No. 18-1150

IN THE

Supreme Court of the United States

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 *AMICI CURIAE* 116 LAW LIBRARIANS AND 5 LAW LIBRARY ORGANIZATIONS IN SUPPORT OF RESPONDENT

KYLE K. COURTNEY
Counsel of Record
HARVARD UNIVERSITY*
One Harvard Yard
Widener Library G-20
Cambridge, MA 02138
(617) 495-4089
kyle_courtney@harvard.edu

Counsel for Amici Curiae

On the Brief:
LESLIE A. STREET
WILLIAM & MARY SCHOOL OF LAW*
613 South Henry Street
Williamsburg, VA 23185

DAVID R. HANSEN
DUKE UNIVERSITY*
411 Chapel Drive
Durham, NC 27708

* Institutions are listed for identification purposes only.

October 16, 2019

291697

COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

TABLE OF CONTENTS. i

TABLE OF CITED AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT. .3

ARGUMENT. 4

I. PRINCIPLES OF DUE PROCESS AND THE RULE OF LAW REQUIRE MEANINGFUL PUBLIC ACCESS TO OFFICIAL VERSIONS OF "THE LAW" 4

A. Official versions of codes are published under the authority of the state and carry special weight as evidence of legislative enactments. 8

B. The Official Code of Georgia Annotated is the only official version of the code of Georgia, and as a matter of due process, residents and those affected by the laws of Georgia have a right to access it. 11

Page

II. "THE LAW" IS INSEPARABLE FROM THE OFFICIAL, AUTHORITATIVE LEGAL PUBLICATIONS IN WHICH IT IS PUBLISHED 12

III. COPYRIGHT OF OFFICIAL LEGAL PUBLICATIONS FRUSTRATES PRINCIPLES OF DUE PROCESS AND DOES NOT SERVE THE PURPOSES OF COPYRIGHT LAW 16

A. The expansive control that copyright owners wield is incompatible with the due process interests of the public in access to and use of official legal publications. 16

B. Granting Exclusive Rights in the OCGA Does Not Serve the Purposes of Copyright 19

CONCLUSION 23

APPENDIX 1a

TABLE OF CITED AUTHORITIES

Page

CASES

Banks v. Manchester,
128 U.S. 244 (1888). 20, 21

Bldg. Officials & Code Adm. v. Code Tech., Inc.,
628 F.2d 730 (1st Cir. 1980) .5, 18

Bounds v. Smith,
430 U.S. 817 (1977) 7

Callaghan v. Myers,
128 U.S. 617 (1888) 19-20

CompuServe, Inc. v. Patterson,
89 F.3d 1257 (6th Cir. 1996). 17

Cox *Broad. Corp. v. Cohn*,
420 U.S. 469 (1975). 6

Davidson v. Wheelock,
27 F. 61 (C.C.D. Minn. 1866) .20

Ford Motor Co. v. Abercrombie,
62 S.E.2d 209 (1950). 15

Fox Film Corp. v. Doyal,
286 U.S. 123 (1932). 16

Georgia v. The Harrison Co.,
548 F. Supp. 110 (N.D. Ga 1982) 11

Page

Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985) 16, 19

Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997) 17

Howell v. Miller, 91 F. 129 (6th Cir. 1898) 20

In re Appeal of Tenet HealthSystems Bucks County, LLC, 880 A.2d 721 (Pa. Super. 2005) 10

Mazer v. Stein, 347 U.S. 201 (1954) 19

Nash v. Lathrop, 6 N.E. 559 (Mass. 1886) 5, 20

Peterson v. Peterson, 156 Idaho 85 (2014) 9

Petrick v. Maynard, 11 F.3d 991 (10th Cir. 1993) 7

Shuman v. State, 358 So. 2d 1333 (Fl. 1978) 9

State v. Boecker, 893 N.W.2d 348 (Minn. 2017) 9

Page

Stephan v. United States,
319 U.S. 423 (1969) 9

Stewart v. Abend,
495 U.S. 207 (1990) 16

Texaco, Inc. v. Short,
454 U.S. 516 (1982) 8

United States National Bank of Oregon v. Independent Insurance Agents of America, Inc.
508 U.S. 439 (1993) 9

West Publishing Co. v. Mead Data Central, Inc.,
799 F.2d 1219 (8th Cir. 1986) 14

Wheaton v. Peters,
33 U.S. 591 (1834) 20, 21

STATUTES AND OTHER AUTHORITIES

U.S. Const. Art. 1, Cl. 8 § 8 19

1 U.S.C. § 204(a) (2018) 9

17 U.S.C. § 101 20

17 U.S.C. § 105 20

17 U.S.C. § 106 16

Page

17 U.S.C. § 501(c)(3) 18

17 U.S.C. § 503 18

17 U.S.C. § 506(a) 18

11th Circ. R. 28-1(k) 11

Act of Mar. 3, 1817, ch. 63, 3 Stat. 376. 20

Am. Ass'n Of Law Libraries, *Law Libraries and Access To Justice: A Report of the American Association of Law Libraries Special Committee on Access to Justice* (July 2014) 7

American Association of Law Libraries, *Law Libraries and Access to Justice*, (July 2014) 2

Ark. Code. Ann. § 1-2-102 (2019) 10

Craig A. Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendency*, 83 Mich. L. Rev. 1291 (1985). 20

Craig Joyce, *A Curious Chapter in the History of Judicature: Wheaton v. Peters and the Rest of the Story (of Copyright in the New Republic)*, 42 Hous. L. Rev. 325 (2005) .20

Page

Ga. Code Ann. § 1-1-1 (2019) 11, 12

Ga. Code Ann. § 1-3-1 (2018) 15

J. Walter Clark, *History of the Supreme Court Reports of North Carolina and of the Annotated Reprints*, 22 N.C. 11 (1921) 21

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 (2019) 12-13

"Letter from James Madison to W.T. Barry" (Aug. 4, 1822), *in 9 Writings of James Madison* 103 (G. Hunt ed. 1910) 6

