No. 18-1150

In The Supreme Court of the United States

STATE OF GEORGIA, et al.,

Petitioners,

v.

PUBLIC.RESOURCE.ORG, INC.,

Respondent.

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

BRIEF OF THE STATES OF ARKANSAS, ALABAMA, IDAHO, KANSAS, MISSISSIPPI, SOUTH CAROLINA, SOUTH DAKOTA, AND TENNESSEE AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the government edicts doctrine extends to—and thus renders uncopyrightable—works that lack the force of law, such as the annotations in the Official Code of Georgia Annotated.

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INTEREST OF AMICI CURIAE[1]

Amici are the States of Arkansas, Alabama, Idaho, Kansas, Mississippi, South Carolina, South Dakota, and Tennessee. Amici have copyrighted annotations in their official codes.

The decision below threatens those copyrights. In it, the Eleventh Circuit held that the annotations in Georgia's official code are not copyrightable. To justify that holding, the court relied on a number of factors concerning those annotations' preparation and their status under Georgia law. Those factors are typical of the production of official annotated codes and their status under other States' laws. As a result, the Eleventh Circuit's reasoning would likely invalidate a copyright asserted by nearly any State (or by a State's assignee) in the annotations to an official state code.

By invalidating those copyrights, the reasoning of the decision below, if adopted by other circuits, would threaten the continued production of official annotated state codes. Official annotated codes are generally prepared by third-party annotators who recoup the costs of preparing those codes by selling the official annotated codes and pocketing the revenues of those sales. Without copyright protection, the annotations would become freely available, and the annotators' sales would dry up. The annotators would likely begin demanding payment for annotating state codes. Were

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[1] Counsel of record for all parties have received notice of amici's intent to file this brief.

that to occur, States would either incur substantial costs in continuing to produce annotated codes, or cease producing their official annotated codes altogether—depriving their citizens of a valuable research tool to understand the law.

SUMMARY OF ARGUMENT

The decision below holds that under certain circumstances, a State cannot copyright the annotations of judicial decisions and state attorney general opinions in its official annotated code. That decision might initially appear factbound, but in reality it at least threatens, and would likely invalidate, copyrights held in the official annotated codes of twenty-one other States, two territories, and the District of Columbia.

Whether those copyrights are valid is an important question worthy of this Court's review. States use copyright protections to give third parties incentives to annotate their official codes. Under the typical arrangement, the company that produces the annotations in an official annotated code sells that code and keeps the revenues from its sale. Without copyright protections in the annotations, States would be forced to choose between paying these third parties to annotate their codes or giving up their annotated codes altogether.

The loss of annotated codes would be costly. Annotations are not themselves the law, nor authoritative guidance on it. But despite the advent of electronic

legal research, lawyers and nonlawyers alike continue to look to the annotations in annotated codes as a starting point in researching how state law has been interpreted. Thus, the decision below ultimately threatens to deprive many States' citizens of a valuable tool for determining what the law is.

In addition to the importance of the issues reached in the decision below, its resolution of these issues is wrong. It is no doubt true that there can be no copyright in the law itself because copyright only subsists in "original works of authorship." 17 U.S.C. 102(a). The ultimate authors of the law are the public at large, rather than the legislature or judiciary. But the same is not true of nonbinding annotations, which had never been held uncopyrightable by any court until the decision below. The annotation of a case is not an exercise of popular sovereignty, but a comment on it, and the original work of authorship of the company or body that wrote it.

ARGUMENT

I. This case presents an issue of profound importance to States with copyrighted official annotated codes.

The decision below held that annotations in a State's official annotated code are not copyrightable at least where they are part of an official code, App. 38a-42a; and their preparation is supervised by officials who exercise sovereign power, App. 37a-38a, and was

authorized by legislation that went through bicameralism and presentment, App. 47a-51a. The facts on which this holding rests are hardly Georgia-specific. Rather, the characteristics of the annotations in Georgia's code that led the Eleventh Circuit to deem them uncopyrightable are largely present in the case of every copyrighted annotated state code.

