

No. 18-1150

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IN THE  
*Supreme Court of the United States*

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GEORGIA, ET AL.,

*Petitioners,*

v.

PUBLIC.RESOURCE.ORG, INC.,

*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 IN OPPOSITION**

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### **RULE 29.6 STATEMENT**

Public.Resource.Org, Inc. is a nonprofit corporation that has no parent corporation and nothing to declare with respect to stock ownership.

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## **BRIEF FOR THE RESPONDENT**

The Question Presented is whether Georgia's only official code is an edict of government that cannot be copyrighted, because the law belongs to the People. Our copyright system's twin goals are to promote creation of useful works and their dissemination to a wide audience. But the courts have long ruled that governments need no incentive to create the law. In issuing edicts of government, officials act as agents of the People, in whose name the edicts are issued.

Here, the State of Georgia decided that its only official code should be annotated. The state itself oversaw the preparation of the work, even though it farmed out to an experienced code publisher the labor of organizing the statutes and drafting the annotations. The state registered the copyright in the annotations in its own name, compensating the publisher only by giving it an exclusive license for a limited term.

If this case arose in another circuit, those courts, analyzing the undisputed facts, would have arrived at the same result that the Eleventh Circuit did.

But although there is no square circuit split, there might as well be. There is no doubt that lower courts have struggled with applying the edicts of government doctrine in gray areas.

That confusion and perceived inconsistency among the lower courts has made it difficult for governments, publishers, the public, and even the U.S. Copyright Office to know their rights and obligations. And that confusion will only get worse as advancing technology speeds the distribution of government edicts online.

Respondent's mission is to harness technology's power to improve public access to all sources of the law, the raw materials of our democracy. While respondent adamantly defends the Eleventh Circuit's decision, it also urgently needs to know, if that court did apply the wrong approach to edicts of government, what is the correct approach. Respondent is no scoff-law, but is regularly threatened with copyright infringement lawsuits like this one for posting materials it sincerely believes are in the public domain. Legal research providers, teachers, librarians, lawyers, and the general public all also need to know the scope of copyright protection, if any, for such materials. The Court should grant certiorari to clarify, authoritatively, how courts should analyze whether a given work is an uncopyrightable government edict.

### **STATEMENT OF THE CASE**

Respondent Public.Resource.Org, Inc. (Public Resource) is a nonprofit organization with the mission of improving public access to government records and primary legal materials. Pet. App. 8a. In 2013, Public Resource purchased all the current volumes of the print Official Code of Georgia Annotated (OCGA), scanned them, and uploaded them to its website to be freely available to the public. *Id.* at 8a-9a.

In July 2015, petitioners sued Public Resource in the United States District Court for the Northern District of Georgia for infringing Georgia's copyright in the OCGA's annotations. Pet. App. 9a. The district court granted petitioners' motion for partial summary judgment and denied Public Resource's motion for summary judgment. *Id.* at 9a-10a. The court determined that because the annotations formally lack the

force of law, they are not in the public domain. *Id.* at 10a. It also rejected both Public Resource’s challenges to the validity of Georgia’s copyright and its fair use defense. *Id.* The court entered a permanent injunction against Public Resource. *Id.*

The Eleventh Circuit reversed, holding that “no valid copyright interest can be asserted in any part of the OCGA.” Pet. App. 2a. At the outset, the court observed that “[a]nswering this question means confronting profound and difficult issues about the nature of law in our society and the rights of citizens to have unfettered access to the legal edicts that govern their lives.” *Id.* The OCGA’s annotations go well beyond summaries of judicial opinions. They include section titles, statutory history, Georgia Code Revision Commission (Commission) guidance, summaries of judicial histories and more. These materials are not exactly a state’s statutory text (which is clearly not copyrightable) or commentaries created by a private publisher (generally copyrightable). *Id.*

Therefore, the court of appeals determined that it must “drill down on the core attributes” that would determine whether the annotations are “an exercise of sovereign power.” Pet. App. 2a. The court identified three hallmarks that would determine whether the entire official code, which merges statutes and annotations, should be treated as “the sovereign expression of the People by their legislature”: the identity of the public officials who created the work; the authoritativeness of the work; and the process by which the work was created. *Id.* at 3a-4a.