Mary Whisner, *The United States Code, Prima Facie Evidence, and Positive Law*, 101 Law Libr. J. 545 (2009) 9

Olufunmilayo B. Arewa, *Open Access in a Closed Universe*, 10 Lewis & Clark L. Rev. 797 (2006) 14, 15

Roscoe Pound, *Theories of the Law*, 22 Yale L.J. 114 (1912) 3

Ryan Metheny, *Improving Lives by Building Social Capital: A New Way to Frame the Work of Law Libraries*, 109 Law Libr. J. 631 (2017) 1

Page

Sup. Ct. R. 37.6 1

"The Bluebook: A Uniform System of Citation" 248, T.1.3 (20th Ed. 2015) 11

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are law library associations, individual law librarians from county, state, federal, and academic law libraries, and professors of law. These many *amici* share a common view that open, equitable, and effective access to official legal information is a fundamental right, superior to copyright. We also share the lived experience of knowing that access to official published law can be rendered meaningless if interspersed copyrighted content can be used to limit access and use of the whole work. We ask the Court to find that if a state publishes binding law in a publication it designates as official, as Georgia has done here, the official status of that publication should override any competing copyright interest in ancillary material that might otherwise be protected if included in another type of publication.

Amici rely on unrestricted access to the text of the official law as designated by the states, including Georgia, to give effect to our collective missions of facilitating equal and equitable access to legal information, serving legal professionals as well as the general public who both govern and are governed through the law. *See* Ryan Metheny, *Improving Lives by Building Social Capital: A New Way to Frame the Work of Law Libraries*, 109 Law Libr. J. 631 (2017). For this mission, we rely on full access and reuse of official legal texts for purposes such as conducting and supporting legal research and scholarship, teaching legal research, and preserving state legal materials.

---

1. Counsel for the parties have consented to this brief. Under Rule 37.6, amici affirms that no counsel for any party authored this brief in whole or in part, and no person other than amici or its counsel made a monetary contribution to fund the preparation or submission of this brief.

While legal professionals and the public rely on unrestricted access to the law in order to fulfill their legal obligations and participate in democratic self-rule, the present *amici* have a special and vital need for open, unencumbered access to the official copies of the law in order to fulfill their mission. Claims of copyright asserted over official legal texts inhibit our ability to bridge the gap for many who need meaningful access to the law by imposing artificial cost and use restrictions. Copyright can be wielded to control basic library services such as reproducing copies for users, or public distribution or public display of official copies of the law online for remote access. In the face of such restrictions, notwithstanding the best efforts of law libraries, our ability to meet the needs of the public is compromised.

As part of our mandate, *amici* also note that the number of *pro se* patrons interacting with the legal system continues to grow rapidly. For many of these *pro se* litigants, who generally do not have any legal aid available to them, any additional financial restriction is extremely burdensome, including fees to view official law publications levied by commercial publishers such as RELX, the parent company of the publisher of the Official Code of Georgia Annotated ("OCGA"). Law libraries around the United States are reporting that the number of these *pro se* litigants requiring access to legal texts is increasing. *See* American Association of Law Libraries, *Law Libraries and Access to Justice*, (July 2014), https://www.aallnet.org/wp-content/uploads/2018/01/AccessToJusticeSpecialCommittee2014LawLibrariesAndAccessToJustice.pdf (last visited Sept. 30, 2019). Those *pro se* patrons do not have an organization to represent them before the court, but given their heavy reliance on law libraries for access to the official

publications such as the OCGA, we present views that we believe are also representative of their needs.

SUMMARY OF ARGUMENT

Due process and the rule of law require that the public has meaningful access to "the law." Every major modern society since the Greeks has recognized the importance of this principle. Roscoe Pound, *Theories of the Law*, 22 Yale L.J. 114, 117 (1912).

In the United States, "the law" largely comes from appellate courts, legislatures, and administrative agencies who have been granted rule-making authority. As every first year law student learns, those law-making bodies have developed highly specific methods for communicating their pronouncements of law through official publications, such as the Official Code of Georgia Annotated ("OCGA").

Those specific methods and their resulting official publications serve a number of important functions that are intrinsic to the underlying purpose of supporting democracy and of fair notice of the law. Official publications of the law assure the reader of the reliability and currency of the text, as well as its acceptance for use in other parts of the legal system, such as for citation before a court. Access to official publications is also critical for conducting and supporting legal scholarship, teaching legal research, preserving state legal materials, and providing equal and equitable access to legal information. A critical feature that enables those uses is that the government has identified the publication as holding special weight as an official, authoritative source.

The major point of this brief is that when a state gives official status to a publication containing binding legal pronouncements, the contents of the whole of that publication must be freely and fully accessible by the public. Assertion of copyright over even portions of the publication effectively renders access and use of the core statutory text meaningless. In addition to the logistical difficulties of disentangling binding edicts of law from ancillary materials published with it, if the publication must be disassembled into its component parts for reuse--annotations protected and filtered out, while the statutory text may be copied--the remaining pieces are no longer the "official" publication and unusable for their intended purpose. A state should not be allowed to assert the broad and powerful coercive rights granted by copyright over an official publication of law by interweaving clearly uncopyrightable edicts of law with otherwise copyrightable ancillary materials, such as annotations. Granting copyright protection over even portions of the OCGA would harm law librarians and by extension the public, while granting a windfall to publishers and states who should need no copyright incentive to fulfill their constitutional obligation to publish official copies of their laws. Accordingly, this Court should affirm the decision of the 11th Circuit.

ARGUMENT

I. PRINCIPLES OF DUE PROCESS AND THE RULE OF LAW REQUIRE MEANINGFUL PUBLIC ACCESS TO OFFICIAL VERSIONS OF "THE LAW"

The U.S. Constitution demands that the public have notice of and access to the law. "Every citizen is presumed

to know the law thus declared, and it needs no argument to show that justice requires that all should have free access to the opinions, and that it is against sound public policy to prevent this, or to suppress and keep from the earliest knowledge of the public the statutes or the decisions and opinions of the justices." *Nash v. Lathrop*, 6 N.E. 559, 560 (Mass. 1886).