The annotations in the official annotated codes of twenty-two States (including Georgia), two territories, and the District of Columbia are copyrighted.[2] The decision below threatens and would likely invalidate the copyrights in all of them. If that were to occur, either States' cost of making official annotated codes would substantially increase, or those codes would disappear altogether.

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[2] *See* Registration Nos. TX0008663448 (Sept. 17, 2018) (Alabama), TX0008570445 (Mar. 22, 2018) (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), TX0008566022 (Feb. 1, 2018) (Kansas), TX0008269291 (Oct. 5, 2015) (Minnesota), TX0008588394 (Apr. 3, 2018) (Mississippi), TX0008489689 (Aug. 1, 2016) (Nebraska), TX0008532691 (Aug. 28, 2017) (New Hampshire), TX0008600436 (Dec. 4, 2017) (New Mexico), TX0008533641 (Dec. 19, 2017) (North Carolina), TX0008589858 (Mar. 20, 2018) (North Dakota), TX0008545032 (Dec. 8, 2017) (Puerto Rico), 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), TX0008613009 (May 10, 2018) (Virginia), TX0008475282 (May 24, 2017) (Virgin Islands), TX0008604570 (Feb. 12, 2018) (Wyoming).

A. The decision below would likely invalidate every copyright in an official annotated state code.

To hold that Georgia's official annotated code is uncopyrightable, the decision below relied on three main factors. Although the court couched these factors in Georgia-specific terms, all three would apply equally to the official annotated code of almost any State. First, the Eleventh Circuit noted that an agent of a branch of Georgia's government with lawmaking authority supervised preparation of the annotations. App. 30a. Something similar could be said of nearly any State with an official annotated code. Second, the court relied on the annotations' ostensibly "authoritative weight," App. 46a, particularly as evidenced by their placement in the official state code, App. 39a-42a. And third, it pointed to the fact that Georgia adopted its official annotated code through "bicameralism and presentment." App. 51a. But annotations in an official annotated state code will *by definition* be found within the State's official code and be adopted by the State's legislative process. Because the three factors relied upon by the decision below would apply to virtually any official annotated state code, its reasoning threatens to invalidate the copyright in any such code.

The first factor on which the Eleventh Circuit relied to hold that Georgia's annotations are not copyrightable is that their preparation is supervised by a commission that is "largely composed of officials from the legislative branch" and is "an agent of the Georgia General Assembly." App. 30a. According to the

Eleventh Circuit, if the preparation of annotations is supervised by legislative or judicial officials, "it is substantially more likely that the work is constructively authored by the people" because those officials have lawmaking authority. App. 36a-37a. This factor would be satisfied in the case of virtually every copyrighted annotated state code. As is true in Georgia, outside contractors generally prepare the annotations to those codes. *See* App. 27a-28a. But those contractors almost invariably prepare them under the supervision of legislative-branch or judicial-branch officials, including state legislators or state-court judges themselves in many cases.[3]

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[3] Ala. Code 29-5A-22 (code commissioner supervises compilation of code); Ala. Code 29-5A-1(a) (legislative council appoints code commissioner); Ala. Code 29-6-1(a) (legislative council is comprised of state legislators); Alaska Stat. 24.20.070(b) (revision of code is a responsibility of legislative council); Alaska Stat. 24.20.020 (legislative council is comprised of state legislators); Ark. Code Ann. 1-2-303(a)(1) (code revision commission supervises revision of code); Ark. Code Ann. 1-2-301(b) (majority of members of commission are members of state legislature, while the balance of members are appointed by the state supreme court); Colo. Rev. Stat. 2-5-101-102 (revisor of statutes, under supervision and direction of legislative committee, supervises preparation of code); Del. Code Ann. tit. 1, 210(b) (revisors of statutes, in consultation with legislative council, supervise preparation of code); Del. Code Ann. tit. 29, 1101 (legislative council is comprised of state legislators); Kan. Stat. Ann. 77-133 (revisor of statutes supervises preparation of code); Kan. Stat. Ann. 46-1211(a) (revisor is appointed by legislative coordinating council); Kan. Stat. Ann. 46-1201(a) (legislative coordinating council is comprised of state legislators); Minn. Stat. 3C.08 (revisor of statutes supervises preparation of code); Minn. Stat. 3C.01 (legislative coordinating commission appoints revisor); Minn. Stat. 3.303 (legislative coordinating commission is comprised of state legislators); Miss. Code Ann. 1-1-107