The Eleventh Circuit read this Court’s precedents to teach that the “ultimate inquiry” is whether a work is “attributable to the constructive authorship of the

People, which is to say whether it was created by an agent of the People in the direct exercise of sovereign authority.” Pet. App. 24a. “Statutes and judicial opinions are the most obvious examples of what falls within the ambit of the rule” that “the law” is in the public domain. *Id.* But that “does not mean that [works] that carry the clear force of law are the only works that may be subject to the rule.” *Id.* Rather, there is a “zone of indeterminacy at the frontier” between edicts that carry the force of law and those that do not. *Id.* at 24a-25a (citing *Jean v. Nelson*, 711 F.2d 1455, 1480-83 (11th Cir. 1983), *on reh’g*, 727 F.2d 957 (11th Cir. 1984), *aff’d*, 472 U.S. 846 (1985)). Identifying the “ultimate inquiry” is still difficult when a work in question does not fall neatly into a category like statutes or judicial opinions. *Id.* But it does point a court toward a way to structure its analysis. “Put simply, there are certain things that make the law what it is.” *Id.* at 25a. Because the OCGA’s annotations are neither obviously within the ambit of the edicts of government doctrine (as statutes and judicial opinions are) nor obviously outside it, the court analyzed the OCGA’s annotations using the three critical markers it had identified.

First, the court of appeals considered it important that the Georgia General Assembly is the driving force behind the annotations’ creation. Pet. App. 26a. The Commission, an arm of the General Assembly, exerts authoritative influence over their preparation. Although Lexis initially prepares many of the annotations, it must follow the Commission’s punctilious instructions specified in its publication agreement with the state. *Id.* at 27a. For example, the publication

agreement instructs Lexis which court decisions to include and specifies the content of the summaries, such as discussion of portions of judicial opinions that involve direct constructions of a statute. Resp. C.A. App. 271-72.<sup>1</sup>

The Commission also directly supervises and controls Lexis's preparation of the annotations. The agreement's first section explains that the OCGA must include not just the kinds of annotations recited in the agreement, but "other material related to or included in such Code at the direction of the Commission." Pet. App. 28a. Indeed, the Commission has "the ultimate right of editorial control." *Id.* "In short, the Commission exercises direct, authoritative control over the creation of the OCGA annotations at every stage of their preparation." *Id.* at 29a. The Commission's "intimate involvement" is of great significance because it is an arm of the General Assembly, and includes nine members of the General Assembly and the Lieutenant Governor. *Id.* The Commission's funding comes from appropriations "provided for the legislative branch of state government." *Id.* (quoting Ga. Code Ann. § 28-9-2).

Georgia law also provides that "the Office of Legislative Counsel shall serve as staff for the Commission." Pet. App. 29a (quoting Ga. Code Ann. § 28-9-4) (alteration omitted). That office provides various advisory and legal services "for the legislative branch of

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<sup>1</sup> Petitioners at times suggest that they disagree with the Eleventh Circuit's understanding of Georgia law. But because they do not attempt to show that the court of appeals' interpretation is clearly erroneous, this Court will treat it as definitive. *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1149 (2017).

government” and is therefore an adjunct to the General Assembly. *Id.* at 30a (quoting Ga. Code Ann. § 28-4-3). Georgia’s own Supreme Court has held that the Commission’s work is “legislative.” *Id.* (citing *Harrison Co. v. Code Revision Comm’n*, 244 Ga. 325 (1979)). The “Commission is therefore, in a real sense, the ‘alter ego’ of the General Assembly.” *Id.* at 31a.

Not only does the legislature, through the Commission, closely supervise Lexis’s preparation of the annotations, but the completed annotations are subject to the approval of not only the Commission but also the General Assembly. The General Assembly votes to make the OCGA the official codification of Georgia’s laws and to incorporate the annotations into the OCGA. Pet. App. 31a-32a (quoting Ga. Code Ann. § 1-1-1). The General Assembly consists of public officials whose official duties “peculiarly include the direct exercise of sovereign power.” *Id.* at 37a. Georgia’s Constitution provides that “[t]he legislative power of the state shall be vested in a General Assembly which shall consist of a Senate and a House of Representatives.” Ga. Const. art. III, § I, para. I.