Despite "not needing an argument," courts have supported this principle as a basic requirement of due process:

> Due process requires people to have notice of what the law requires of them so that they may obey it and avoid its sanctions. So long as the law is generally available for the public to examine, then everyone may be considered to have constructive notice of it; any failure to gain actual notice results from simple lack of diligence. But if access to the law is limited, then the people will or may be unable to learn of its requirements and may be thereby deprived of the notice to which due process entitles them.

Bldg. Officials & Code Adm. v. Code Tech., Inc., 628 F.2d 730, 734 (1st Cir. 1980).

While binding edicts of law are a particularly important type of legal publication, this court has also held in a number of cases, particularly with regard to judicial proceedings, but also in other contexts, that the public has certain rights to access and use other legal documents and related government publications as well. This tradition has a long history rooted in the

idea of democratic government. *See* "Letter from James Madison to W.T. Barry" (Aug. 4, 1822), *in* 9 *Writings of James Madison* 103 (G. Hunt ed. 1910) ("A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both."). The basic principle of access is driven by the idea that citizens have a right to interact freely with the output of their government in order to properly govern themselves. For example, "[t]he freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business. In preserving that form of government the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 495 (1975).

While records such as court documents and other non-binding legal materials must be freely publishable and accessible without threat of liability, much more so is the need for the public to access official legal publications that are primarily composed of binding law. For law libraries in particular, copyright over official publications raises the prospect of liability for everything from everyday uses such as providing individual copies for lawyers, to emerging uses such as digital access through online library portals that allow law libraries to bring the text of the law to many more users who are homebound, disabled, or without resources to travel to a physical law library. While law libraries have long served a variety of constituencies, their mission has recently emphasized a focus on those historically excluded from access to

justice. *See* Am. Ass'n Of Law Libraries, *Law Libraries and Access To Justice: A Report of the American Association of Law Libraries Special Committee on Access to Justice* (July 2014), http://www.aallnet.org/mm/Publications/products/atjwhitepaper.pdf. For example, although they do not have their own national association, prison law libraries play a major role in access to the legal system for those who are incarcerated. In fact, courts have stated that the "Due Process Clause of the Fourteenth Amendment guarantees state inmates the right to 'adequate, effective, and meaningful' access to the courts.'" *Petrick v. Maynard*, 11 F.3d 991, 994 (10th Cir. 1993) (quoting *Bounds v. Smith*, 430 U.S. 817, 822 (1977)). The guarantee of this court access is satisfied "by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." *Bounds*, 430 U.S. at 828. The logical prerequisite to this guarantee of access is that law libraries themselves must be able to provide access to official copies of the law to their users. This includes access to related materials such as notes, commentary, and other useful annotations that are created or commissioned by the government as part of the "official" code. Law libraries have long worked to overcome the many natural barriers that exist for users to access these materials--for example, printing physical copies of law books is costly, and access to the internet is not free--but requiring law libraries to also tackle artificial legal barriers, such as copyright, that are erected solely for economic profit is incompatible with the spirit and principle of the rule of law and of due process.

In this case, the state of Georgia seeks the right to hold users of the OCGA liable for copyright infringement by asserting that because parts of the official publication

are copyrighted, copying of the whole of the OCGA is impermissible. The Constitutional bar for adequate access to the law is not high--legislatures must do "nothing more than enact and publish the law," *Texaco, Inc. v. Short*, 454 U.S. 516, 532 (1982)--and so states are free to adopt a variety of ways to communicate the law's requirements. Indeed, states differ significantly in their approach to statutory publications, codifications, and the weight and authority they vest with either type of publication. However, when a state makes a choice to imbue a particular publication with special "official" status, authority, and evidentiary weight, it should not also be permitted to threaten its citizens and other members of the public with serious legal liability when they freely reuse that publication, regardless of whether the state includes in the publication materials such as annotations, that would otherwise be copyrightable if published in another publication.

A. Official versions of codes are published under the authority of the state and carry special weight as evidence of legislative enactments.

When a state designates a legal publication as "official," that designation is important, often carrying with it significance as a matter of reliability and its use as evidence of legislative enactments. As legislation is created, copies emanate into the world with a variety of legal statuses. The original session law is, in many states, viewed as the canonical text--perfect evidence of the legislative enactment--while other publications of the law, such as an official statutory codification, are afforded

their own special evidentiary status.[2] Yet other versions, such as commercial editions published by an independent publisher, or free but unverified electronic copies, carry no special evidentiary weight.

For example, the majority of the subject-based codification of the official United States Code is viewed by the courts as "prima facie evidence that the provision has the force of law." *See United States National Bank of Oregon v. Independent Insurance Agents of America, Inc.* 508 U.S. 439 (1993); *see also* 1 U.S.C. § 204(a) (2018). These distinctions are a matter of law. *See Stephan v. United States*, 319 U.S. 423 (1969) (stating that "the very meaning of 'prima facie' is that the Code cannot prevail over the Statutes at Large when the two are inconsistent.").

