

No. 18-1150

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In the Supreme Court of the United States

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STATE OF GEORGIA, ET AL.,  
*Petitioners,*

v.

PUBLIC.RESOURCE.ORG.,  
*Respondent.*

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*On Petition For A Writ Of Certiorari To The United  
States Court of Appeals For The Eleventh Circuit*

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**BRIEF FOR MATTHEW BENDER & CO., INC.  
AS *AMICUS CURIAE* IN SUPPORT OF  
PETITIONERS**

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- N. Ill. U. College of Law, *Basic Legal Research, Forms of Publication of Statutory Law: Session Laws & Codes, Annotated Codes*,  
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**INTEREST OF *AMICUS CURIAE*\***

LexisNexis Group, through the publisher amicus Matthew Bender & Co., Inc. (hereinafter, together, “LexisNexis”), entered into a contract with the General Assembly of Georgia and the State of Georgia (hereinafter, together, the “Commission”), which requires LexisNexis to freely distribute the statutory texts of Georgia to the public, as well as research, create, manage, publish, distribute, update and license statutory annotations for those Georgia statutes. *See* Pet. App. A, 55a–56a. In exchange for these services, LexisNexis maintains exclusive license to sell the annotations at a capped fee, while providing free copies of the annotations to select libraries. *See* Pet. App. B, 57a. As the creator and publisher of annotations in both Georgia and many other States and U.S. Territories, LexisNexis has unique knowledge regarding the issues in this case.

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\* Counsel for all parties have consented to this filing and were given proper notice of *amicus curiae*'s intent to file a brief under Rule 37.2. Under Rule 37.6, *amicus curiae* affirms that 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 to fund the preparation or submission of this brief. No person or entity other than *amicus curiae* or its counsel made a monetary contribution to the brief's preparation or submission.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The Eleventh Circuit's decision needlessly destroys a thriving market for the creation of State-owned annotations by private publishers, which benefits the public's understanding of the law and does not impose greater taxpayer funding obligations by the States. The necessary consequences of the Eleventh Circuit's unprecedented decision will either lead to the States no longer offering statutory annotations or spending substantial taxpayer dollars to fund such annotations' creation. The Eleventh Circuit's decision will thus benefit no one, while undermining the core purpose of copyright law and the public's understanding of the law.

Twenty-three States and U.S. Territories have contracted with publishers like LexisNexis for the creation of statutory annotations. *See* LexisNexis, *Statutory Editorial Process*, [http://www.lexisnexis.com/documents/pdf/20170303045425\\_large.pdf](http://www.lexisnexis.com/documents/pdf/20170303045425_large.pdf) (last visited April 1, 2019). These annotations provide great benefit to the public's understanding of law. The creation of these annotations is an expensive, labor-intensive process, requiring a trained attorney to read judicial and agency decisions and make sensitive judgments about the annotations' contents. Annotations provide users with a wealth of information about how the statutes came to be, how they have been interpreted by courts and agencies, and the like. These works have long been properly protected by copyright law, providing an

incentive for their creation. *See Howell v. Miller*, 91 F. 129 (6th Cir. 1898); *W.H. Anderson Co. v. Baldwin Law Pub. Co.*, 27 F.2d 82 (6th Cir. 1928); *see U.S. Copyright Office, Compendium of U.S. Copyright Office Practices* §§ 313.6(C)(2), 717.1 (3d ed. 2017) *available at* <https://www.copyright.gov/comp3/docs/compendium.pdf> (“[a] legal publication that analyzes, annotates, summarizes, or comments upon a legislative enactment, a judicial decision, an executive order, an administrative regulation, or other edicts of government may be registered as a non-dramatic literary work”); *see also Callaghan v. Myers*, 128 U.S. 617, 645–46 (1888).

By adopting a new, overly-broad understanding of the “government edicts” doctrine, the Eleventh Circuit abolished the right of States to protect their annotations, and to permit their contractual counterparties to derive value from these annotations’ distribution to interested citizens. The primary (and often only) commercial value that LexisNexis and other publishers derive from contractual arrangement for the creation of these annotations is the exclusive license to sell the annotations at the mandated capped fee. But if annotations can now be copied and posted on the Internet for free by groups such as Respondent, as unprotected government edicts, this will destroy LexisNexis’ ability to recoup the substantial costs of the annotations’ creation. This will inevitably lead to the discontinuance of publicly-valuable contractual arrangements for the creation of such annotations, as

soon as current contracts expire, causing needless harm to States and the public.