Turning to the second critical factor, authoritativeness, the panel reasoned that while the annotations do not carry the force of law, they are nevertheless authoritative. Pet. App. 38a. Specifically, the General Assembly merged the annotations with the statutory text into a single, unified edict stamped with the state’s imprimatur and created and embraced by the same government body that wrote the statutory text. *Id.* The legislature did not have to merge the annotations with the statutes to create the OCGA, and then stamp the completed work with the state’s impri-

matur, but it chose to do so. *Id.* at 40a. That act combined the two components into a unified whole, “intermingl[ing]” “their attributes” and “alter[ing]” “their distinct character.” *Id.* at 40a-41a. The court reasoned that “Georgia law tells us that the official codification of Georgia statutes contains not only statutory text but also annotations that have been combined and unified with the statutory text into a single edict.” *Id.* at 41a. Thus, a full understanding of the statutes necessarily includes understanding the annotations, and the annotations are “clearly laden with legal significance.” *Id.* The legislature’s decision to label the unified whole “Official” strengthens their significance; official comments to the Code are “authoritative in a way that annotations ordinarily are not.” *Id.* An annotation labeled as Code Commission Guidance warns that “[a]ttorneys who cite unofficial publications of 1981 Code do so at their peril.” *Id.* (quoting Ga. Code Ann. § 1-1-1, in turn citing *Georgia v. Harrison Co.*, 548 F. Supp. 110 (N.D. Ga. 1982)). That warning demonstrates the importance of the state’s decision to stamp the OCGA with its imprimatur. Similarly, the legislature enacted a law allowing the OCGA’s publisher to use the state emblem on its cover, while other private parties are forbidden to use it. *Id.* at 42a (citing Ga. Code Ann. § 50-3-8). Georgia courts’ treatment of the annotations reinforces that conclusion: those courts frequently characterize the annotations as “accorded great weight” in determining statutory meaning and legislative intent. *Id.* at 42a-44a.

Finally, the panel considered its third marker: the process by which the annotations were created. Pet. App. 47a. They are not created by the same process as the public domain statutory provisions, but the

processes are “very closely related.” *Id.* The former are published “as a collection of session laws, representing all of the acts and resolutions passed during that particular legislative session.” *Id.* (quoting Austin Martin Williams, *Researching Georgia Law (2015 Edition)*, 31 Ga. St. U. L. Rev. 741, 761 (2015)). The annotations, as the Commission prepared them, were adopted by the General Assembly as an integral part of the official Code. *Id.* at 48a (citing Ga. Code Ann. § 1-1-1). The General Assembly did so through an act passed by both houses and signed into law by the Governor. Bicameralism and presentment are “the essential hallmarks of legislative process.” *Id.* (citing *INS v. Chadha*, 462 U.S. 919 (1983); Ga. Const. art. V, § II, para. IV; Ga. Const. art. III, § V, para. V).

The court of appeals concluded that all three critical markers show that the OCGA’s annotations and the OCGA itself are a work of the legislature as an exercise of its sovereign power. Pet App. 53a. “To advance the interests and effect the will of the People, their agents in the General Assembly have chosen to create an official exposition on the meaning of the laws of Georgia.” *Id.* As a result, the OCGA “is intrinsically public domain material, belonging to the People, and, as such, must be free for publication by all.” *Id.*

The Eleventh Circuit accordingly reversed the district court’s judgment, vacated the order granting injunctive relief, and remanded for further proceedings. Pet. App. 53a.

## REASONS FOR GRANTING THE WRIT

### I. The Petition Should Be Granted.

Despite the absence of a square circuit conflict (*see infra* Part II) and the correctness of the Eleventh Circuit's decision (*see infra* Part III), this Court's review is warranted because under this Court's existing precedent the government edicts doctrine is difficult to apply when a work does not fall neatly into a category, like statutes or judicial opinions, already held to be edicts. As a result, the case law is confusing and outcomes are difficult to predict.

The Court has previously seriously considered whether to grant certiorari to decide similar questions. It has twice called for the Solicitor General's views. *S. Bldg. Code Cong. Int'l, Inc. v. Veeck*, No. 02-355, *cert. denied*, 537 U.S. 1043 (2002); *Practice Mgmt. Info. Corp. v. Am. Med. Ass'n*, No. 97-1254, *cert. denied*, 524 U.S. 952 (1998). Both times, the Court followed the United States' ultimate recommendation that review be denied. But in the more recent case, *Veeck*, the United States recognized that review of the question could be appropriate later after further developments in the doctrine in the courts of appeals. *Veeck* U.S. Br. 19. Seventeen years have since passed, more courts have opined on how to apply the doctrine, and this Court's intervention is now sorely needed.