This issue of what constitutes evidence of "the law" has also been litigated at the state level in states like Minnesota, Idaho, and Florida with courts in those states pointing out that while their codes are not the canonical "laws themselves," they are given special status by providing prima facie evidence of it. *See State v. Boecker*, 893 N.W.2d 348, 353 (Minn. 2017). *See also Peterson v. Peterson*, 156 Idaho 85, 89-90 (2014); *Shuman v. State*, 358 So.2d 1333, 1338 (Fl. 1978). Although the issue has not been litigated frequently, at least one state appellate court has pointed out the difference in an official legal publication versus an unofficial one—in this case, one produced by a

2. In some states and for portions of the United States Code, legislatures have reenacted statutory codifications as "positive law," transforming those portions of the code from *prima facia* evidence of the law into enacted, perfect fidelity copies of the law itself. *See* Mary Whisner, *The United States Code, Prima Facie Evidence, and Positive Law*, 101 Law Libr. J. 545 (2009).

commercial third-party, West Publishing Company—by explaining that unofficial statutory compilations do not become the official version of the law just by the practice of the bar or courts, and thus unofficial codifications are not law that should be cited in courts. *In re Appeal of Tenet HealthSystems Bucks County, LLC*, 880 A.2d 721, 725-726 (Pa. Super. 2005). Distinctions between official and unofficial versions of the law matter, and thus the public's right to access official versions of annotated codes should not be conflated with their right to access unofficial annotated codes. If litigants are left only with unimpeded access to unofficial publications of the law, they rely on the law at their own peril.

Not every state chooses to officially codify their law. For example, Virginia does not officially codify its laws, with the Acts of Assembly forming the "official law of the Commonwealth." The Executive Committee of the Virginia Code Commission, http://codecommission.dls.virginia.gov/code-of-virginia-codification-policies.shtml (last visited September 6, 2019). In other states, like Arkansas, and in this case, Georgia, states not only codify, but enact the codification as law. See Ark. Code. Ann. § 1-2-102 (2019). When states chose to officially codify, then those codifications become law and the state should not be permitted to burden core rights of access to that law by interspersing copyrighted additions and then asserting that the whole is then copyrighted.

B. The Official Code of Georgia Annotated is the only official version of the code of Georgia, and as a matter of due process, residents and those affected by the laws of Georgia have a right to access it.

In Georgia's case, the Official Code of Georgia is the "legal evidence of laws" as it is codified as positive law. OCGA § 1-1-1 (2019). The Official Code of Georgia Annotated is both published under the official authority of the state (under state seal) and as the official text of statutory law in Georgia. All litigants in Georgia courts are required, by law, to cite to the Official Code of Georgia. In 1982, the U.S. District Court for the Northern District of Georgia indicated that anyone citing the non-official version of the Georgia Code "will do so at his own peril if there is any inaccuracy in that publication or any discrepancy." *Georgia v. The Harrison Co.*, 548 F. Supp 110, 117 (N.D.Ga 1982). The State of Georgia is not the only legal entity that demands access and citation to the OCGA. The 11th Circuit similarly requires litigants to cite to the OCGA, via incorporation by reference of "The Bluebook: A Uniform System of Citation," which requires that litigants cite to the current official statutory code currently in force. 11th Circ. R. 28-1(k). *See also* "The Bluebook: A Uniform System of Citation" 248, T.1.3 (20th Ed. 2015) ("[c]ite to Ga. Code Ann. (published by LexisNexis), if therein.").

Indeed, the first statute in the OCGA proclaims the OCGA as the only official version of the statutory code in the state of Georgia, "The statutory portion of the codification of Georgia laws prepared by the Code Revision Commission and the Michie Company pursuant to a contract entered into on June 19, 1978, is enacted and

shall have the effect of statutes enacted by the General Assembly of Georgia." OCGA § 1-1-1 (2019). The statutory text goes on to make clear, "The statutory portion of such codification shall be merged with annotations, captions, catchlines, history lines, editorial notes, cross-references, indices, title and chapter analyses, and other materials pursuant to the contract and shall be published by authority of the state pursuant to such contract and when so published shall be known and may be cited as the 'Official Code of Georgia Annotated.'" *Id.* Thus, the statute makes clear two principles: First, that the OCGA is the only official version of the law and second, that the OCGA only exists as published under contract to include also annotations, captions, catchlines, history lines, editorial notes, cross-references, indices, title and chapter analysis, etc. Without these parts, there is no "official" version of the OCGA. So, for example, the free version of the Georgia Code that the state of Georgia makes available through Lexis's website is not official, cannot be cited in court, and cannot be relied upon in courts by the public. Unless the official version of the law, the OCGA, is available for use without encumbrance, Georgia fails in its responsibilities to ensure that its citizens have access to the law.

II. "THE LAW" IS INSEPARABLE FROM THE OFFICIAL, AUTHORITATIVE LEGAL PUBLICATIONS IN WHICH IT IS PUBLISHED

The documents that make up a published law are evocative because they communicate to readers information about three key attributes, "officialness, authenticity and authority," that assure users that the document they are accessing is actually "the law." 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, 210 (2019). All of these characteristics are particularly important in the legal process.

However, of these three characteristics, the "official" factor is the most critical for law libraries to continue to provide free, non-discriminatory, unencumbered access to the complete official law to their patrons. Interference with access to official texts comes in many forms: the process of licensing materials itself is frequently burdensome on important uses. Even just understanding and negotiating license terms can take significant time and expertise. Furthermore, access to contractual restrictions and high fees mean that law libraries are often not positioned to provide materials in their collections on the terms patrons need to have meaningful access to the law. These interferences with access stem directly from one greater risk, which is the focus of the present case: allowing the government to copyright the official law.

If copyright in an official code is allowed, the law has the potential to be frustratingly split up into different parts, further confusing the purpose of the "official" status and interfering with legitimate access and use. If the government splits official legal publications into protectable and unprotectable elements, this divided text can no longer be called "official." If it is not official, it can not be used or cited by legal researchers in the courts. It is also disfavored for use in legal scholarship, for teaching legal research, and for preservation purposes. In addition, allowing copyright to protect these official legal publications can have long term ramifications for access, technology, and innovation. This action will restrict those entities - whether the present *amici* at law libraries, but

also public libraries, prison libraries, legal publishers, legal technology innovators, or the general public - from providing access to others who lack the means to comply with the copyright owner's demands. When official sources of the law are not burdened with copyright, anyone, including law libraries, can take the law and make it easier for people to use and find. Those critical functions simply cannot be accomplished when the law is copyrighted.