(legislative committee supervises preparation of code); Miss. Code Ann. 1-1-103 (committee is comprised of state legislators); Neb. Rev. Stat. 49.702 (revisor of statutes supervises preparation of code); Neb. Rev. Stat. 50-401.01(1)-(2) (revisor of statutes is appointed by executive board of legislative council, which is comprised of state legislators); N.H. Rev. Stat. Ann. 17-A:1 (director of legislative services supervises preparation of code); N.H. Rev. Stat. Ann. 17-A:2 (director of legislative services is appointed by legislative committee); N.M. Stat. Ann. 12-1-3 (New Mexico compilation commission supervises preparation of code); N.M. Stat. Ann. 12-1-2 (commission is presided over by the state supreme court's chief justice or a justice he designates, and includes the director of the legislative council service); N.C. Gen. Stat. 164-10 (legislative services office supervises preparation of code); P.R. Laws Ann. tit. 2, 223 (leaders of legislature supervise preparation of code); R.I. Gen. Laws 43-4-18 (office of law revision supervises preparation of code); R.I. Gen. Laws 22-11-3.2 (legislative committee appoints director of office of law revision); S.C. Code Ann. 2-13-60 (code commissioner supervises preparation of code); S.C. Code Ann. 2-13-10 (legislative council appoints code commissioner); S.C. Code Ann. 2-11-10 (legislative council is comprised of state legislators); S.D. Codified Laws 2-16-6 (code commission supervises preparation of code); S.D. Codified Laws 2-16-3 (majority of code commission members are state legislators or appointees of legislative research council); Tenn. Code Ann. 1-1-105 (code commission supervises preparation of code); Tenn. Code Ann. 1-1-101 (code commission is comprised of state supreme court's chief justice, two members appointed by him, a director of the general assembly's office of legal services, and the state's attorney general); Vt. Stat. Ann. tit. 2, 421-23 (legislative council supervises preparation of code); Vt. Stat. Ann. tit. 2, 402 (legislative council consists of state legislators); Va. Code Ann. 30-146 (code commission supervises preparation of code); Va. Code Ann. 30-145 (code commission is comprised of a mix of state legislators, state-court judges, former state legislators, appointees of leaders and committees of the state legislature, and executive-branch officials); V.I. Code Ann. tit. 2, 210 (code revisor supervises preparation of code); V.I. Code Ann. tit. 2, 209 (code revisor is appointed by president of the legislature).

The second factor on which the Eleventh Circuit relied to hold that Georgia's annotations are not copyrightable is their ostensibly "authoritative weight." App. 46a. The Eleventh Circuit gave a secondary and a primary reason for concluding Georgia's annotations "carry authoritative weight." *Id.* The secondary reason is simply a factual error. The Eleventh Circuit cited a number of Georgia state-court cases that relied on official *comments* compiled in Georgia's annotated code. App. 43a-44a. But, as Georgia has explained, it claims no copyright in those comments. Pet. 27 n.7. The annotations in which Georgia asserts copyright are annotations of judicial and state attorney general opinions, and the Eleventh Circuit cited no case (as none exists) where a Georgia court so much as cited the Georgia code's annotations of Georgia courts' opinions, or those of the state attorney general. That is unsurprising. To rely on those annotations as authoritative commentary on what a court held or the state attorney general opined would be absurd.