For the reasons generally outlined by petitioners, the law governing when a publication is an "edict of government"—and therefore exempt from copyright—is unclear. This Court last addressed that question directly over a century ago. *See infra* Part III. Since then, the issue has become much more significant, for at least four reasons. First, there is a trend toward

industry and professional organizations drafting model statutes and regulations and encouraging government entities to enact them, giving them the force of law. Second, the internet and other technological advances have made it easier and cheaper to disseminate judicial opinions and codes, including annotated official codes. Third, innovative companies have created new legal research services that capitalize on availability of digitized legal materials to enable the public to use these materials for research in ways they could not with print versions or the databases that Lexis and Westlaw offer their subscribers. Fourth, “big data” can be used to reveal interesting and useful information, such as how a statute that governs particular conduct varies across different jurisdictions. Meanwhile the lower courts’ general approaches have diverged. This Court’s guidance on how the courts should analyze issues involving the edicts of government doctrine would benefit both the lower courts and the owners and users of government works.

The current uncertainty in this area of the law creates significant costs. Codes are generally scanned or otherwise reproduced and posted online by non-profit entities that, like respondent, have only modest budgets and operate in the public interest. These few entities bring state and local codes to a huge population of users, nationally and internationally. The threat of litigation and a possible money judgment for infringement is a very substantial deterrent to posting and disseminating those legal materials. As respondent’s amici demonstrate, many others would post the same materials, including in ways that make them

more useful, if not chilled by states' and publishers' aggressive and arguably overreaching assertion of copyrights.

The varying approaches of the courts of appeals also create the prospect that a publisher owning copyright in official legal materials will select the forum it deems most favorable to its copyright claim or most convenient. The risk is that the most copyright-protective jurisdiction's articulation of how to determine what works are uncopyrightable government edicts—essentially, the “least common denominator”—will effectively have nationwide reach.

Respondent's experience is illustrative and guides its view that this Court's intervention is warranted. Respondent's mission is to improve the public's access to primary sources of law, the raw materials of our democracy. It frequently receives demands to take down such materials from its website. Several of these have been followed by lawsuits alleging copyright infringement.

Respondent has thus posted online the codes of numerous states. In the United States, “almost all ‘official’ versions of state statutory codes and regulations are published by” two private companies: Thompson Reuters (which owns West) and RELX Group (which owns Lexis). Leslie A. Street & David R. Hansen, *Who Owns the Law? Why We Must Restore Public Ownership of Legal Publication*, 26 J. Intell. Prop. L. 205, 206 (forthcoming 2019). States and their private publishers often assert copyrights on statutory collections. In addition to Georgia's registered copyright in the OCGA's annotations, 20 other states have registered copyright in all or part of their codes: Arkansas, Colo-

rado, Connecticut, Kansas, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Mexico, South Dakota, Tennessee, Vermont, Virginia, West Virginia, and Wyoming.

Some states have done little or nothing to enforce their asserted rights, but others have aggressively sought to enforce them against respondent. Georgia is an example. Mississippi is another. It has threatened to sue respondent for posting the state's annotated official code, which is created similarly to Georgia's, under the state legislature's supervision and control. The State of Idaho, the State of Oregon, and the District of Columbia previously invoked copyrights against respondent, but later withdrew those assertions.

Relying on the government edicts doctrine, respondent has also posted an array of model public safety codes (such as building, fire safety, and occupational safety codes) originally promulgated by private organizations and later incorporated into law by federal, state, and local governmental entities.

Posting those materials has subjected respondent to repeated and prolonged litigation. "Despite what appears to be a clear rule against copyright protection over the law, publishers continue to assert copyright to effectively prevent free access to official legal publications." Street & Hansen, *supra*, at 222. One such publisher sued respondent in the Northern District of California, resulting in a stipulated judgment in respondent's favor. *Public.Resource.Org v. Sheet Metal & Air Conditioning Contractors' Nat'l Ass'n*, No. 3:13-cv-00815 (N.D. Cal.).

A number of standard setting organizations also sued respondent in the District Court for the District of Columbia in litigation still pending. *Am. Soc’y for Testing & Materials v. Public.Resource.Org, Inc.*, 78 F. Supp. 3d 534 (D.D.C. 2015), *rev’d and remanded*, 896 F.3d 437 (D.C. Cir. 2018). That litigation was brought precisely to determine the copyright protection for model codes incorporated into law.

Besides active litigation, respondent has been threatened with suit through numerous “takedown” demands. The majority have never been withdrawn.<sup>2</sup>

This case is moreover an excellent vehicle for this Court to clarify the government edicts doctrine. This is the case at the margins. The annotations of the OCGA are not formally “law.” But for the reasons the Eleventh Circuit explained, they have all the hallmarks of government edicts. A ruling by this Court would help elucidate the boundaries of the doctrine.