An element of this same risk was laid out clearly in an earlier case involving a legal publisher. West Publishing previously prepared the books of the National Reporter System and the page citations they created became a fundamental requirement in legal citation. In *West Publishing Co. v. Mead Data Central, Inc.*, 799 F.2d 1219 (8th Cir. 1986), Lexis, a relative newcomer to the legal publication market at the time, sought to create their own database of case law, including "star pagination," which was a unique method of corresponding to each page number in West's National Reporter System. *Id.* at 1222. West claimed that Lexis's inclusion of star pagination was copyright infringement. *Id.* Initially, the Eighth Circuit affirmed a preliminary injunction, finding that there was a potential infringement. See *id*. at 1229. However, over the following decades, scholars noted that this decision effectively restrained the general access to the law, by letting one single commercial entity control the law through copyright, and suppressed any innovation and development of computer legal research technologies that would have aided further access to the law. *See* Olufunmilayo B. Arewa, *Open Access in a Closed Universe*, 10 Lewis & Clark L. Rev. 797 (2006). Splitting legal publications into protectable pagination and unprotectable legal decisions was the direct cause of hampering future

innovation in access to law. Eventually, the parties settled, and pagination was no longer a copyright issue. The result allowed Lexis and several other legal research innovators to enter the market without fear of litigation for making the law available. *Id.* at 823

In the present case, the Court can avoid a similar potential set-back for innovation in legal access and research technology by simply ruling that a designation of a law as "official" by the government makes the official law uncopyrightable.

Additionally, the State of Georgia, itself, mandates that any interpretation of the official statutes should require access to all the official legal materials which may include materials that are not merely the plain language of the statute. "In all interpretations of statutes, the courts shall look diligently for the intention of the General Assembly, keeping in view at all times the old law, the evil, and the remedy." Ga. Code Ann. § 1-3-1 (2018). The annotations at issue in this case certainly aid this mandatory rule to discover the "intention of the General Assembly" – which could include notes, cross-references, and other parts of the official materials printed in the OCGA. The Georgia common law states that "[t]he cardinal or pre-eminent rule governing the construction of statutes is to carry into effect the legislative intent and purpose if that is within constitutional limits." *Ford Motor Co. v. Abercrombie*, 62 S.E.2d 209, 211 (1950). Again, the annotations at issue must be accessible to the public, so that citizens can discover "the effect the legislative intent and purpose" that is required for proper legal analysis of the statutes.

III. COPYRIGHT OF OFFICIAL LEGAL PUBLICATIONS FRUSTRATES PRINCIPLES OF DUE PROCESS AND DOES NOT SERVE THE PURPOSES OF COPYRIGHT LAW

A. The expansive control that copyright owners wield is incompatible with the due process interests of the public in access to and use of official legal publications.

The Copyright Act grants holders of rights broad, exclusive rights to control reuse of their works. 17 U.S.C. § 106 (2019). Sometimes referred to as a "limited monopoly," *Stewart v. Abend*, 495 U.S. 207, 229 (1990), those rights include the right of copyright owners to control how and when the works they own are made available to the world. Copyright owners, for example, have the exclusive right to determine when or even if to publish a work. *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985). ("The right of first publication encompasses not only the choice whether to publish at all, but also the choices of when, where, and in what form first to publish a work"). Further, this Court has stated, "[t]he owner of the copyright, if he pleases, may refrain from vending or licensing and content himself with simply exercising the right to exclude others from using his property." *Fox Film Corp. v. Doyal,* 286 U.S. 123, 127 (1932).

Copyright owners may also leverage their exclusive rights to impose significant restrictions on who may have access, when, for how much, and under what circumstances through licensing restrictions. Courts have held, for example, that owners of copyrightable websites or software may impose terms on access such as mandatory

arbitration, *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997) and choice of forum, *CompuServe, Inc. v. Patterson,* 89 F.3d 1257 (6th Cir. 1996).

Indeed, Lexis has imposed in its publication of the unofficial, free version of the Georgia Code online significant contractual restrictions on access and use. *See Terms of Use, LexisNexis.* https://www.lexisnexis.com/terms (https://perma.cc/RQ4Z-9AYN) (last visited September 30, 2019). Among them are that its contents may only be used for personal use, *id.* at § 2.1, "Limitations on Use" ("The Content on this Web Site is for your personal use only and not for commercial exploitation."), may not be reproduced or republished "all or in part" except for personal purposes (apparently excluding use in legal filings), users must agree to surrender rights to pursue other unrelated claims against Lexis, *id*. at § 4.6 "Intellectual Property Rights" ("You agree that you shall have no recourse against Provider for any alleged or actual infringement or misappropriation of any proprietary or other right in the Postings you provide to Provider"), users must follow specific conditions on how they can link to the code, *id*. at § 6 "Linking to this Web Site", agree to have their use of the content tracked and monitored, *id*. at § 23 "Privacy", and agree to a governing law and forum in another state, § 22 "Governing Law and Jurisdiction" (specifying New York). Finally, Lexis asserts the rights to change these terms at any time with minimal notice to users. *Id*. at § 26 "Modification to terms of use."

These types of contractual terms are not unusual to find on any website, including sites offering access to unofficial versions of other states' codes. *See, e.g.,* Arkansas Code Public Access, https://portal.arkansas.gov/

agency/bureau-of-legislative-research/service/arkansas-code-search-laws-and-statutes/. But permitting copyright to extend to official legal publications such as the OCGA creates a potent and troubling combination. In that situation, not only can website operators such as Lexis impose license terms as a condition of access to their site, they can also act as the *exclusive* source for such content, threatening copyright infringement liability against organizations such as Public.Resource.Org and non-profit law libraries that seek to provide public access to the OCGA, free of these kinds of restrictions. Those liability threats are serious, giving the state of Georgia coercive control. A law library that scans and shares copies of the OCGA with its users faces penalties of up to $150,000 per work infringed. 17 U.S.C. § 501(c)(3) (2019). That same library faces impoundment or destruction of any copies made. 17 U.S.C. § 503 (2019). And if a library user--for example a lawyer at a for-profit law firm--merely copied and used those scans and was found to have done so "for purposes of commercial advantage," that law firm could face criminal liability. 17 U.S.C. § 506(a) (2019).

