

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 BRENDAN KEEFE, IN HIS
OFFICIAL CAPACITY AS CHIEF
INVESTIGATIVE REPORTER FOR 11ALIVE
ATLANTA, AND WXIA-TV AS *AMICI CURIAE*
IN SUPPORT OF RESPONDENT**

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INTERESTS OF AMICI CURIAE¹

Brendan Keefe is the Chief Investigative Reporter for the 11Alive Investigation Team, which is a part of 11Alive WXIA-TV² – a broadcasting platform providing local news to the Atlanta area. 11Alive provides a fundamental public service to the citizens of Georgia by informing them of local, national, and global events. Amici are collectively interested in promoting public accountability. Amici emphasize that copyrighting annotations which have been made part of the official code obscures government transparency and inhibits access to justice.

SUMMARY OF THE ARGUMENT

The right of the people to know the laws that bind them has long been recognized as a fundamental tenet of a democratic society. As exemplified by the experiences of Brendan Keefe, the State of Georgia's asserted copyright deprives members of the public of this fundamental right. As such, Amici respectfully maintain the decision of the United States Court of Appeals for the Eleventh Circuit should be affirmed.

¹ Pursuant to Sup. Ct. R. 37.6, amici curiae state that no counsel for a party has written this brief in whole or in part, and that no person or entity, other than amici curiae, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Pursuant to Sup. Ct. R. 37.3 (a), written consent to the filing of this brief has been obtained from counsel for Petitioners and Respondent

² WXIA-TV is a division of Pacific and Southern, LLC, which is a Delaware LLC that is qualified to do business in Georgia. TEGNA Inc. is the sole member of Pacific and Southern.

ARGUMENT**I. THE STATE OF GEORGIA IS NOT ENTITLED TO COPYRIGHT THE O.C.G.A. ANNOTATIONS BECAUSE THE ASSERTED COPYRIGHT HAS ALREADY PRODUCED INJUSTICE AND UNDERMINES THE PUBLIC'S RIGHT TO KNOW THE LAWS THAT BIND THEM**

The official laws of Georgia must be accessible to the people of Georgia in order to uphold justice and the sovereign will of the people. *See Code Revision Comm'n v. Pub.Resource.Org, Inc.*, 906 F.3d 1229, 1255 (11th Cir. 2018) (“In creating the annotations, the legislators have acted as draftsmen giving voice to the sovereign's will. The resulting work is intrinsically public domain material, belonging to the People, and, as such, must be free for publication by all.”). It has long been recognized that laws and their official interpretations should not be copyrightable because the public has a right to access the rules which govern them. *See Howell v. Miller*, 91 F. 129 (6th Cir. 1898) (“no one can obtain the exclusive right to publish the laws of a state”) (Harlan, J., sitting by designation); *see also Nash v. Lathrop*, 6 N.E. 559, 559 (Mass. 1886) (“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.”) As shown below, the

courts' concern about asserting copyright over official legal materials has been actualized in Georgia, where the asserted copyright on annotations to the O.C.G.A. prevents the press and the public from accessing and meaningfully engaging with the law.

**A. THE STATE'S ASSERTED
COPYRIGHT HAS ALREADY
PRODUCED INJUSTICE BY
MAKING THE LAW INACCESSIBLE**

The O.C.G.A. is not accessible to the general public. Notice of the law, a concept enshrined in at least the ex post facto and prohibition of vague laws clauses of the United States Constitution, is a practice dating back to ancient civilizations. Leslie A. Street & David R. Hansen, *Who Owns the Law? How to Restore Public Ownership of Legal Publication*, 26 J. Intell. Prop. L. 205, 207 (2019). The Georgia legislature is attempting to avoid its responsibility to provide fair notice of its laws through its asserted copyright.

The story of an investigative journalist in Georgia, Brendan Keefe, exemplifies this gross inaccessibility. On May 17, 2016, Mr. Keefe published an 11Alive investigative report in which he recorded his personal attempt to access a paper copy of the O.C.G.A. Brendan Keefe & Michael King, "Transparency should apply to our lawmakers too," 11Alive, May 17, 2016, UPDATED: Mar. 28, 2017, <https://www.11alive.com/article/news/investigations/transparency-should-apply-to-our-lawmakers-too/85-197258289>.

In particular, Mr. Keefe first attempted to procure a copy of the O.C.G.A. via Georgia's Open Records Act

in September 2015. JA 161-163. Mr. Keefe sent a letter to the Georgia Office of Legislative Counsel requesting inspection of the O.C.G.A. JA 163. He received a swift response from the Legislative Counsel denying his request. JA 161-162. Specifically, the Legislative Counsel informed Mr. Keefe “there was no need [for him] to resort to an open records request” since “[t]he O.C.G.A. is available at many libraries, such as the Georgia State University Law School and general public libraries.” JA 161. The Legislative Counsel further added that if Mr. Keefe wished to obtain his own copy of the O.C.G.A., he could “purchase it from Lexis Nexis . . . like anyone else.” JA 161.