This Court should grant the Petition, and then reverse the Eleventh Circuit's holding, making clear that these publicly-beneficial annotations have the full protections of U.S. copyright law.

## ARGUMENT

### **I. State-Owned Statutory Annotations, Created By Private Parties Under Contracts With The State, Are Deeply Valuable Both To States And To The Public**

A. Statutory annotations provide great benefit to the public's understanding of the law. See *The Federalist* No. 62 (James Madison), at 323–24 (George W. Carey & James McClellan eds., 2001) (“[I]t will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood.”) Twenty-three States and U.S. Territories contract with private entities for the creation of statutory annotations, which provide explanations as to judicial and other interpretations of statutes. See LexisNexis, *Statutory Editorial Process*, [http://www.lexisnexis.com/documents/pdf/20170303045425\\_large.pdf](http://www.lexisnexis.com/documents/pdf/20170303045425_large.pdf). (last visited April 1, 2019). An annotated code “provides the text of the statute” and “contain[s] additional editorial enhancements helpful to the researcher,” including “[c]ase

annotations,” “[h]istorical and statutory notes providing summaries of the changes each public law or public act made to the section,” and “[r]eferences to secondary sources.” N. Ill. U. College of Law, *Basic Legal Research, Forms of Publication of Statutory Law: Session Laws & Codes, Annotated Codes*, <https://libguides.niu.edu/c.php?g=425200&p=2904735> (last visited March 26, 2019). Statutory annotations are “an incredibly important research tool” and, “because often what you are trying to do is see how a statute applies, these annotations are pure gold.” Shawn G. Nevers, “Don’t Underestimate the Importance of Statutes,” *ABA Student Lawyer*, Vol. 40, No. 2, October 2011, available at <https://abaforlawstudents.com/2011/10/01/dont-underestimate-importance-statutes/>. “By using an annotated code . . . , a researcher finds a wealth of information interpreting that statute, simply by retrieving a relevant section.” Brooklyn Law Sch. Libr., *Researching Statutes: Annotated Codes*, <http://guides.brooklaw.edu/c.php?g=330891&p=2222835> (last visited April 1, 2019).

B. The contract between LexisNexis and the Commission illustrates the commercial arrangements that make the creation of these publicly-beneficial statutory annotations possible in the first place.

The Commission has a contract with LexisNexis (the “Contract”) under which LexisNexis is responsible for researching, managing, creating, publishing, and distributing an annotated version of State laws as the

O.C.G.A. App., *infra*, 2a, ¶4. The Contract is awarded pursuant to an open bid process, under which LexisNexis and third parties present bids to administer the Commission's project to publish and distribute the laws of the State of Georgia in both hardbound book and electronic format. LexisNexis must provide two functions under the Contract:

First, LexisNexis must provide free, publicly available copies of the actual statutory texts of the laws of Georgia. LexisNexis provides online access to the statutory text of Georgia laws and the Georgia Constitution via a link to the State of Georgia website located at [www.legis.ga.gov](http://www.legis.ga.gov). App., *infra*, 2a, ¶¶5,6. This publication includes free statutory text and numbering, numbers of titles, chapters, articles, parts and subparts, captions and history lines. The online electronic version of Georgia's laws includes robust features and capabilities, such as "terms and connectors" searching and "natural language" searching. Online Georgia code users may also print copies, save copies to their hard drive in PDF format, or e-mail copies to others. App., *infra*, 2a, ¶¶5,6. Neither the Commission nor LexisNexis claim any copyrights in the actual statutory text.

Second, and most relevant here, LexisNexis must research, create, manage, publish, and distribute annotations to the O.C.G.A. as a work for hire, while providing free copies to certain libraries. App., *infra*, 2a, ¶¶5,6. For private ownership of copies of the O.C.G.A., the Commission requires that Lexis Nexis

cap the price of a copy at \$404.00, a fraction of the typical retail cost of an annotated statute set.<sup>†</sup> Each annotation is an original and creative work, which is protected by copyrights owned by the State of Georgia as a work for hire. *See* Pet. App. A, 11a-12a.

