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 AMICI CURIAE 39 LAW STUDENTS, 24 SOLO AND SMALL-FIRM PRACTITIONERS OF LAW, AND 38 LEGAL EDUCATORS IN SUPPORT OF RESPONDENT

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## INTEREST OF AMICI CURIAE

Amici are 39 law students, 24 solo practitioners and small-firm attorneys, and 38 law professors and other legal educators.[1] They span at least 48 schools and 26 U.S. states and territories. Collectively, amici have a critical interest in being able to access the law—including official annotations that lack the force of law but, as government edicts, carry the legal authority of the State.

Student amici are studying to practice law and need unfettered access to the law in order to learn, compare, and build a complex understanding of the systems that govern daily life. Legal educator amici study and teach law and are similarly harmed when restricted access to the law interferes with their ability to teach. Attorney amici must be able to access the law in order to advise their clients competently and are particularly harmed when their only option is an expensive, proprietary database. And all amici are harmed when the creation of tools for reading, using, and analyzing the law are hobbled by a copyright system whose constraints on copying are meant to encourage creation, not regulate civic access to government.

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[1] Pursuant to Supreme Court Rule 37, the parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than the amici or their counsel made a monetary contribution to the preparation or submission of this brief.

Appendices A, B, and C contain the names of and additional information about amici. Most amici signed via a web form; for each such person, counsel collected identifying information and the user attested that they read the draft brief, agreed with its arguments, and wanted be included among those on whose behalf the brief is submitted.[2] *See* http://iptlc.usc.edu/?page_id=1136, https://perma.cc/G8P8-ZZU2. All amici have signed the brief as individuals and not on behalf of their employers or other organizations.

## SUMMARY OF ARGUMENT

Like the parties, amici law students, legal educators, solo practitioners, and small legal practices begin with the undisputed: government edicts—"the law"—are free for all to copy and use. Amici agree with the outcome of the decision below, in which the Eleventh Circuit recognized that "obtaining a full understanding of the laws of Georgia requires having unfettered access to the annotations" and thus the Official Code of Georgia Annotated (OCGA) are government edicts that "must be free for publication by all." *Code Revision Comm'n for Gen. Assembly of Georgia v. Public.Resource.Org, Inc.*, 906 F.3d 1229, 1255, Pet. App 1a, 52a-53a (11th Cir. 2018).

Amici agree with the rule proposed by Public.Resource.Org (PRO), which captures the

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[2] A small number of amici contacted counsel directly via email to sign on to the brief.

important features of uncopyrightable edicts of government:

> Legal materials adopted by or published under the authority of the State are not the proper subject of private copyright.

Resp. Br. 35. But regardless of what rule the Court ultimately applies, it must be broad enough to include materials like the OCGA, which lack the force of law but are officially endorsed and promulgated by the state legislature, "have been made an inextricable part of" the law, Pet. App. 2a, and "clearly have authoritative weight in explicating and establishing the meaning and effect of Georgia's laws," Pet. App. 4a.

When states are permitted to copyright these materials, they can and do create financial and physical barriers to access. Here, Georgia has conditioned access to the only official state code on payment to a single, private provider. Free access is offered only at limited in-state locations via outdated technology. This impermissibly disadvantages amici, who need the OCGA to study and practice law, but generally have limited resources and often do not even live in Georgia.

Restrictions on amici's access to the law pose a serious problem. Last year, there were 111,561 J.D. candidates enrolled in the 203 ABA-accredited law schools across the country. American Bar Association, *2018 Standard 509 Information Report Data Overview* (Dec. 14, 2018), https://perma.cc/EVE2-UR63. As of 2005,[3] 36% of lawyers—approximately 335,000

[3] More recent data was unavailable.

individuals—were solo practitioners. American Bar Foundation, *The U.S. Legal Profession in 2005* (2005), https://perma.cc/H7PJ-LKQW. And only 2.4% of practicing lawyers reside in Georgia. *See* American Bar Association, *ABA National Lawyer Population Survey, Lawyer Population by State* (2019), https://perma.cc/L6WL-XN9X.