The scope of the government edicts doctrine is raised by a number of active disputes, including the *American Society* case pending in the district court on remand from the D.C. Circuit. But that case is substantially more complicated than this one and involves contested facts. Moreover, the court of appeals in *American Society* directed the district court to address

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<sup>2</sup> These have included threats from the American Petroleum Institute, National Standard Plumbing Code Committee, American Society of Safety Engineers, American Society of Mechanical Engineers, American Welding Society, American Conference of Governmental Industrial Hygienists, American Educational Research Association, National Council on Radiation Protection and Measurement, British Standards Institution, and Federal Accounting Standards Board.

the issues on fair use grounds before resorting to a copyrightability determination—a course that may provide all parties involved with a far less definitive rule. That and other cases will not reach this Court, if ever, for several years. All parties would benefit from this Court’s earliest guidance.

The procedural posture of this case is also ideal for review in this Court. It was resolved on summary judgment. The parties stipulated to all the material facts. There are accordingly no disputed or murky factual questions that could interfere with the Court’s ability to resolve the Question Presented. Moreover, the Eleventh Circuit has definitively interpreted Georgia law in a way that this Court would not revisit, providing a clear foundation to resolve the Question Presented. *See supra* at 5 n.1.<sup>3</sup>

Given the ongoing significance of the Question Presented to public interest organizations such as respondent, as well as students, librarians, researchers, and newer legal research services, certiorari should be granted.

## **II. There Is No Circuit Conflict.**

Although petitioners are correct that the courts of appeals diverge in their approaches to applying the government edicts doctrine, sufficient to justify review

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<sup>3</sup> If petitioners in fact intend on the merits to dispute any aspect of the Eleventh Circuit’s interpretation of Georgia law, it is *essential* that they advise the Court of their position in their reply brief, as well as their basis for asserting that the court of appeals’ understanding is clearly erroneous. If they were to do so, it would make this case a poor vehicle, because this Court’s review would be clouded by disputes over the meaning of state law that are a predicate to resolving the Question Presented.

in this Court, they are incorrect that any court of appeals would decide this case differently.

Petitioners contend that a circuit conflict arises because the Eleventh Circuit looked to three factors in determining whether the OCGA is copyrightable. *See* Pet. 22. But the reason is that the Eleventh Circuit reserves its three-factor test to analyze unusual cases in which the work in question is not a kind of writing already held to be an edict—enacted statutes and judicial opinions—but which the state has nonetheless created and expressly adopted as its authorized companion to its statutes. No other court has considered a truly similar case. The respective states’ processes for creating “official” legal publications vary widely. *See* Street & Hansen, *supra*, at 210-21. For its part, the Eleventh Circuit did not suggest that its standard would apply on the distinct facts of the cases petitioners cite.

Petitioners contend that the ruling below conflicts with the Second Circuit’s holding that a county could hold a valid copyright in certain “tax maps.” *County of Suffolk v. First Am. Real Estate Sols.*, 261 F.3d 179 (2d Cir. 2001). According to petitioners, the rulings are irreconcilable because the particular tax maps in that case “clarified the nature of legal duties,” Pet. 16, and because the accused infringer had argued that the maps are “analogous to judicial opinions and statutes,” *id.* at 17 (quoting 261 F.3d at 184-85). Petitioners further argue that the ruling below conflicts with the legal rule applied by the Second Circuit, which supposedly “interpreted the government edicts doctrine to hinge on two primary factors”: (1) whether an economic incentive was necessary to create the work; and

(2) whether the public required notice of the work to know the law. *Id.*

There is no conflict. First, petitioners misread *County of Suffolk* to “hinge” on two factors alone. In fact, the Second Circuit merely stated that those “two considerations *influence*” the determination. 261 F.3d at 194 (emphasis added).

Further, the tax maps lacked any of the hallmarks the Eleventh Circuit identified as identifying edicts of government in the public domain. They were in no sense incorporated into the government’s code as an authoritative statement of the law. That the maps arguably clarified county residents’ duty to pay property tax would not be sufficient to trigger the government edicts doctrine under the Eleventh Circuit’s decision.

The remaining cases cited by petitioners all involve “copyright protection for privately developed, government-adopted works,” Pet. 18, that were not commissioned and copyrighted by the government, even if such works are often created with the intention of promoting them for incorporation into law. “Government-adopted” is petitioners’ label that conveniently encompasses both earlier private works that a later-enacted statute refers to, and works, like the OCGA, that the state legislature commissioned and approved to explicate the statutes it enacts. The copyrightability of the former is an important and recurring issue. But it is distinct from the central issue in this case: whether the state can use copyright to prevent members of the public from posting and disseminating its only official code, including the annotations.