The principal reason the Eleventh Circuit gave for concluding that Georgia's annotations have authoritative weight, however, is true of every official annotated state code. Namely, that court reasoned that Georgia's annotations have authoritative weight *because they are part of Georgia's official code*. App. 39a-42a. The court acknowledged that Georgia's code "disclaims any legal effect in the annotations." App. 41a. Regardless, the court reasoned that because "the official codification of Georgia statutes contains . . . annotations . . . they are to be read as authoritative in a way that

annotations ordinarily are not." App. 42a. Whatever might be said of this peculiar reasoning on its merits, it applies by definition to every State that chooses to include annotations in its official statutory code.

The third and final factor on which the Eleventh Circuit relied to hold that Georgia's annotations are not copyrightable is Georgia's "use of bicameralism and presentment to adopt the annotations." App. 51a. This factor too, as the Eleventh Circuit understood it, would be satisfied in the case of every official annotated state code. In discussing this factor, the Eleventh Circuit initially noted that the Georgia legislature annually reenacts its annotated code. App. 47a-48a. But as that court acknowledged, Georgia only annually "reenact[s] the *statutory* portion of the Code." App. 47a (emphasis added) (brackets omitted) (internal quotation marks omitted) (quoting 2017 Ga. Laws 275). Indeed, the court went on to note that Georgia's annual code reenactments provide that "the annotations 'contained [therein] are not enacted as statutes by the provisions [of those reenactments].'" App. 6a (quoting 2015 Ga. Laws 9, sec. 54).

Therefore, in reaching the conclusion that Georgia "adopted" its annotations through bicameralism and presentment, all the Eleventh Circuit ultimately relied upon is the fact that *the law originally designating Georgia's annotated code as its official code* was adopted through bicameralism and presentment. App. 47a (citing Ga. Code Ann. 1-1-1). This again is true of every official annotated state code. Every State or territory that has chosen to make its official code an

annotated code did so through a law enacted through bicameralism and presentment (with the exception of Nebraska, which has a unicameral legislature).[4]

In sum, two of the three factors on which the Eleventh Circuit relied to hold that Georgia's annotations are not copyrightable—that they are part of the State's official code, and that the State decided to include annotations in its official code through a law enacted by its legislature and presented to its governor—are true, by definition, of every official annotated state code. The other factor—that legislative- or judicial-branch officials supervise the preparation of those annotations—is true of virtually every official annotated state code in which the State (or the annotators with which it contracts) holds a copyright. Therefore, the decision below, if adopted by other circuits, would at the very least threaten—and likely invalidate—every copyright in an official annotated state code.

B. Whether States can copyright the annotations in their official codes is an issue of profound importance.

As Georgia explains in its petition, States use copyright protections to facilitate the affordable production

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[4] *See*, *e.g.*, Ala. Code 1-1-14; Alaska Stat. 01.05.006; Ark. Code Ann. 1-2-102; Colo. Rev. Stat. 2-5-101(3), 2-5-102(1)(b); Del. Code Ann. tit. 1, 101(a), 210(a); Kan. Stat. Ann. 77-133(h), 77-137; Miss. Code Ann. 1-1-7, 1-1-8(1); Neb. Rev. Stat. 49-765, 49-767; N.M. Stat. Ann. 12-1-3, 12-1-7; P.R. Laws Ann. tit. 2, 226; S.C. Code Ann. 2-7-45, 2-13-60(3); Tenn. Code Ann. 1-1-105(a), 1-1-111(b); Vt. Stat. Ann. tit. 1, 51, tit. 2, 422(b).

of official annotated codes. All but one of the amici States contracts with a third party to prepare its code's annotations.[5] That third-party annotator is willing to prepare the annotations at an affordable rate (and in some cases at no cost at all) because it receives the revenues from the code's sale. If States lost their copyrights in their codes' annotations, those annotations would be reproduced by actors like the respondent, the annotators' revenue stream from their sale of codes would dry up, and the annotators would demand to be paid more for their work. At that point, amici States would be faced with the difficult choice of paying substantial sums to third parties to create annotations for dozens of volumes of code, or making their official codes unannotated.