Significant harm is done by allowing states to copyright and restrict access to state materials necessary to understanding the law, including the official explications of the law contained in the OCGA. *All* law students, legal educators, and legal practitioners must have free and complete access to the law. The Court should therefore decline to limit the government edicts doctrine to materials with the "force of law" and should affirm the decision below.

## ARGUMENT

Amici, whose professions intrinsically rely on interpreting and understanding the law, have a vital need to freely access and use that law. This need and the policy behind the government edicts doctrine go well beyond the materials that carry the "force of law." Official annotations—particularly those enacted by the legislature—act as essential guideposts for interpreting and applying the law. The government edicts doctrine should not be narrowly constrained to only materials with the "force of law." Non-binding but authoritative materials like those at issue in this case must be free for all—including amici—to access and use.

## I. Law Students, Legal Educators, Solo Practitioners, and Small Firms Must Be Able to Freely Access Edicts of Government.

While the general public is owed unrestricted access to the law—including the official annotations at issue here—amici, whose profession is fundamentally intertwined with the law, have a particularly vital need for that access.

### A. Law Students and Legal Educators Must Have Full Access to the Law.

Whether a law student intends to practice law, teach it, or do something else entirely, a core purpose of law school is to give students the tools they need to read, analyze, and understand the contours of the law. Restricting access to government edicts that have the "force of law" can hobble legal education. In particular, official, legislature-backed annotations—even those lacking the "force of law"—provide authoritative legal context about legislative intent and clarify how the law is applied. They constitute part of the law and no student attempting to study law could do so properly without including the official annotations in their studies.

Part of an effective legal education is studying the differences between the laws of multiple jurisdictions. Studying and comparing the law becomes even more difficult when the only freely available version of the law omits critical information like the OCGA's annotations, which "clearly have authoritative weight in explicating and establishing the meaning and effect of Georgia's laws," Pet. App. 4a. And when copyright restrictions render the law of some jurisdictions

potentially unavailable for free *at all*, this simply cannot be accomplished.

Relying on schools to foot the bill to provide full, paid access to databases is not a solution because not all schools can afford expensive private legal databases for their students. Basic fairness demands that governments not advantage well-resourced schools and their students over others when it comes to the study of law. Even if these proprietary databases are offered to law schools for free, it is not enough—their access to the law must not be conditioned on the good graces of private entities governed explicitly by a profit motive.

Many databases fairly charge for the additional value they add, including analysis, specialized tools, and annotations that are truly privately developed. But there is no justification for a commercial entity to be the sole provider of the official version of the law, effectively forcing any student studying that law to pay.

### B. Solo Practitioners and Small Practices Must Have Full Access to the Law.

Practicing lawyers must make use of *all of* the law that applies to their clients. Yet Georgia's position is that it is fine to practice law without consulting the *official* code promulgated by the state legislature if you cannot afford to buy access.

While large law firms may be readily able to absorb the substantial subscription costs of private commercial databases, smaller and solo firms may not be able to afford these subscriptions. The expense is amplified by the possibility that the law necessary to good representation may be spread across multiple

exclusively licensed databases, forcing attorneys in smaller practices to spread their resources even more thinly. Moreover, attorneys in these practices also tend to have smaller, less affluent clients and so cannot reasonably pass these costs on.

As with students, there is no legitimate reason to force all lawyers practicing in a jurisdiction to pay a private party for access to the official version of the law. As long as state governments can keep monopoly control over the publication of their laws, they are able to extract licensing fees. And whether they do this directly or through commercial proxies, it raises the cost for all who need to access the law and excludes some from accessing it at all.

## II. Amici's Need for Access to the Law Encompasses Many Government Edicts Lacking the "Force of Law."

Georgia seeks to limit the scope of the government edicts doctrine by using a bright-line rule that excludes any materials that lack the "force of law." This rule, however, would exclude many materials that are undisputedly uncopyrightable and are needed by amici in order to study and practice law and serve their clients.

### A. The OCGA's Annotations Are Necessary to Study and Practice Law in Georgia.

While the annotations in the OCGA do not have the force of law, as the official explication by the Georgia legislature of binding Georgia law, they are critical to anyone who wants to study or practice law in Georgia.