As the district court properly recognized below, the creation of these annotations “requires a tremendous amount of work.” *See* Pet. App. B, 69a-70a. LexisNexis’ team of attorney-editors generates substantive, original annotations on select legal cases regarding the statutes. These annotations provide a brief description of the application or interpretation of statutes, rules, laws or constitution, as well as analysis of the legal holdings within a case that have relevance to those provisions. App., *infra*, 3a, ¶¶12,13.

The LexisNexis editor-employees, who are all attorneys, begin by reading case law opinions to identify discussion points and interpretation issues. They analyze the material for noteworthiness and determine whether the court or other authority’s discussion is relevant to an understanding of the provision. After cases are selected for inclusion, the editors then verify each potential source to ensure

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<sup>†</sup> For example, the current online retail price for West’s® Code of Georgia annotated is \$4,406 (one-time purchase with no updates) or \$330 per month for a fixed term of 24, 36, 60, or 120 months (will include updates during the term). <https://store.legal.thomsonreuters.com/law-products/Court-Rules/Westsreg-Code-of-Georgia-Annotated/p/100027635>; *accord* Pet 10.

validity and to gain an understanding of how the statutory provision relates to the issue being discussed. App., *infra*, 4a, ¶¶15-19. The annotation often includes a written analysis of the court’s application of the law to the particular facts of a case or a description of the court’s interpretation or construction of the provision. Certain cases are selected for an in-depth review and analysis by a quality review team and further editing. For those annotations created by the editors in the specialized Prospective Case Law Enhancements group, LexisNexis forwards the annotations to its Georgia legal specialist employees for additional review and editing. App., *infra*, 5a, ¶¶21-24. Once LexisNexis experts quality check the annotation, they select the most on-point and specific classification from the LexisNexis taxonomy scheme for indexing. The annotation is subject to continuous review by LexisNexis to ensure continued accuracy.

An annotation first sets forth the statutory language, followed by “Editor’s Notes” drafted by LexisNexis editors explaining the historical scope and language of the code section as held in cases selected by the editors. *See* Br. of Amicus Curiae Matthew Bender & Co., Ex. 2, Code Revision Commission v. Public.Resource.Org, Inc., 1:15-cv-2594-MHC (June 27, 2016), ECF No. 38-2. Next comes the “Judicial Decisions” section, which is further divided by the editors into subtopics. *Id.* Again, LexisNexis employee editors draft the “Judicial Decisions” section, which are not the judicial opinions or quotes from the actual judicial decisions, but rather brief summaries deemed

important to the public and selected and written by LexisNexis' employee editors. *Id.* The annotations created by LexisNexis not only include "Judicial Opinions," but also Attorney General opinions, advisory opinions of the State Bar, law reviews, and bar journals. *See id.* The LexisNexis editorial staff regularly reviews these materials and selects those it deems the most noteworthy for inclusion in its annotations. App., *infra*, 5a, ¶25.

The Commission does not review, revise, or approve any annotation, except through a routine administrative acceptance of the project in its entirety each year as established by the State's statute. *See* Pet. App. A, 31a-32a. The annotations are not drafted or proposed by a bicameral elected legislature. They are not presented to or voted on by the Governor of the State of Georgia. *See* Pet. App. A, 47a-48a. Instead, the annotations are prepared by LexisNexis employee editors, with no legislative process for approval. Notably, the Georgia legislature has expressly codified that the annotations are not the law as expressly stated in O.C.G.A. §1-1-7. Further confirming that the annotations are not created through a legislative process, LexisNexis quarterly sends out periodic pocket-part updates to the O.C.G.A. and makes such updates available on-line without any review or approval from, or any notice to, the Commission or the State legislature. *See* Br. of Amicus Curiae Matthew Bender & Co., Ex. 2, Code Revision Commission v. Public.Resource.Org, Inc., 1:15-cv-2594-MHC (June 27, 2016), ECF No. 38-2 (reproducing OCGA § 10-7-21's

annotations). Neither the Commission nor the legislature votes on or dictates the removal of a particular entry. App., *infra*, 5a, ¶25. In all, annotations are valuable, privately-generated works, which the State of Georgia contractually requires that LexisNexis create and update at considerable expense and effort to Lexis Nexis and at no expense to the State.