If States opted to make their official codes unannotated, the public would lose a valuable legal research tool. Although annotations are not authoritative simply because they appear in an official code, the legal community still uses them heavily, even in an age of electronic legal research. For example, one recent survey of hundreds of lawyers found that a majority of the lawyers surveyed frequently or very frequently use the annotations in annotated codes to find cases relevant to their research. Am. Ass'n of Law Libraries Special Interest Section, *A Study of Attorneys' Legal Research*

[5] Amicus State of Kansas is unique in that it self-publishes its annotated code. The annotations contained in the Kansas Statutes Annotated are the work product of the Office of the Kansas Revisor of Statutes, which is the holder of the copyright. The annotations copyrighted by Kansas include summations of cases, attorney general opinions, and even law review articles that address a particular statute.

Practices and Opinions of New Associates'Research Skills 29 (2013), *available at* https://tinyurl.com/y6xhrcg3. The researchers found no statistically significant difference between younger and older lawyers' uses of annotations. *See id.*

Another recent study of hundreds of law-firm librarians found that seventy percent of those librarians believed that knowing how to use print codes remains an essential skill. Patrick Meyer, *Law Firm Legal Research Requirements and the Legal Academy Beyond Carnegie*, 35 Whittier L. Rev. 419, 445 (2014). Thirty-six percent believed that lawyers should *usually* use print-based codes for statutory research. *Id.* at 443. And many advise their firm's lawyers to begin their legal research in annotated codes. *See id.* at 468, 482.

Outside the legal community, the need for annotated codes is even greater. *Pro se* litigants, including prisoners, do not often have access to (or know how to use) expensive electronic legal research services like Westlaw or Lexis. With the help of annotated codes, however, they can find cases that interpret a statute that affects their interests, read brief summaries of those cases' holdings, and look those cases up in reporters or on the Internet, where most courts' opinions are now freely available. Absent official annotated state codes, *pro se* litigants' ability to understand the laws that govern them would be seriously hampered. Indeed, this Court once summarily affirmed a decision holding that a state that provided its prisoners with unannotated state codes denied them reasonable access to the courts because, in part, "[t]here [we]re no annotated codes" in the state prisons. *Gilmore v. Lynch*,

319 F. Supp. 105, 110 (N.D. Cal. 1970), *aff'd sub nom. Younger v. Gilmore*, 404 U.S. 15 (1971).

If States stopped producing official annotated codes, annotated codes would still exist. Today, States with official unannotated codes typically have one or more unofficial annotated codes. The logic of the decision below would not invalidate copyrights in unofficial annotated codes. The annotations in them are in no way "attributable to the constructive authorship of the People." App. 4a.

Unofficial annotated codes, however, are an unsatisfactory replacement for official annotated codes. One of the drafters of the legislation that created Georgia's official code recently observed, in explaining why Georgia opted for an official annotated code, that "creating only an unannotated version would force lawyers to purchase [two] versions"—the official unannotated version to ensure accurate citation to the code, and the unofficial annotated version for the annotations. Elizabeth Holland, *Will You Have to Pay for the O.C.G.A.?: Copyrighting the Official Code of Georgia Annotated*, 26 J. Intell. Prop. L. 99, 111 (2019). Indeed, the decision below noted in support of its holding that relying on an unofficial code for statutory text is a risky business. App. 41a.

Moreover, as Georgia explained in its petition, States require the contractors that prepare their official codes to sell them at an affordable rate; unofficial codes are typically far more expensive. Pet. 10, 34. In States where the publishers of unofficial annotated codes have no official annotated code for competition,

an annotated code can be a five-figure purchase. *See*, *e.g.*, Thomson Reuters, West's Florida Statutes Annotated, *available at* https://tinyurl.com/y2os7ryo. In States like Georgia that have official annotated codes, an annotated code can cost as little as $400. Pet. 10. Allowing copyrights to subsist in *official* annotated codes ensures that an invaluable research aid will remain within the means of small firms and solo practitioners, the clients they serve, and the general public.