Georgia points out that "the Georgia Supreme Court has explained that 'the inclusion of annotations in an 'official' Code [does] not * * * give the annotations any official weight." Pet. Br. 10 (quoting *Harrison Co. v. Code Revision Comm'n*, 260 S.E.2d 30, 35 (Ga. 1979)). As PRO notes, this case was decided well before the OCGA existed. *See* Resp. Br. 49.

Perhaps more importantly, that court was merely stating what all here agree—that annotations do not have the force of law and cannot effectively amend a statute—as is evident from the citation that immediately follows:

> Headings and classifications inserted by the codifiers in a Code of laws even though such code be adopted by the legislature as an 'official code' are not the law and cannot be effective to amend the original enactment from which the codification was taken, or to alter its meaning and make it mean something other than what it meant before the adoption of the code.

*Oxford v. Generator Exch., Inc.*, 99 Ga. App. 290, 292, (1959).

The Georgia Supreme Court was not denying that "official" annotations offered up by the state legislature carry additional weight in interpreting the code. In fact, as the court below amply demonstrated, Georgia courts "frequently have characterized OCGA comments as *conclusive statements* about statutory meaning and legislative intent." Pet. App. 44a (emphasis added).

The annotations are also government edicts because they have been fully merged with the code in the OCGA, and the OCGA is the *only* official code of Georgia. *See* Pet. App. 47a-48a. Lexis advertises the "official" nature of the code. *See* Resp. Br. 6. And there is no "Official Code of Georgia Unannotated" from which a student, educator, or lawyer can extract just the code.

Georgia appears to believe that anyone who wants the Georgia code should pick it apart, section by section, from the official annotations. The only place the code is made available without annotations is a single Lexis website, which still claims copyright on portions of that presentation and provides no way to obtain just the portions that Georgia does not claim exclusive rights over. The court below held that the annotations are "so enmeshed with Georgia's law as to be inextricable." Pet. App. 26a. It cannot be that the only path for students, educators, and practitioners to access and use Georgia law is to manually extricate the "inextricable."

Finally, Georgia makes much of PRO's recognition that "[o]nly the laziest student or lawyer would rely on a judicial summary [in the OCGA] without reading the actual judicial decision." Pet. Br. 10 (modification in original). But this misses the point. No one is saying that the annotations alone are a substitute for the state code. Rather, the annotations are *part of* the official state law, and are needed to be used *in conjunction* with the code and judicial decisions. Indeed, no student or lawyer would be wise to study only the concurrence in a case. But, as noted below, a concurrence is needed to fully study and apply a

majority opinion and is undisputedly a government edict. *See* Pet. Br. 48.

Georgia's proposed rule appears to exclude numerous other government edicts that lack the "force of law" but are necessary to the study and practice of law. PRO identifies several, including legislative histories, committee reports, draft bills, floor debates, and agency guidance. *See* Resp. Br. 41. Each of these is an official government document, endorsed by and published under the authority of the state and needed by those who study, teach, or practice law. Legislative histories inform statutory interpretation. Agency letter rulings tell private actors how to behave. The law cannot be properly understood without these materials and so we do not allow private interests to lock them up behind copyright's bars.

The Court should recognize that the edicts of government doctrine is broad. A comprehensive legal education and thereafter, quality legal representation, depend on law students', legal educators', and solo practitioners' equal access to the law.

### B. The "Force of Law" Test Excludes Undisputed Government Edicts Needed by Amici.

Georgia's proposed "force of law" test also excludes materials that are generally accepted to fall within the government edicts doctrine.

For example, concurrences, dissents, and dicta do not have binding legal force, but Georgia agrees they are uncopyrightable government edicts. *See* Pet. Br. 47-48. As the Court in *Banks* noted, "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, whether it is a declaration of unwritten law, or an interpretation of a constitution or a statute." *Banks v. Manchester*, 128 U.S. 244, 253 (1888) (emphasis added). By not expressly excluding concurrences, dissents, and dicta, the Court recognized that the edicts of government include these works lacking the "force of law."

Georgia attempts to explain this difference by suggesting that it can be hard to determine which text is dicta (lacking the force of law), or which dissents or concurrences will later be endorsed (gaining the force of law). *See* Pet. Br. 48. This in no way, however, explains the principle behind including them as "government edicts" when they fail Georgia's proposed test.