## **II. The Eleventh Circuit’s Approach Needlessly Destroys Economic Incentive To Create These Publicly Valuable Works, Contrary To This Court’s Precedents And The Core Purposes Of Copyright Law**

“The economic philosophy behind the [Copyright Clause] empowering Congress to grant . . . 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) (quoting U.S. Const., Art. I, § 8, cl. 8). Consistent with this principle, the Copyright Act specifically recognizes “annotations” as works entitled to copyright protection, *see* 17 U.S.C. § 102(a), and copyright law has long granted protection for annotated cases and statutes, *see, e.g., W.H. Anderson Co.*, 27 F.2d at 82; *Howell*, 91 F. 129; *Lawrence v. Dana*, 15 F. Cas. 26 (C.C.D. Mass. 1869). The Copyright Office’s treatise expressly notes the protectability of annotations. U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices* (3d ed. 2017) *available at* <https://www.copyright.gov/comp3/docs/compendium.pdf>

f. And the Copyright Office repeatedly has registered the copyrights in State-owned annotated statutes. *See* Vernon's Annotated Statutes of the State of Texas (AA000020419), New Mexico 2015 Advance Code Service (Reg. TX0008001813), Registration No. TX0008633448 (Alabama) (Alaska), TX0008590841 (June 11, 2018) (Arkansas), TX0008381033 (Feb. 16, 2017) (Colorado), TX0008551825 (Jan. 16, 2018) (Delaware), TX0008566647 (Apr. 23, 2018) (District of Columbia), TX0008588533 (Mar. 13, 2018) (Idaho), TX0008430948 (Jan. 9, 2017) (Kansas), TX0008588394 (Apr. 3, 2018) (Mississippi), TX0008532691 (Aug. 28, 2017) (New Hampshire), TX0008600436 (Dec. 4, 2017) (New Mexico), TX0008555142 (Jan. 16, 2018) (Rhode Island), TX0008549132 (Oct. 18, 2017) (South Carolina), TX0008625275 (Aug. 7, 2018) (South Dakota), TX0008588806 (Mar. 19, 2018) (Tennessee), TX0008530993 (Nov. 23, 2017) (Vermont), TX0008604570 (Feb. 12, 2018) (Wyoming) (searchable through Copyright Office's public catalog, <http://bit.ly/2VTNDI9>).

Contrary to this uniform recognition of the copyright protection afforded to statutory annotations, the Eleventh Circuit transformed the long-standing, narrow government edicts doctrine into a bulldozer that destroys the commercial value of statutory State-owned annotations. In its Petition, the State of Georgia shows why the Eleventh Circuit's decision deepens a circuit split on the proper understanding of the government edicts doctrine, Pet. 15–22, how the annotations here would be protected by copyright laws

under the approach to this doctrine that other courts apply, Pet. 22–24, and why the Eleventh Circuit’s decision is wrong on the merits, including contrary to this Court’s decision in *Callaghan v. Myers*, 128 U.S. 617 (1888), and *Wheaton v. Peters*, 33 U.S. 591 (1834), Pet. 24–32. LexisNexis merely wishes to add to this analysis the critical point that the Eleventh Circuit’s decision destroys the value of State-owned, privately created annotations, contrary to the core “economic philosophy” of the copyright laws of this nation, *Mazer*, 347 U.S. at 219, which is an issue of national importance, warranting this Court’s review.

For context, there are two ways that State legislatures generally generate statutory annotations for the benefit of the public’s understanding of the laws. The Eleventh Circuit’s approach destroys the more efficient, taxpayer friendly of these two approaches, without any grounding in the copyright law.

Under the first model, a State can create the annotations itself using its own staff and/or pay a private party to provide any service that its own staff cannot accomplish. Colorado takes an approach along these lines. Colorado’s staff creates case annotations, cross-references, and other notes relating to the State’s legal code. Colorado law expressly states that the copyright in these ancillary materials is the “sole property of the State of Colorado as owner and publisher thereof.” Colo. Rev. Stat. § 2-5-115 (allowing the State’s committee or its designee may register the copyright in the work). The Colorado General

Assembly's Committee on Legal Services maintains a contract with LexisNexis to publish and distribute the statutes, both in book form and in an online portal. In the Colorado-style model, the creation costs of the ancillary annotations are borne primarily by taxpayers and paid for by taxes on its citizens. Jennifer Gilroy & Abby Chestnut, *Who Owns the Law? The Colorado Perspective on Copyright and State Statutes* (Apr. 6, 2017), [available at https://legisource.net/2017/04/06/who-owns-the-law-the-colorado-perspective-on-copyright-and-state-statutes/](https://legisource.net/2017/04/06/who-owns-the-law-the-colorado-perspective-on-copyright-and-state-statutes/).

