc'y for Testing & Materials v. Public.Resource.Org, Inc.*, 896 F.3d 437, 440 (D.C. Cir. 2018); *Practice Mgmt. Info. Corp. v. Am. Med. Ass'n*, 121 F.3d 516 (9th Cir. 1997), *amended*, 133 F.3d 1140 (9th Cir. 1998).

drafts the provisions, because the law derives its authority from the consent of the public, expressed through the democratic process." The people have a right to the works their government creates on their behalf. As we discuss more fully *infra*, the annotations merged into Georgia's only official code meet this test.

The second factor—that the work must relate to a "distinctly governmental" function—serves to cabin the first. It is common ground that the Copyright Act permits states and their political subdivisions to obtain copyright in at least *some* of the works they create. For instance, public university professors can copyright books written in the course of their employment; state agencies can obtain copyright interests in commissioned art, music, or history books; local governments can copyright creative advertising campaigns for local industries.[9] Where a state simply acts like a private author, allowing the state to obtain a copyright in those works does not implicate the purposes of the government edicts doctrine.

But where the output of core governmental functions—legislating, interpreting, and enforcing the laws, for instance—are placed out of reach of the people, that creates the serious problem this Court addressed in *Banks*: The "authentic exposition and interpretation of the law," "binding

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[9] The Florida Department of Citrus, for example, developed and obtained a copyright in various works featuring "Captain Citrus," which it uses to promote Florida's orange juice industry. *See* Florida Department of Citrus, *Captain Citrus* https://www.floridacitrus.org/captain-citrus/ (last visited Oct. 11, 2019).

every citizen," must be "free for publication to all." 128 U.S. at 253. A dedication to this principle, that the works of *governing* must be available to the people, is, in *amici*'s view, the key to identifying works within the scope of the government edicts doctrine.

This is of critical importance in today's era of electronic documents, where works are often published first—and in some instances only—online. While the case below primarily concerns the annotations of Georgia's official code, there are other, equally troubling trends. The free, online version of Georgia's code—*sans* annotations—is available only to users who agree to a private license agreement provided by Lexis. *See* Code of Georgia - Free Public Access: Terms & Conditions, http://www.lexisnexis.com/hottopics/gacode/Default.asp (last visited Oct. 11, 2019) (a pop-up puts users to a Hobson's choice: agree to the terms and conditions, or proceed no further). In another case, Lawriter, the private publisher of Georgia's official Rules and Regulations, has sought to prevent other legal research platforms from publishing copies of those official Rules, asserting that it has the right to require viewers of those Rules to agree to strict license requirements in order to view the *official state law*. *See Fastcase, Inc. v. Lawriter LLC*, No. 1:17-cv-00414 (N.D. Ga. filed Feb. 2, 2017).[10]

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[10] *See also* Rules and Regulations of the State of Georgia, Terms and Conditions of Agreement for Access to Rules and Regulations of the State of Georgia Website, http://rules.sos.state.ga.us/cgi-bin/page.cgi (last visited Oct. 11, 2019).

With today's rapid shifts in technology, it is impossible to anticipate each new possible way that these issues will arise, or how they will be presented. Thus, a test that is unduly rigid, or that fails to take into account the on-the-ground realities, is destined to fail or be circumvented as a mere formality. Instead, the Court should adopt a test that honors the principles underlying *Banks*, and the government edicts doctrine as a whole. A test like that proposed by *amici* here best ensures that the access of the people to their laws, and their government, remains free and unrestricted.

E. Petitioner's Proposal To Limit The Government Edicts Doctrine To Works Having "The Force of Law" Would Harm The Public.

By contrast, Petitioner's proposed "force of law" rule is disastrously narrow. In the first instance, it is inconsistent with the principles that have animated the Court's prior precedents. As noted

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Indeed, and of some note here, Georgia has a long history of attempting to limit access to the O.C.G.A. In 1979, Georgia attempted to give initial contractor Michie a monopoly in selling the statutes themselves—an attempt they were forced to abandon. *Harrison Co. v. Code Revision Comm'n*, 260 S.E.2d 30, 33, 37 (Ga. 1979). Even after this decision, Georgia attempted to bar a competitor of Michie from publishing the Code prior to its effective date, going so far as to assert that this competitor's copy of the Code might be inappropriately confused with the O.C.G.A. *Georgia ex rel. Gen. Assembly, by & through Code Revision Comm'n v. Harrison Co.,* 548 F. Supp. 110, 114-17 (N.D. Ga. 1982), *vacated*, 559 F. Supp. 37 (N.D. Ga. 1983). Thus, Georgia itself has recognized the value the market places on its official, state-authored Code.