Petitioners assert that the Fifth Circuit adopted its own distinct standard in *Veeck v. Southern Building Code Congress International, Inc.*, 293 F.3d 791 (5th Cir. 2002) (en banc), *cert. denied, supra*. In that case, a private body created a model building code with the intention that it would be adopted as law. The Fifth Circuit held that once adopted, the codes were necessarily “the law” and accordingly were not copyrightable. Petitioners contend that *Veeck* gives rise to a conflict because the Fifth Circuit did not look to whether, absent copyright, the private organization would have an economic incentive to produce the model code. Pet. 20-21. In fact, the *Veeck* court considered incentives as a policy argument for accepting the copyright claim but rejected it. 293 F.3d at 805. First, the court reasoned that the plaintiff had survived and grown for 60 years without any legal affirmation of copyright protection. *Id.* Second, code-writing groups succeed because of the need for industry standards, quality control, and self-regulation, regardless of the availability of copyright. *Id.* at 805-06 (citing 1 *Goldstein on Copyright* § 2.5.2, at 2:51). Third, the plaintiff could have published model codes with its own commentaries and other annotations not available in the official codes to preserve its income stream from the model codes. *Id.*

But in any event, petitioners’ argument is question-begging, which is why other courts would not inquire into the publisher’s economic incentives in the distinct context of this case. The inquiry into private parties’ incentives is appropriate, if at all, only when that party creates the work independently and it is only later incorporated into law. Then, it makes more sense to ask whether negating the author’s copyright

because of the government’s decision to make use of works—which was not the reason the work was created—would destroy the incentive to create it in the first instance.

This case is very different. Georgia made the decision to farm out preparation of the OCGA to Lexis, not to pay Lexis for its work, and to keep the copyright for itself. Instead, Lexis would make money selling the OCGA. But it will always be true that if the state refuses to provide compensation itself, a private party will have a lesser incentive to produce a work. Petitioners’ argument effectively reduces to the position that every work produced by a third party under such an arrangement—and indeed almost every work produced by a private party at all—is copyrightable. It makes no difference whether the work is incorporated into the state’s law. The straightforward answer is that the state cannot manufacture its own exclusive right in a work by refusing to pay a contractor for it. The state could ensure the publication of the OCGA by creating it using its own staff or by paying Lexis the way it pays innumerable other third parties.

This Court has previously considered whether the rulings cited by the petition are in conflict and—following the recommendation of the Solicitor General—denied certiorari. *See Veeck, supra; Veeck U.S. Br.* But petitioners omit the denial from their discussion of, and indeed their citation to, *Veeck*.

The Solicitor General identified important features that distinguished the cases on which petitioners rely for the purported circuit conflict. Most of those distinctions apply equally here. The annotations “were created for the sole purpose” of explicating Georgia law, rather than as private standards. *Veeck U.S.*

Br. 11. The materials “comprehensively govern a very broad range of primary conduct.” *Id.* The materials in this case—unlike those involving the particular materials at issue in the cases cited by petitioners—moreover “expressly regulate an entire area of private endeavor.” *Id.* Further, the legal rules underlying the annotations “carry criminal penalties for their violation.” *Id.* None of that is true in any of the cases cited by petitioners.

Petitioners invoke the 120-year-old opinion in *Howell v. Miller*, 91 F. 129 (6th Cir. 1898), which involved “Howell’s Annotated Statutes of Michigan.” Those volumes included state statutes and, inter alia, “notes and digests of the decisions of the supreme court of Michigan.” *Id.* at 130. Howell had prepared his work privately, without any involvement by the state. Subsequently, the state passed a law providing that Howell’s volumes were “evidence of the existing laws thereof.” *Id.* at 131 (citation omitted). This is why petitioners apply the “government-adopted” label to Howell’s first two volumes.

Subsequently, the legislature passed a bill calling for the compilation and publication of not just state laws but also annotations. 91 F. at 131. Howell alleged that a subsequent volume published by a state-appointed rival, Miller, “printed by direction of the legislature” infringed his copyright in his earlier compilation. *Id.* at 130. The Sixth Circuit held that Howell held a valid copyright in his annotations in those compilations, because those were purely “the result of his labors.” *Id.* at 138. The court affirmed the district court’s denial of a preliminary injunction, because Howell had not demonstrated a likelihood of succeed-

ing on the merits given evidence that Miller’s later volume “made no use whatever of the annotations and digests of Howell.” *Id.* at 141.