On the other hand, under the approach adopted by Georgia and at least twenty-two other States and U.S. Territories, States contract with an experienced vendor, such as LexisNexis, to create annotations, while giving that vendor the right to license annotations for its profit, subject to contractual limitations. The vendor will provide the State with experience and expertise in creating annotations, along with the advantage of cost-effective training of the creative laborers. The cost of creation is generally borne by the vendor, along with an obligation to distribute the text of the statutes. The vendor relies on sales of the annotated statutes to the product's users to offset the costs of creation. In some States, the State owns the copyright in the resulting annotations; in others, the vendor owns the copyright in these ancillary materials. App., *infra*, 6a-7a, ¶29.

Like any vendor providing services under the Georgia-style model, LexisNexis relies on protection of copyright to provide vendor services. App., *infra*, 7a, ¶30. Pursuant to LexisNexis' Contract, the State of Georgia owns the copyright in the annotations as a "work for hire," which it exclusively licenses to LexisNexis for publication and distribution under the Contract's terms. App., *infra*, 4a, ¶20. LexisNexis does not charge the Commission any fee to create the annotations. Instead, the Commission authorizes LexisNexis to charge a capped fee to customers accessing online copies and to sell hardcopy books and CDs of the work. LexisNexis also must incur the expense of keeping inventory on hand to provide a reasonable supply of complete sets of hard copies of the O.C.G.A. so that it may fill any request within two weeks, as required under the Contract. App., *infra*, 6a-7a, ¶29. The overhead costs of creating and maintaining the annotations are high because the tasks require time and skill, as discussed in detail above. See generally App., *infra*, 3a-6a, ¶¶ 11-28.

The Eleventh Circuit's decision destroys the commercial market for these annotations, such that States simply no longer will be able to enter similar agreements with vendors for the distribution of legal texts and the creation and maintenance of annotated legal resources in the future. App., *infra*, 7a, ¶30. Entering into such contracts in the wake of the Eleventh Circuit's decision would cause substantial economic harm to the State of Georgia and LexisNexis because the annotations would already be freely

distributed by platforms such as Respondent. App., *infra*, 8a, ¶32. As the district court properly explained, “[b]ecause [Respondent] has copied every word of the annotations verbatim and posted them free of charge, [Respondent’s] misappropriation destroys Lexis/Nexis’ ability to recover those costs.” See Pet. App. B, 72a.

The Eleventh Circuit’s decision would cause significant damage to States like Georgia and their citizens, as well as the public’s understanding of the law. Under a well-established contractual structure, those States and U.S. Territories paid no money to have publishers such as LexisNexis maintain, update and make their statutes available to the public on-line at no charge, and to create, update and publish a robust annotation using experienced LexisNexis employee editors who are lawyers. See Pet. App. B, 54a-58a; App., *infra*, 2a, ¶6. Devoid of the copyright protection previously afforded to the annotations, and faced with organizations such as the Respondent, no publisher will operate under the previous structure once its existing contract expires.

In that world, States and U.S. Territories and their citizens either will move to the Colorado-style model and have to absorb significant employee and publishing costs to create annotations themselves; pay a publisher market rates to create annotations, which would be significant; or hope that independent publishers will choose to create their annotations, such as West does now, but which cost users ten times the cost currently charged by LexisNexis under its

contractually capped Contract. The States and their citizens who have relied on the Georgia-style structure will now face higher taxes and costs, and the significant loss of their copyrights and meaningful access to their laws and the robust legal resources. In short, they would suffer precisely the types of harms resulting from the destruction of economic incentives that the copyright laws are designed to avoid.

### CONCLUSION

This Court should grant the Petition and reverse the Eleventh Circuit's judgment.