II. The decision below is wrong.

In holding that Georgia could not copyright the annotations in its official code, the Eleventh Circuit relied on the government-edicts doctrine, a rule of copyright law this Court last addressed in 1888 in interpreting a copyright statute that has since been fundamentally revised. *See Banks v. Manchester*, 128 U.S. 244 (1888); *Callaghan v. Myers*, 128 U.S. 617 (1888). Although no one questions that the doctrine survives in some form, its footing and contours are today unclear. As one judge recently observed, "Today, the *Banks* rule might rest on at least four possible grounds: the First Amendment; the Due Process Clause of the Fifth Amendment; Section 102(b) of the Copyright Act, which denies copyright protection to [ideas], or Section 107 of the Act, which sets forth the fair-use doctrine." *Am. Soc'y for Testing & Materials v. Public.Resource.Org, Inc.*, 896 F.3d 437, 458-59 (D.C. Cir. 2018) (Katsas, J., concurring) (citation omitted). To this list of rationales, the decision below adds yet a fifth: that government edicts do not qualify as original works of authorship under Section 102(a) of the

Copyright Act because their authors are ultimately the people at large under a theory of popular sovereignty. App. 11a-12a (citing 17 U.S.C. 102(a)); *see* App. 21a-23a (attributing this rationale to *Veeck v. So. Bldg. Code Congress Int'l, Inc.*, 293 F.3d 791 (5th Cir. 2002) (en banc), and *Bldg. Officials & Code Adm'rs v. Code Tech., Inc.*, 628 F.2d 730 (1st Cir. 1980)).

It is true that a State's citizens, not its legislators or judges, are the ultimate authors of state statutes or judicial opinions for copyright purposes. *See Banks*, 128 U.S. at 253 (reasoning that judicial decisions could not be copyrighted because judges could "[i]n no proper sense . . . be regarded as their author or their proprietor, in the sense" those terms were used in the copyright statute in effect at the time). But Georgia's citizens are in no way the "ultimate authors of the annotations"—comprising summaries of judicial and attorney general opinions—in Georgia's official annotated code. App. 4a. The same is true elsewhere. No State's official annotated code is "constructively authored by the People" of that State. App. 26a.

To be clear, the sorts of annotations that the Eleventh Circuit's rule would "attribut[e] to the constructive authorship of the People," App. 53a, are statements of the following kind: "Trial court erred in granting a city summary judgment in homeowners' action alleging that the city violated state and federal regulations governing floodplain management in constructing a park near their homes because there was an issue of material fact regarding whether the city fully complied with standard engineering practice . . .

and without such a finding it could not be determined whether the park project was a nuisance pursuant to this section. . . .” Ark. Code Ann. 14-268-105 (citing *Hall v. City of Bryant*, 379 S.W.3d 727 (Ark. Ct. App. 2010)). Or to take another example: “In a prosecution for selling and offering for sale nursery stock infected with a disease . . . the state was not required to show that the sale was made with knowledge that the trees were so affected.” Ark. Code Ann. 2-16-204 (citing *Jacobs v. State*, 243 S.W. 952 (Ark. 1922)).

Those statements are not the law, or even descriptions of it; they are merely one annotator’s description of how a court decided a particular case. *See* Ark. Code Ann. 1-2-115(c) (“All . . . annotations . . . set out in this Code are given for the purpose of convenient reference and do not constitute part of the law.”); Ga. Code Ann. 1-1-7 (describing the effect of Georgia’s annotations in identical terms). Another annotator could describe that decision quite differently, and indeed other annotators do. *See Jacobs*, 243 S.W. at 952 (reporter annotating *Jacobs* as holding that in a prosecution for sale of diseased nursery stock, “the state was not required to show a criminal intent”). And while the official annotation offers a “convenient reference,” Ark. Code Ann. 1-2-115(c), no citizen would reasonably believe that it has any authority that the unofficial annotation lacks. The only authoritative statement on the matter is contained in the decision itself. Official annotations are useful glosses on authoritative interpretations of the law—not authoritative interpretations of the law themselves.