After receiving the Legislative Counsel’s response, Mr. Keefe attempted to follow the Legislative Counsel’s instruction and searched for a physical copy of the O.C.G.A. in a library. His first stop was the Alpharetta Branch of the Atlanta-Fulton County Library, eight miles from his home. While the library catalog indicated the library had a complete copy of O.C.G.A., a clerk informed Mr. Keefe it was not immediately available and would have to be ordered from storage or another branch. Continuing his search, Mr. Keefe then visited the Main Branch and Headquarters of the Atlanta-Fulton Library, 30 miles from his home. The Main Branch, just 2.3 miles from the State Capitol building, is the largest public library in the most populous city and county of Georgia. Mr. Keefe asked to see the O.C.G.A. and was told there was no publicly accessible copy in the main areas of the library. Instead, the volumes were in a backroom behind a locked door. Mr. Keefe was given two options: inform the staff which volume he wanted and they

would retrieve it for him, or request special permission. Mr. Keefe requested special permission to both visit the room and obtain photographs. He was required to identify himself as a member of the press to be granted special permission. Once in the backroom, Mr. Keefe noticed the library did not house a current and complete O.C.G.A. Some volumes were missing entirely, and others dated to the 2010 edition—six years out of date.

Persisting, Mr. Keefe visited the Fulton County Law Library, inside the Fulton County Superior Court building just one block from the State Capitol building. There, access is only granted after undergoing security screening. Photography is prohibited without a signed order from the Chief Judge of the Fulton County Superior Court, thus limiting the ability to record and reproduce portions of the O.C.G.A. even for personal use.

As a journalist, Mr. Keefe is a professional fact-finder, and he was still unable to access a complete and up-to-date version of the O.C.G.A. after visiting three different Fulton County Public Library branches, including the main branch mere blocks from the State Capitol building.

The State's asserted copyright has already produced injustice by making the law inaccessible.

B. THE STATE'S ASSERTED COPYRIGHT UNDERMINES THE PUBLIC'S RIGHT TO KNOW THE LAWS THAT BIND THEM

By directing individuals like Brendan Keefe to rely on libraries with outdated, inaccessible volumes or

directing them to websites with incomplete information, or forcing them to pay hundreds of dollars for updated copies of the law, the State uses its asserted copyright of the O.C.G.A. to lead the public on a wild goose chase to know the laws that bind them. Amici believe the Petitioner should facilitate the security and ongoing protection of the legal interests of the people of Georgia, rather than make participation in the legal system unduly burdensome.

Due to its asserted copyright, the State posts only an un-annotated version of the O.C.G.A. online, where it is hosted by LexisNexis (“Lexis”). Relying on the un-annotated Lexis version of the code, however, can be extremely cumbersome, particularly for laypersons and pro se advocates who are interested in a particular area of the law and may not have experience searching for legal documents. First, users must find the Lexis site which hosts the un-annotated code. Second, they must agree to a contract put forth by Lexis in order to access the site. Third, users must navigate through several layers of expanding menus to uncover the text of a single code section. Searches are further complicated if an individual does not know which specific code section to which to refer. Searching keywords in the Lexis search bar produces a multitude of results, and the public cannot filter these results or use advanced search techniques without paying for LexisAdvanced. Each additional task involved in parsing the code is an incentive for members of the public to turn to alternate legal resources. However, these alternate resources are often out of date. *See, e.g.,* JUSTIA U.S. Law, 2018 Georgia Code (Oct. 7, 2019), <https://law.justia.com/codes/georgia/2018/> (“**Disclaimer:** These codes may not be the most recent

version. Georgia may have more current or accurate information. We make no warranties or guarantees about the accuracy, completeness, or adequacy of the information contained in this site or the information linked to on the state site. Please check official sources.”) (emphasis in original).

And most significantly, without providing the public access to the notes, references, headings, titles, decisions, opinions, analysis, etc. which are part of the annotations the State created, citizens are left with no Rosetta Stone with which to decipher legal jargon and recognize terms of art.

As such, the State’s asserted copyright undermines the public’s right to know the laws that bind them.

CONCLUSION

Public access to law is fundamental to a healthy democracy, for it facilitates advocacy for individuals’ rights, political speech, and holding public officials accountable. To be made truly public, neither official codes nor their official annotations can be subject to copyright.

Amici respectfully request this Honorable Court to affirm the decision of the United States Court of Appeals for the Eleventh Circuit.

Respectfully Submitted,

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