There is also a simpler explanation for their inclusion: like the official annotations, dicta, concurrences, and dissents are *always* needed in order to understand the opinions that do carry force of law. Even majority opinions that have been overturned remain uncopyrightable because they are needed to apply and interpret the law. And in the same vein, the official annotations endorsed by the legislature are always needed by students, educators, and practitioners studying and practicing law.

As the Eleventh Circuit recognized, materials like the OCGA annotations, "while not having the force of law, are part and parcel of the law." Pet. App. 26a. The Court should ensure that the government edicts doctrine is interpreted broadly enough to include such documents which are vital to interpreting the law.

## III. Limited Access to the OCGA Demonstrates Why It Should Be Subject to the Government Edicts Doctrine.

The restrictions placed on access to the OCGA illustrate why it must be subject to the government edicts doctrine. Meaningful access to the law is not merely the ability to view portions of it through a single, limited, government-chosen service. The ability to read, reproduce, and process the entirety of the law, free of the constraints of copyright, is necessary to allow study, practice, and innovation.

First, as explained above, the only free online source of the Georgia statutory code is through a single private party and excludes much material that is part of the *only* official code of Georgia and is "frequently . . . characterized . . . as conclusive statements about statutory meaning and legislative intent" by Georgia courts. *See* Pet. App. 43a. On that "free" site—which can only be accessed after you agree to their terms—Georgia purports to retain copyright on portions of the annotation-free online version (though not the code itself). This means that under Georgia's view, there is *no* copyright-free source of even the unannotated code. Users do not get the benefit of the official annotations and innovators are unable to offer their own presentation of the law without risking liability.

Second, the only free source of the Official Georgia Code Annotated is select Georgia state- and county-operated facilities in CD-ROM or book form. *See* Pet. Br. 12. But limiting free access of the law to technologically dated, legally encumbered CD-ROM discs and paper copies at a few sites inside a single state means there is no meaningful access to the many

amici who need to access Georgia law from other parts of Georgia, to say nothing of the rest of the country.

The net result—particularly in the digital age—is that student amici cannot effectively study, educator amici cannot effectively teach, and attorney amici cannot effectively practice Georgia law without paying a private party. In order words, limited access to materials like the OCGA is simply not enough.

This limited access also stymies legal innovators. As other amici explained at the petition stage, nonprofit and for-profit legal innovators such as Judicata, Casetext, and Fastcase are building the next generation of legal research tools and can only do so when their access to the law is not encumbered by copyright. *See Brief of Amici Curiae Next-Generation Legal Research Platforms and Databases and Digital Accessibility Advocate in Support of Respondent* (May 9, 2019), https://perma.cc/XP3H-62MG. New tools process and analyze freely available law to provide improved capabilities, including artificial intelligence and advanced visualizations. *Id.* at 2.

The availability of these tools particularly benefits amici. Many of these tools are available for free or at competitive prices, making them particularly valuable to student and attorney amici who lack the resources of large firms. New tools process and analyze freely available law to provide improved capabilities, including artificial intelligence and advanced visualizations. *Id.* at 2.

They also provide competition that lowers prices and increases quality for all legal tools—particularly to the benefit of small practices or soon-to-be lawyers.

The tools also incentivize larger databases to innovate and roll out better product features to attract subscribers; sometimes they even acquire such innovators. *See id.* at 15 n.4. But none of this can happen unless these innovators can lawfully and effectively access government edicts, including the annotations at issue in this case.

Simply making the law "available" for viewing through a single vendor is therefore inadequate. All parties—including those working to improve the tools available to students and lawyers—must be free to perform their own analysis of the law and offer it to the public in new, innovative ways, without paying gatekeepers for the right to something that is and should be owned by the public.

## CONCLUSION

For the foregoing reasons, the Court should read the government edicts doctrine to include documents like the OCGA—official, state-endorsed annotations that have been intertwined with statutory code at the behest of a state legislature—and ensure that they are free for use by amici and the entire public.

Respectfully submitted,

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[4] Numbers in parentheses indicate size of firm; all other attorneys are solo practitioners. Three attorney amici indicated they were also professors, and one indicated they were not an attorney but a pro se litigant.

## APPENDIX C:
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