Petitioners claim that *Howell* is irreconcilable with the ruling below based on the terse assertion that *Howell* “addressed the copyrightability of a work remarkably similar to the OCGA annotations.” Pet. 18. But the works are not similar in the relevant sense. Howell did not publish his annotations under the authority of the state. Rather, Howell published his works on his own initiative. Further, although the state later assigned some evidentiary effect to his volumes, it did so *only* with respect to “laws,” rather than the accompanying annotations. It was only the later statute—which gave rise to the competing compiler’s accused work—that called for the publication of annotations under the state’s authority. 91 F. at 131.

Petitioners next rely on *CCC Information Services, Inc. v. Maclean Hunter Market Reports, Inc.*, 44 F.3d 61 (2d Cir. 1994). That case involved the publisher’s “compendium of its projections of used car valuations.” *Id.* at 63. Various state statutes and regulations “requir[ed] that insurance payments for total losses be at least equal either to Red Book [the plaintiff’s publication] value or to an average of Red Book and Bluebook values (unless another approved valuation method is employed).” *Id.* at 73. In a single paragraph, the Second Circuit rejected the argument “that a state’s reference to a copyrighted work as a legal standard *for valuation* results in loss of the copyright.” *Id.* at 74 (emphasis added).

Petitioners attempt to construct a conflict between the decision below and the holding of *CCC Information* only by omitting the words “for valuation.”

See Pet. 19. But that is a critical limitation. The Second Circuit did not consider more broadly when the state's incorporation of materials into its legal regime—which are obviously far removed from insurance valuations—would amount to edicts of government. The Second Circuit itself did not rely on the *CCC Information* decision in *County of Suffolk*—the Second Circuit case petitioners argue is most analogous. See *supra* at 14.

Petitioners next cite *Practice Management Information Corp. v. American Medical Ass'n*, 121 F.3d 516 (9th Cir. 1997), *as amended*, 133 F.3d 1140 (9th Cir. 1998). There, the AMA published—and made freely available—a coding system of medical procedures (the CPT). The federal government later contracted with the AMA to use its own modified version of that system for Medicaid and Medicare billing. It further “adopted regulations requiring applicants for Medicaid reimbursement to use the CPT.” *Id.* at 518.

The Ninth Circuit rejected two arguments for finding that the AMA lost its copyright. First, the government neither produced nor registered copyright in the CPT. To the contrary, “the AMA authored, owns, and maintains the CPT and claims a copyright in it.” 121 F.3d at 518. In those circumstances, “copyrightability of the CPT provides the economic incentive for the AMA to produce and maintain the CPT.” *Id.* Second, the AMA had neither “restricted access to” the CPT nor “intends to do so in the future.” *Id.* at 519. The AMA's copyright thus “poses no realistic threat to public access.” *Id.*

Here, in contrast, Lexis initially prepared or compiled the annotations at the state's direction; the an-

notations moreover govern an array of private, primary conduct. The Ninth Circuit in *Practice Management* had no cause to address those very different circumstances. As the Solicitor General explained in distinguishing *Practice Management* from *Veeck*, even if “some of the reasoning in [that case] differs from that in this case,” the Ninth Circuit was not “called upon to address ... anything like the [annotations] at issue here.” *Veeck* U.S. Br. 12. “Despite those comments, however, the Ninth Circuit did not address facts similar to those present here, and its general comments in [*Practice Management*] would certainly not be dispositive if that court faced the question whether the public may make copies in circumstances like those here.” *Id.* at 12 n.3.

In any event, the decisions cited by petitioners holding that a handful of works are copyrightable do not even finally determine whether those works may be published in the public interest. Even if a work is copyrightable, copying is not infringement when it constitutes “fair use.” 17 U.S.C. § 107. Fair use includes copying “for nonprofit educational purposes.” *Id.* § 107(1).

It is therefore significant that petitioners fail to acknowledge the most significant recent federal appellate ruling involving the publication of model codes incorporated into state law, in which respondent is the defendant as well: *American Society for Testing & Materials v. Public.Resource.Org, Inc.*, 896 F.3d 437 (D.C. Cir. 2018). *See supra* Part I. The D.C. Circuit strongly suggested that such standards are not copyrightable, given that there is “a serious constitutional concern with permitting private ownership of standards essential to understanding legal obligations.” 896 F.3d at 447.