Because the OCGA, the whole of it and not just in part, is the complete legal publication to which the public must have access, the control that copyright law would grant the state is incompatible with that goal. "We cannot see how this aspect of copyright protection can be squared with the right of the public to know the law to which it is subject." *Bldg. Officials & Code Adm. v. Code Tech., Inc.*, 628 F.2d 730, 735 (1st Cir. 1980).

B. Granting Exclusive Rights in the OCGA Does Not Serve the Purposes of Copyright

The Copyright Act ultimately aims to achieve the Constitutional goal to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. Art 1, Cl. 8 Sec. 8. "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.' " *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 558 (1985) (quoting *Mazer v. Stein*, 347 U.S. 201, 219 (1954)).

But in this case, the incentive structure that the Copyright Act is built on is entirely unnecessary. As a matter of due process, states must publish their laws. No additional incentive is needed because the Constitution demands it. While states are free to choose from a variety of ways to do that, whatever the method chosen, states must follow through on their obligation.

Second, and more specifically to the arguments of Georgia and some of its amici, the copyright incentives for publishing law, even with ancillary research aids such as annotations, are not nearly as significant as are claimed. A brief review of legal publishing bears this out. Beginning with common law cases in the early nineteenth century, courts began to recognize that applying copyright protection to primary law was harmful to the public interest. See, e.g., *Callaghan v. Myers*, 128 U.S. 617,

645-47 (1888); *Banks v. Manchester*, 128 U.S. 244, 253-54 (1888); *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 668 (1834); *Howell v. Miller*, 91 F. 129, 138 (6th Cir. 1898); *Davidson v. Wheelock*, 27 F. 61, 62 (C.C.D. Minn. 1866); *Nash v. Lathrop*, 6 N.E. 559, 562-63 (Mass. 1886)). Later, the federal government codified these decisions into the U.S. Code, barring copyright protection for U.S. government works, including, any official laws. *See* 17 U.S.C. § 101, § 105 (2019).

In *Wheaton v. Peters*, 33 U.S. 591 (1834), this Court resolved a dispute between the Court's first and second official reporters. *See Act of Mar. 3, 1817, ch. 63, 3 Stat. 376* (providing for an official reporter). Henry Wheaton, the first reporter, published reports containing the text of Justices' opinions and, additionally, his own unique annotations, including statements of the cases' facts, procedural histories, and abstracts of the Court's decisions. *Wheaton*, 33 U.S. at 617. After Wheaton, the second official reporter, Richard Peters, created his own summaries of the Court's prior decisions. In doing so, Peters used some parts of Wheaton's annotations. See Craig A. Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendency*, 83 Mich. L. Rev. 1291, 1364-1385 (1985). Wheaton sued Peters for copyright infringement. The Court's decision stated that "no reporter has or can have any copyright in the written opinions delivered by this court." *Wheaton*, 33 U.S. at 668. *See also* Craig Joyce, *A Curious Chapter in the History of Judicature: Wheaton v. Peters and the Rest of the Story (of Copyright in the New Republic)*, 42 Hous. L. Rev. 325, 351 (2005).

Later, *Banks v. Manchester*, 128 U.S. 244 (1888) expanded the holding from *Wheaton*, denying copyright

protection for state judicial opinions. The materials at issue in Banks, the Ohio court's opinions and its statements of the case and syllabuses, were "exclusively the work of the judges," and were "not… author[ed]" by the court's official reporter. *Id.* at 251. Therefore, applying the "public policy" announced in *Wheaton* (that "no copyright could ... be secured in the products of the labor done by judicial officers in the discharge of their judicial duties,") the Court held that the copying of the judge-created materials did not provide grounds for an infringement claim. See *id.* at 253-254. The "work done by the judges . . . is free for publication to all" because it "constitutes the authentic exposition and interpretation of the law, which[] bind[s] every citizen." *Id.* at 253.

In the midst of all these rulings, states continued to publish their law and, in at least some cases, did so complete with ancillary research tools. For example, in North Carolina, the North Carolina State Supreme Court has now published its official reports for well over a century, complete with annotated headnotes. That practice began in the late 1800s and the commercial transaction was simple and free from exclusive copyright control, the annotator (in that case, a North Carolina Supreme Court justice) was paid a fixed amount, between $25 and $50 a volume, to produce the annotations. J. Walter Clark, *History of the Supreme Court Reports of North Carolina and of the Annotated Reprints*, 22 N.C. 11-14 (1921).

In many other states the creation of research aids has proliferated as well in the absence of exclusive control over the official text. For many states, commercial publishers have found the market lucrative enough to publish their own unofficial versions of the code, complete with

annotations. *E.g., compare West's* North Carolina Code Annotated (West) *with* North Carolina General Statutes (the official Lexis publication). This Court's own reports are published in a number of versions, both official and commercial, which include copyrightable additional content. *Compare* L. Edition Preface *with* U.S. Reports Preface, *with* S. Ct Reports Preface.