above, the reasoning in *Wheaton* and *Banks* supports a far broader rule. Indeed, Petitioner concedes, as it must, that many judicial opinions—dissents, for example, or statements respecting denial of *certiorari*—lack the force of law, and thus on its face Petitioner's argument is inconsistent with this Court's precedents. Petitioner nonetheless asserts that these opinions may remain uncopyrightable, and the precedent not overruled, as a "prophylactic rule . . . providing a clear, administrable standard." Pet. Br. 48. Petitioner's position not only ignores the principles underlying the Court's precedents, discussed *supra*, but also fails to acknowledge that numerous other government works are traditionally public and vitally important documents the public needs access to, with no ready substitute.

Legislative history, interpretative rules, attorney general opinion letters, dissenting judicial opinions—these examples barely begin to summarize the variety of vital public documents that could be locked away from anyone who does not pay, were the Court to adopt Petitioner's proposed rule. Yet allowing states to limit or eliminate access to these materials would not lead to improved, more creative legislation or incentivize better deliberation. To the contrary, removing such materials from the people would weaken the democratic process and deprive the public of an important tool for ascertaining the "authentic exposition and interpretation" of the law.

In support of their proposed test, Georgia and its *amici* make a functional argument, asserting that permitting the state to copyright government works saves the government money, because the state

does not have to fund Lexis's work through upfront government appropriations. *See* Pet. Br. 11; Matthew Bender *Amicus* Br. 8-9.

In the first place, it is important to understand that this scheme likely saves taxpayers nothing. The government of Georgia may not pay Lexis through appropriated dollars, but Lexis receives its compensation from the People of Georgia nonetheless—the cost is merely shifted from carefully apportioned taxes reflecting a reasoned allocation of financial burden across the populace, to the people and institutions with the financial means to access legal material at higher-than-marginal costs. In fact, beyond the distributional arbitrariness of who pays, it is highly likely that the market-clearing copyright-protected price is *higher* in the aggregate than would be an up-front investment in creating the work with tax dollars, free for all to read and reuse. *See, e.g.*, Stephen Breyer, *The Uneasy Case For Copyright: A Study of Copyright Books, Photocopies, and Computer Programs*, 84 Harv. L. Rev. 281, 287, 307 (1970). In short, this arrangement only *seems* to save the people of Georgia money.

Indeed, Georgia's funding arrangement with Lexis should be seen as simply another manifestation of governments using fees to covertly raise funding. As the Court recognized last term: "Perhaps because they are politically easier to impose than generally applicable taxes, state and local governments nationwide increasingly depend heavily on fines and fees as a source of general revenue." *Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019) (quoting American Civil Liberties Union et al. *Amici* Br. 7). This dependence is harmful,

however, to the most vulnerable citizens, who must pay for something that should be freely available.

Moreover, even on its own terms Georgia's argument proves too much. No doubt Georgia could save money by giving its judges copyright in their works to compensate them, and allowing them to sell access to their opinions. But copyright exists not to create an alternate system of government funding, but to give private actors an economic incentive to produce creative works. It may be more fiscally convenient for state budget directors to assign copyrights to government works; that is no reason at all to cabin the scope of the government edicts doctrine.

F. The United States' Proposal Is Closer To Correct, But Not Quite Right

The United States in its amicus brief wisely rejects Petitioner's view, and instead proposes a test that focuses on the capacity in which the government official served when she or he created a work (an approach closer to the Eleventh Circuit's test than to Petitioner's). Under its interpretation of the law, anything a judge or lawmaker does in his official capacity is a government edict. U.S. Br. 21.

This test, too, however, is unduly narrow. For instance, the United States' preferred principle would exclude works by executive branch officials, except when they "reflect quasi-legislative and judicial forms of executive authority." *Id.* at 20 n.3. It would also exclude works that are created by contractors, on behalf of lawmakers, in their name, at their direction, and to which the government claims authorship.