Respectfully submitted,

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April 2019

## **APPENDIX**

**APPENDIX — AFFIDAVIT OF ANDERS GANTEN  
OF THE UNITED STATES DISTRICT COURT,  
NORTHERN DISTRICT OF GEORGIA,  
ATLANTA DIVISION, DATED MAY 17, 2016**

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

CIVIL ACTION NO.  
1:15-cv-2594-MHC

CODE REVISION COMMISSION ON BEHALF  
OF AND FOR THE BENEFIT OF THE GENERAL  
ASSEMBLY OF GEORGIA AND THE STATE  
OF GEORGIA,

*Plaintiff,*

v.

PUBLIC.RESOURCE.ORG, INC.,

*Defendant.*

**AFFIDAVIT OF ANDERS GANTEN**

I, Anders Ganten, state as follows:

1. I am over the age of 18.
2. I currently serve as Senior Director Government Content Acquisition at LexisNexis, which oversees *amicus* Matthew Bender & Company, Inc. (for purposes of this Affidavit, “LexisNexis”).

*Appendix*

3. LexisNexis is a leading global provider of content-enabled workflow solutions designed specifically for professionals in the legal, risk management, corporate, government, law enforcement, accounting, and academic markets. LexisNexis originally pioneered online information with its Lexis® and Nexis® services. LexisNexis also provides and publishes analytic legal research materials.

4. LexisNexis has executed a contract (the “Contract”) with the Code Revision Commission on Behalf of and For the Benefit of the General Assembly of Georgia and the State of Georgia Commission (the “Commission”) under which LexisNexis is responsible for researching, managing, creating, publishing, and distributing an annotated version of State laws as the Official Code of Georgia Annotated (“O.C.G.A.”).

5. The Contract is awarded under an open bid process, whereby LexisNexis and third parties may present bids to administer the Commission’s project to publish and distribute the laws of the state of Georgia in both hard bound book and electronic format.

6. Under the Contract, LexisNexis provides two functions: (1) publically and freely distributing the statutory texts of Georgia and (2) researching, creating, managing, publishing, and distributing annotations to the O.C.G.A. as a work for hire.

7. To distribute the statutory portion of the codification of Georgia’s laws as required in the Contract,

*Appendix*

LexisNexis provides online 24/7/365 access to the statutory text of Georgia laws and the Georgia Constitution via a link to the State of Georgia website located at [www.legis.ga.gov](http://www.legis.ga.gov).

8. All statutory text and numbering, numbers of titles, chapters, articles, parts and subparts, captions and history lines are included in this publication. This online resource is entirely free to users.

9. The online electronic version of Georgia's laws includes robust features and capabilities, such as "terms and connectors" searching and "natural language" searching.

10. Online Georgia code users may also print copies, save it to their hard drive in PDF format, or e-mail copies to others.

11. As part of its obligations under the Contract with the Commission, LexisNexis's team of attorney-editors creates annotations for the relevant statutes in the O.C.G.A. (the "Annotations").

12. These editors create substantive original Annotations on select legal cases regarding the constitutionality, purpose, intent, and meaning of words and phrases, as well as illustrations of particular statutory provisions.

13. These Annotations generally provide a brief description of the application or interpretation of statutes,

*Appendix*

rules, laws or constitution, as well as analysis and guidance of the legal holdings within a case that have relevance to those provisions.

14. The attached document labeled *Amicus Exhibit 2* provides an example of the statutory text and LexisNexis's Annotations to Official Georgia Code § 10-7-21. *Amicus Exhibit 2* is a true and accurate copy of the material.

15. The creation of the Annotations for the entire Georgia code requires a labor-intensive, creative process.

16. The LexisNexis editors, who are all attorneys (which is required under the Contract), begin by reading case law opinions to identify discussion points and interpretation issues regarding the Georgia code, court rules, and constitutional provisions at issue.

17. The material is subjectively analyzed for noteworthiness, along with a determination of whether the court or other authority's discussion is relevant to an understanding of the provision.

18. After cases are culled and selected for inclusion, the editors then verify each potential source to ensure validity and to gain an understanding of how the statutory provision relates to the issue being discussed.

19. Upon verification, the editors draft the Annotation focusing on succinctness, accuracy, and guidance for future readers.

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20. Each Annotation is an original and creative work of authorship that is protected by copyrights owned by the State of Georgia as a work for hire.