Our contention is not that such annotations are uncopyrightable, or that copyright does not act as an incentive to promote their creation. When produced independently and published in unofficial publications, those tools may well be protectable. However, the purposes of Copyright are not served, nor are the interests of the public, when creative tools such as annotations are so merged with an *official* publication that exercise of that copyright prevents effective use of the official publication as a whole. In that case, the legally coercive power that copyright grants would interfere with public use and should yield to those interests.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully Submitted,

On the Brief:
LESLIE A. STREET
WILLIAM & MARY
SCHOOL OF LAW
613 South Henry Street
Williamsburg, VA 23185

DAVID R. HANSEN
DUKE UNIVERSITY
411 Chapel Drive
Durham, NC 27708

KYLE K. COURTNEY
Counsel of Record
HARVARD UNIVERSITY
One Harvard Yard
Widener Library G-20
Cambridge, MA 02138
(617) 495-4089
kyle_courtney@harvard.edu

Counsel for Amici Curiae

October 16, 2019

APPENDIX

APPENDIX — LIST OF *AMICI CURIAE*[1]

Law Librarians of New England (LLNE)

Law Library Association of Greater New York
(LLAGNY)

Legal Information Preservation Alliance (LIPA)

Southeastern Association of Law Libraries (SEAALL)

Southwestern Association of Law Libraries (SWALL)

Adam Masarek
Strategic Legal Insights Attorney
Greenberg Traurig

Adeen Postar
Law Library Director and Professor of Practice
American University, Washington College of Law

Alyson Drake
Assistant Director for Operations & Educational
Programs; Director, Excellence in Legal Research
Program; Adjunct Professor of Law
Texas Tech University School of Law

Amanda Runyon
Associate Dean and Director
of the Biddle Law Library
University of Pennsylvania Law School

---

1. Institutions are listed for identification purposes only. All individual signatories are participating in their individual capacity, not on behalf of their institutions.

Amanda Watson
Assistant Professor and Director
of the O'Quinn Law Library
University of Houston Law Center

Amy A. Emerson
Director of the Law Library
and Assistant Professor of Law
Villanova University, Charles Widger
School of Law

Amy Wharton
Director of the Arthur J. Morris Law Library
University of Virginia School of Law

Andrew Lang
Reference Librarian
University of Pennsylvania Law School

Anna Lawless-Collins
Associate Director for Systems
& Collection Services
Boston University School of Law

Anne Klinefelter
Director of the Law Library
and Professor of Law
University of North Carolina

Anne T. Gilliland
Scholarly Communications Officer
and Associate Law Librarian
University of North Carolina, Chapel Hill

Ashley Krenelka Chase
Associate Director
Stetson University College of Law

Ashley Matthews
Reference Librarian
George Mason University Law Library

Benjamin Carlson
Head of Digital Initiatives
Villanova University Charles Widger School of Law

Benjamin J. Keele
Research and Instructional Services Librarian,
Ruth Lilly Law Library
Indiana University, Robert H. McKinney
School of Law

Beth Williams
Senior Director of the Robert Crown
Law Library & Senior Lecturer in Law
Stanford Law School

Billie Jo Kaufman
Interim Law Library Director
& Visiting Professor of Law
Mercer University School of Law

Bonita Shucha
Associate Dean & Director of the Law Library
University of Wisconsin Law School

Brian Barnes
Law Library Director & Associate Professor
Loyola University New Orleans

Brian R. Huffman
Electronic Services Librarian
University of Hawai‘i

Camille Broussard
Associate Dean for Information Services and
Director of the Mendik Law Library
New York Law School

Candle Wester
Associate Director for Faculty Services
& Administration
University of South Carolina

Cara Henley Johnson
Library Manager
O’Melveny

Carissa Vogel
Associate Dean for Library Services, Director of
the Law Library & Professor of Legal Research
Benjamin N. Cardozo School of Law,
Yeshiva University

Catherine Biondo
Research Librarian
Harvard Law School

Catherine Dunn
Director, Westminster Law Library
& Professor in University Libraries
University of Denver, Sturm College of Law

Charlie Amiot
Student Services and Outreach Librarian
University of Kentucky College of Law

Cindy Hirsch
Reference Law Librarian
University of Maine School of Law

Clanitra Stewart Nejdl
Research Services Librarian and Lecturer in Law
Vanderbilt University Law School

Courtney Selby
Associate Dean for Library Services
& Associate Professor of Legal Research
St. John's University School of Law

Dana Rubin
Reference Librarian
New York University School of Law

David Isom
Faculty Services Librarian
University of San Diego School of Law

Dennis Kim-Prieto
Reference Librarian
Rutgers School of Law

Diane M. Rodriguez
Assistant Director
San Francisco Law Library

Duncan Alford
Associate Dean, Directory of the Law Library, and Professor of Law
University of South Carolina School of Law

Edward T. Hart
Assistant Dean for Law Library
UNT Dallas College of Law

Emma Wood
Associate Librarian
UMass Dartmouth Law Library

Erika Cohn
Director of the Law Library
Associate Professor
Saint Louis University School of Law

Faye Jones
Director and Clinical Professor
University of Illinois

Fred Dingledy
Senior Reference Librarian
The Wolf Law Library, William & Mary Law School

Genevieve Tung
Associate Director
Rutgers Law Library

George Taoultsides
Manager, Faculty Research and Scholarly Support
Harvard Law School Library

Greg Lambert
Chief Knowledge Services Officer
Jackson Walker LLP

Heather Casey
Int'l & Foreign Law Reference Librarian
Georgetown University Law Center

Heidi Frostestad Kuehl
Director of the David C. Shapiro
Memorial Law Library
Northern Illinois University College of Law

Jamie J. Baker
Associate Dean & Director, Professor of Law
Texas Tech University School of Law Library

Jane Larrington
Associate Director & Head of Public Services
University of San Diego Legal Research Center

Janet Sinder
Professor of Law & Director of the Library
Brooklyn Law School

Jeffrey Schoerner
Research Analyst & Librarian
Morrison & Foerster LLP

Jennifer L. Behrens
Associate Director for Administration
& Scholarship
J. Michael Goodson Law Library,
Duke University School of Law

John Joergensen
Senior Associate Dean for Information Services
Rutgers Law School

John R. Beatty
Faculty Scholarship Outreach Librarian
Charles B. Sears Law Library,

University at Buffalo
Jootaek Lee
Librarian III/ Assistant Professor
Rutgers Law School

Julie Graves Krishnaswami
Head of Research Instruction
Yale Law School

Julie Kimbrough
Acting Director of the Law Library
& Clinical Assistant Professor of Law
Kathrine R. Everett Law Library
University of North Carolina School of Law