Neither of these exclusions is consistent with the purposes of the government edicts doctrine. Executives are no less servants of the people than judges and legislatures. Just as with judges and legislators, members of the executive branch do not need the incentives of copyright to create works. Nor would it be appropriate to deny access to executive works; just as with judicial and legislative works, executives create their works on behalf of the People, and the People have a right to and interest in them.

II. THE ANNOTATIONS WITHIN THE OFFICIAL GEORGIA CODE ARE GOVERNMENT EDICTS.

In view of the foregoing analysis, the annotations in the Official Code of Georgia Annotated ("O.C.G.A.") are, and must be considered, government edicts.

A. The O.C.G.A. Are Effectively Authored By Georgia And Distinctly Governmental.

As the Eleventh Circuit explained in detail, Georgia goes to great lengths to stamp the annotations with government approval. It requires that the annotations be prepared; it delegates to the Code Revision Commission authority to supervise the annotations' preparation; and it *requires* that the annotations be fully integrated into the official code by requiring the that "statutory portion . . . be merged with annotations . . . and shall be published by authority of the state," O.C.G.A. § 1-1-1. This link is not mere marketing; the Commission is clothed with authority by the Georgia General

Assembly. Many of its members are legislators, its staff come from the Office of Legislative Counsel, and its statutory duty is to prepare "bills to reenact and make corrections in the Official Code of Georgia Annotated." *Id.* § 28-9-5(c). No doubt many publishers have excellent staff, but personnel overlap with those intimately involved with designing and editing legislation is something different. Indeed, the first annotation in the O.C.G.A. cites a case warning that "[a]ttorneys who cite unofficial publication of 1981 Code do so at their peril." Pet. App. 41a (citation omitted).

The annotations contained in the O.C.G.A. are, in form and substance, fully authored by and identified with Georgia's government. A casual reader, opening the middle of one of the volumes, cannot separate the official from the unofficial; to the contrary, Georgia goes to great lengths to identify the annotations, just as much as the statutes themselves, as its own. As the Eleventh Circuit explained, the merger of the annotations with the statutory text "imbues [the annotations] with an official, legislative quality." Pet. App. 40a.

The O.C.G.A. annotations have outsized value to citizens precisely *because* they are marked as official, reviewed, and approved by the author (and interpreter, and enforcer) of the law. That is to say, the annotations' value derives not from the quality of the annotating done by Lexis, but from their link to Georgia's lawmaking capacity and sovereign identity.

The importance of this link is confirmed by Georgia and its *amici*'s policy argument that copyright protection is the cornerstone of Georgia's contract with Lexis, and that without it official

annotations would not be produced. If, contrary to common sense, all the methods Georgia uses to tie the official annotations to itself make no difference, then Lexis is being hoodwinked. Georgia imposes "price controls" on Lexis, such that the O.C.G.A. is "less than *one-sixth* the cost of West Publishing's competing annotated version of the Georgia code." Pet. Br. 11. Why would a sophisticated commercial actor like Lexis enter into such an unfavorable deal if Georgia's imprimatur had no value? In reality, of course, the O.C.G.A. *does* have a greater value than its unofficial competitors *because* it is official. Georgia's commentary on Georgia's code is rightfully treated as having a special status, and that status comes from its author's lawmaking power. Lexis and Georgia both profit from this increased value, and they do so at the expense of the people's free access to the official works of their government. While this may be a win/win for Georgia and Lexis, it is a loss for the public and sound copyright policy.

Moreover, there are substantial pragmatic consequences that result from the state-mandated "merger" of the annotations with the statutory text. Because Georgia's ***only official code*** is a merged text, those wishing to view that code, as a practical matter, *must* do so through Lexis. Anyone wishing to post a free copy of the O.C.G.A—whether a library, a non-profit like Public.Resource.Org, or any other entity—cannot do so without altering the official text, removing the markers of authority and authenticity. As one commentator points out, were libraries to do so, "[t]he resulting derivative material would just be another unofficial

compilation that users should cite at their peril." Street & Hansen, *supra*, at 226.

B. This Case Is Unlike Those Involving Private Authors Where Copyright Has Been Upheld.

Petitioner and the United States disregard the authority with which Georgia clothes the O.C.G.A., and the detailed control it exerts over the annotations, and assert that, as a general matter, annotations added by an author to a government code are copyrightable.