21. The Annotation often includes a written analysis of the court's application of the law to the particular facts of the case law opinion, or describing the court's interpretation or construction of the provision.

22. Certain cases are selected for an in-depth review and analysis by a quality review team and further editing.

23. For those Annotations created by the editors in the specialized Prospective Case Law Enhancements group, LexisNexis forwards the Annotations to Georgia legal analysts for additional review and editing.

24. Once the Annotation is checked for accuracy, style, and jurisdictional requirements, the most on-point and specific classification, as selected by the editors, is assigned to the Annotation from the LexisNexis taxonomy scheme for indexing. Upon completion, the Annotation is included for online and print product publication.

25. The O.C.G.A. is subject to continuous review to ensure that the information is accurate. LexisNexis also makes additions to the statutory text of state laws previously approved and enacted by the legislature of the State of Georgia. When appropriate, subsequent history is added to each case Annotation. When LexisNexis determines that the Annotation is no longer relevant due to negative treatment, it is removed or limited.

*Appendix*

26. As shown in *Amicus Exhibit 2*, the Annotations created by LexisNexis not only include case notes, but also Attorney General opinions, advisory opinions of the State Bar, law reviews, and bar journals. The Annotations contain evaluative, analytical or subjectively descriptive analysis and guidance. Moreover, the analysis and guidance, selection are carefully crafted by LexisNexis' editors, who have years of legal and statutory experience to illustrate and interpret the texts.

27. The LexisNexis editorial staff regularly reviews these materials and subjectively selects those it deems the most noteworthy for inclusion in its Annotations to the statutory and constitutional texts.

28. The Official Code of Georgia Annotated series also includes the United States Constitution, commentary from the Corporate Code Committee of the Business Law Section of the State Bar of Georgia, the Rules and Regulations of the State Board of Workers' Compensation, and the Rules and Regulations of the Subsequent Injury Trust Fund. These secondary and regulatory materials are selected, compiled and assimilated by the LexisNexis editorial staff.

29. Pursuant to the Contract, the State of Georgia owns the copyright in the Annotations as a work for hire, which it exclusively licenses to LexisNexis. LexisNexis does not charge the Commission any fee to create the Annotations. Instead in recognition of the significant time, expertise and creativity required to generate the O.C.G.A., the Contract authorizes LexisNexis to charge

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a fee to customers accessing online copies of and to sell hardcopy books and CD's of the work. However, the Commission places a contractual cap on the amount LexisNexis may charge for such access and works. Contractually, LexisNexis must also incur the expense of keeping inventory on hand to provide a reasonable supply of complete sets of hard copies of the O.C.G.A. so that it may fill any request within two weeks.

30. If the Annotations were not subject to copyright protection or if the PRO and the public could freely access the O.C.G.A. as a fair use under the Copyright Act, LexisNexis could not recoup its significant investment of creativity and resources in developing the Annotations, and it would lose all incentive to remain in the Contract or create the Annotations unless it were directly paid for such services.

31. PRO does not transform the Annotations. PRO does not add, edit, modify, comment on, criticize or create any analysis or notes of its own. The Annotations are already made available electronically by LexisNexis with a robust, fully searchable engine. PRO's use of the Annotations is for exactly the same purpose as LexisNexis and the Commission makes the Annotations available—for legal and scholarly research and public and judicial review. The activities of PRO destroy the marketplace and economic incentives for LexisNexis to create the Annotations. No person will pay for annotations when the identical annotations are available online for free.

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32. LexisNexis's sole revenue to recoup these costs is through hard copy sales, and licensing online access to the O.C.G.A. as permitted by the Contract, and which are easily and economically offered to the public. Because PRO has copied every word of every Annotation verbatim and posted them free of charge, PRO's misappropriation destroys LexisNexis's ability to recover these costs.

33. Since 2003, Thomson West has created its own annotations to the Official Georgia Code in its *West's® Code of Georgia Annotated*, and it sells hardcopies and licenses access to its annotations to recoup the costs and profit from the efforts.

FURTHER AFFIANT SAYETH NAUGHT

The undersigned declares under penalty of perjury that the foregoing is true and correct.

/s/ \_\_\_\_\_  
Anders Ganten

Date: 5/17/16