Kate Irwin-Smiler
Reference Librarian
Professional Center Library, Wake Forest
University School of Law

Kathleen Delaurenti
Head Librarian
Peabody Institute

Kelly Leong
Head of Reference
Maloney Law Library,
Fordham University School of Law

Kelly Reynolds
Law Reference Librarian
University of Oregon

Ken Rodriguez
Reference & Intellectual Property
Law Librarian; Professorial Lecturer in Law
The George Washington University
Law School, Burns Law Library

Kein Garewal
Associate Director of Collections
Harvard Law School

Kristina J. Alayan
Law Library Director & Assistant Professor of Law
Howard University School of Law

Laureen C. Urquiaga
Digital Services Librarian
Howard W. Hunter Law Library

Lee F. Peoples
Associate Dean of Library & Technology
Frederick Charles Hicks Professor of Law
Oklahoma City University School of Law

Lisa A. Goodman
Executive Professor and Director
of the Law Library
Texas A&M University School of Law

Louis M. Rosen
Reference Librarian, Associate
Professor of Law Library
Barry University School of Law

Lu Tuan Nguyen
Reference Librarian
Orange County Public Law Library

Margaret K Maes
Executive Director, Retired
Legal Information Preservation Alliance

Mari Cheney
Assistant Director, Research and Instruction
Lewis & Clark Law School, Boley Law Library

Mariah Ford
Research Services Librarian
Vanderbilt Law School

Mark Williams
Head of Collections
Vanderbilt University Law School

Mary Beth Parker
Associate Director of Operations & Collections
Nova Southeastern University, Shepard Broad
College of Law, Panza Maurer Law Library

Mary Jenkins
Director, Research Solutions
Accufile

Mary Rumsey
Reference and Instructional Services Librarian
Willamette University College of Law

Mary S. Searles
Law Librarian/Director
The John W. King New Hampshire Law Library

Melinda Kent
Manager, Research Services
Harvard Law School Library

Melissa J Bernstein
Director and Professor James E. Faust
Law Library
University of Utah, College of Law

Michael Chiorazzi
Associate dean for Information Services
University of Miami School of Law

Michelle Hook Dewey
Legal Research Services Manager
BakerHostetler

Michelle Trumbo
Executive Director
Legal Information Preservation Alliance

Michelle Wu
Associate Dean for Library Services
and Professor of Law
Georgetown Law

Mitchell Silverman
Independent Legal Education Consultant
Mitchell L. Silverman, Infoneed Research

Patrick J. Charles
Library Director & Associate Professor of Law
Gonzaga University School of Law

Paul Gatz
Reference Librarian and Adjunct Professor
The Ohio State University

Pauline M. Aranas
Associate Dean, John Stauffer Charitable Trust
Chief Information Officer, Director of the Law
Library, and Adjunct Professor of Law
University of Southern California
Gould School of Law

Phillip Thomas Gragg
Associate Dean for Library and Information
Services and Associate Professor of Law
California Western School of Law

Pia M. Hunter
Teaching Assistant Professor
Albert E. Jenner, Jr. Law Library,
University of Illinois College of Law

Rachel Green
Faculty Services Librarian
UCLA School of Law

Raquel J. Gabriel
Professor of Law & Director of the Law Library
City University of New York (CUNY) School of Law

Richard Leiter
Director of the Schmid Law Library
University of Nebraska

Rick Goheen
Asst. Dean for the LaValley Law Library
& Assoc. Professor of Law
University of Toledo

Robert M. Truman
Associate Dean and Director
Boley Law Library, Lewis & Clark Law School

Roger Skalbeck
Professor of Law
University of Richmond School of Law

Ronald E Wheeler
Director of the Fineman and Pappas Law Libraries
Associate Professor of Law and Legal Research
Boston University School of Law

Ryan Metheny
Managing Librarian, Legal Education
LA Law Library

Sara Paul Raffel
Research Manager
Crowell and Moring LLP

Sara Sampson
Assistant Dean for Information Services
& Communications, Director of Law Library,
and Senior Lecturer
The Ohio State University
Moritz College of Law

Sarah A. Lewis
Faculty Services Librarian
& Assistant Professor of Legal Research
University of Kentucky College of Law

Sarah Dunaway
Research Services Librarian, Lecturer in Law
Vanderbilt University Law School

Sarah Lamdan
Professor of Law
CUNY School of Law

Sarah Walangitan
Librarian
Supreme Court of Illinois - Chicago Branch

Shanna Pritchett
Librarian III
Nevada Supreme Court Law Library

Shira Megerman
Senior Legal Information Librarian
Boston University School of Law

Simon Canick
Associate Dean, Law Library & Technology;
Law School Professor
University of Maryland Francis King Carey
School of Law

Stacy Fowler
Associate Professor & Technical Services Librarian
St. Mary's University Law Library

Susan Azyndar
Reference Librarian and Adjunct Professor
Moritz Law Library, Moritz College of Law

Susan deMaine
Associate Librarian
Indiana University

Susan Drisko Zago
Law Library Director and Professor of Law
University of New Hampshire Franklin Pierce
School of Law

Tina M. Brooks
Electronic Services Librarian & Associate
Professor of Legal Research
University of Kentucky College of Law

Todd Venie
Assistant Dean and Director for the Library and
Information Technology Services
Paul M. Hebert Law Center,
Louisiana State University

Ulysses Jaen
Director & Professor
Ave Maria School of Law

Vicenç Feliú
Associate Dean for Library Services
and Professor of Law
NSU - Florida Shepard Broad College of Law

Victoria Williamson
Director
Riverside County Law Library

Wickliffe W. Shreve II
Faculty & Scholarly Services Librarian
and Senior Lecturing Fellow
Duke University School of Law

Yasmin Morais
Cataloging and Reference Librarian
David A. Clarke School of Law,
University of the District of Columbia

Yasmin Sokkar Harker
Law Library Professor
CUNY Law