They base this argument principally on this Court's decision in *Callaghan v. Myers*, in which the Court allowed a court reporter to obtain a copyright in annotations he compiled and published in his own name. 128 U.S. 617, 647 (1888). The Court thus confirmed that an author is not precluded from copyright merely because he is a government officer when he creates his work. Rather, the court reporter—who created and sold his own works in his own name—was entitled to a copyright in those portions of the work originating with him. *Id.*

Petitioner suggests that *Callaghan* should be used to undermine *Banks*'s holding that the *government*'s additions to the law were *not* copyrightable and that the "whole work done" by the judge must be "free for publication to all." *Banks*, 128 U.S. at 253. But *Callaghan* was argued less than two weeks after *Banks*, and was written by the same justice, *see Callaghan*, 128 U.S. at 617, 645; *Banks*, 128 U.S. at 244-45, and the cases can readily be harmonized by reference to the twin

purposes of copyright and the government edicts doctrine.

A critical distinction between this case and *Callaghan* and *Wheaton* is that neither case involved the *government* as an author, nor were the works clothed with the authority of the state. The reporters in *Callaghan* and *Wheaton*, though they published the decisions of the courts, published in their own names and not in the names of the government. Thus, reporter Norman Freeman listed *himself* as the author of the Illinois Reports he published, and sold *his* copyright to Myers, who in turn sought to enforce it against Callaghan. *Callaghan*, 128 U.S. at 620-21.[11] Similarly, Henry Wheaton sought to enforce his own copyright in "Wheaton's Reports," the reports that *he* published. 33 U.S. at 593-94.

Here, however, the State of Georgia declares *itself* the author of the O.C.G.A. The O.C.G.A. is prepared as a work for hire, and the Code Revision Commission, acting pursuant to a delegation by the Georgia General Assembly, has complete control over its contents. The Commission sets the format, and by contract has the "ultimate right of editorial control over all material contained in the Code," such that "in the event of any disagreement

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[11] In *Callaghan*, the reporter was compensated by Illinois by contract, though the Court clarified in dicta that "the question of a salary or no salary ha[d] no bearing." 128 U.S. at 650. He also served a term of office of six years removable only for "misconduct in office, neglect of duty, incompetency, or other cause shown." *Id.* at 646 (citation omitted). But there is no hint that Illinois courts directly oversaw his work, had final editorial control over it, or in any way approved or even saw it before publication.

between the Commission and the Publisher over the material to be included, the decision of the Commission shall control." J.A. 536. The Lexis annotators work under the direct supervision of the Commission, pass over the copyright to it under a work-for-hire agreement, are subject to its final editorial control, and ultimately must have their completed work approved by the Commission and voted upon by the Georgia legislature. Unlike in *Callaghan* and *Wheaton*, the annotations are not Lexis's "own marginal notes"; by law, the right to control all notes belongs to the Commission and ultimately to the General Assembly.

Petitioner and its *Amici* argue that in copyrighting the annotations in the O.C.G.A., Georgia is simply acting as any private author could in hiring others to annotate a work. But Georgia is not a private author, and the O.C.G.A ***is the only written official code of the state's laws***. In enacting the O.C.G.A., Georgia is engaging in the distinctly governmental function of lawmaking. Relying on its identity as the author of the law, it is wrapping a public domain work with official commentary, then loudly dubbing it the authorized version. Georgia is the author, the interpreter, and the enforcer of its laws, and this makes all the difference.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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October 16, 2019

APPENDIX

APPENDIX

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List of *Amici Curiae* 1a

LIST OF *AMICI CURIAE*

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Former Senior Advisor to the Chief Technology Officer of the United States

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Former Virginia Secretary of Technology

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City Council Member and former Mayor of the City of Woodland, California

Lee K. Fink
Former Principal Deputy General Counsel, United States Department of Agriculture

Dr. Tyrone Grandison
Former Deputy Chief Data Officer, United States Department of Commerce

Bruce R. James
24th Public Printer of the United States
Former Director, United States Government Printing Office

Cameron F. Kerry
Former General Counsel & Acting Secretary, United States Department of Commerce

Alexander Macgillivray
Former Deputy Chief Technology Officer of the United States

Andrew McLaughlin
Former Deputy Chief Technology Officer of the United States

Raymond Mosley
Former Director of the Office of the Federal Register

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