Given this lack of authority, the people cannot be sensibly described as the authors of official annotations. The Eleventh Circuit explained that the people should be deemed the authors of the law for copyright purposes because in this country, the people—and not the government—are sovereign. App. 19a-20a. That is true. But the people are not law annotators. It would be perfectly sensible, and even correct, for a citizen to say, "We the People of Arkansas, through our legislature, have made selling diseased trees a crime"; or to say, "We the People of Arkansas, through our legislature, have chosen to include annotations in our State's official statutory code." But it would be absurd for a citizen to say, "We the People of Arkansas, through a contractor hired by our Code Revision Commission, have annotated a decision of our State Supreme Court as holding that in a prosecution for the sale of diseased trees, the state was not required to prove knowledge of the disease."

Because that understanding of the people's relation to official annotations is so absurd, no court had ever held that the people are the authors of official annotations for copyright purposes until the decision below. To the contrary, this Court has held twice that annotations by a government-employed official court reporter are authored by the *reporter* for copyright purposes, even though it simultaneously held that the opinions that reporter annotated are not authored, within the meaning of copyright law, by the judges who write them. *See* Pet. 28-29 (discussing *Wheaton v. Peters*, 33 U.S. 591 (1834)); Pet. 31 (discussing *Callaghan*

v. Myers, 128 U.S. 617 (1888)). That is because—as every opinion of this Court reiterates—annotations of opinions are not the law even when a government employee prepares them, while opinions themselves are the law. *See*, *e.g.*, *United States v. Stitt*, 139 S. Ct. 399, 402 n.* (2018) ("The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader.") (citing *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337 (1906)).

The only apparent exception proves the rule, as demonstrated by the contrast between *Banks* and *Callaghan*. In *Banks*, this Court held that syllabi and headnotes prepared by Ohio Supreme Court Justices themselves were not copyrightable. *See Banks*, 128 U.S. at 253. That is because Ohio Supreme Court syllabi and headnotes, at that time, were "subject to revision by the judges concurring in the opinion" just as much as the opinion itself, *id.* at 250, and were themselves deemed binding interpretations of the law. *See Pioneer Tr. Co. v. Stich*, 73 N.E. 520, 522 (Ohio 1905) (holding that as between dicta in opinion and "the holding . . . as expressed in the syllabus," "[t]he syllabus controls"); *Hixson v. Burson*, 43 N.E. 1000, 1003 (Ohio 1896) ("reluctantly overrul[ing] the second [headnote of the] syllabus" of an 1880 Ohio Supreme Court decision).

Just one month later, the Court held just the opposite—that the Illinois Supreme Court's official reporter's syllabi and headnotes were copyrightable. *See Callaghan*, 128 U.S. at 645, 647-50. Within a short time

frame, therefore, the Court held both that the public officials who created Ohio's syllabi and headnotes were not authors for copyright purposes, *see Banks*, 128 U.S. at 253, and also that the "public officer" who created Illinois's syllabi and headnotes was an author for copyright purposes, *Callaghan*, 128 U.S. at 645.

There is only one possible explanation for the discrepancy between *Banks* and *Callaghan*. Ohio's syllabi were law and therefore ultimately the work of the people, while Illinois's syllabi were true annotations and therefore attributable only to the reporter who wrote them. The same is true of annotations under today's Copyright Act; they are "original works of authorship" of their creators. 17 U.S.C. 102(a). The decision below to the contrary cannot stand. This Court should grant certiorari and ultimately reverse.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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