But the D.C. Circuit remanded the case for consideration of whether and when posting codes constitutes fair use. The court first suggested that respondent could prevail “as a matter of law.” 896 F.3d at 447. But it ultimately remanded to the district court for a more detailed analysis of the different kinds of model codes. The court of appeals found that respondent “distributed these standards for the purpose of educating the public about the specifics of governing law.” *Id.* at 448. Further, “[w]here an incorporated standard provides information essential to comprehending one’s legal duties, for example, this factor would weigh heavily in favor of permitting a nonprofit seeking to inform the public about the law to reproduce in full the relevant portions of that particular standard.” *Id.* at 450. The court also recognized that such works “fall at the factual end of the fact-fiction spectrum, which counsels in favor of finding fair use.” *Id.* at 451. Judge Katsas separately concurred to stress that the plaintiffs’ view that copying model codes incorporated to law is copyright infringement “cannot be right: access to the law cannot be conditioned on the consent of a private party.” *Id.* at 458.

### **III. Petitioners’ Arguments On The Merits Are Not A Basis To Grant Review.**

#### **A. The decision below is consistent with this Court’s precedent.**

The court of appeals correctly understood this case to turn on whether the OCGA is an edict of government. To discern what hallmarks make a work an edict of government, the court of appeals began with the Court’s first cases addressing copyrightability of portions of reporters of judicial decisions. Pet. App. 13a.

Petitioners read *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834), to hold that the Court’s opinions were not copyrightable because they are “the law,” and from that infers that copyrightability of annotations to the opinion turns on whether they are themselves “the law.” Pet. 28. But *Wheaton* does not say that. Instead, the Court’s holding turned on who created the specific works published in the case reports. Because the opinions Mr. Wheaton published were “delivered by this [C]ourt,” and published under the authority of Congress, they were not subject to copyright. 33 U.S. (8 Pet.) at 668. Mr. Wheaton, however, was the author of his own marginal notes, his restatements of the attorneys’ arguments, and any other annotations he chose to publish. Nothing suggests that the Justices or any other court employee had any hand in creating Mr. Wheaton’s annotations.

The Court did not discuss whether the judicial opinions or Mr. Wheaton’s own annotations had the force of law. Most judicial opinions contain holdings that have the force of law, but they also include plenty of sentences and paragraphs that do not. For example, an opinion typically recounts facts that put the legal issues in their context, and often summarizes the parties’ competing arguments. But under this Court’s precedent, entire judicial opinions—not just the rationale and holdings—are in the public domain. Nor is there any dispute that concurring and dissenting opinions are in the public domain. And non-precedential and unpublished opinions, which cannot be cited for their holdings, also fall into the category of judicial opinions. So the Court’s statement that no one can hold copyright in the Court’s opinions can only be the result of finding that the Justices wrote their entire

opinions, not just the holdings, on behalf of the People, who all have the right to copy them.

Petitioners argue that the Eleventh Circuit’s decision conflicts with *Wheaton* because this “Court never suggested *Wheaton*’s statutory position as official reporter precluded him from asserting copyright over his annotations.” Pet. 29-30. They posit that in appointing an “official” reporter, the Court had the goal of “ensuring that its decisions were accurately reported and widely disseminated.” *Id.* at 30. Petitioners find the federal government’s arrangement with the Court’s official court reporter analogous to Georgia’s arrangement with Lexis. *Id.*

Those arguments lack merit. First (again), *Wheaton* does not say anything like that. Second, if the reason for letting the publisher hold copyright to annotations is to make it profitable to publish the official reports, then why does Georgia not provide in its agreement with Lexis that Lexis, as an author, owns the copyright in the OCGA’s annotations?

Third, if the *Wheaton* Court’s goal was to encourage an official publisher to disseminate its decisions, why stop with the annotations? Indeed, *Wheaton* wanted the Court to hold that it had exclusive rights to publish any reports containing the Court’s opinions. But the Court unanimously refused to do so.

The Court’s next edicts case, *Banks v. Manchester*, 128 U.S. 244 (1888), confirms that whether a work is promulgated by a government entity, exercising its sovereign power on behalf of the People, is the ultimate inquiry. Again, the Court commenced its analysis with the term “author” in the Copyright Act of 1790. *Id.* at 253. In *Banks*, the judges authored their

own opinions, syllabi, and headnotes on behalf of the People of Ohio. *Id.* The Court explained that judges, as public servants, cannot own “the fruits of their judicial labors.” *Id.* This includes not just their opinions but statements of cases and headnotes. All their work “constitutes the authentic exposition and interpretation of the law” and therefore is “free for publication to all.” *Id.* (citing *Nash v. Lathrop*, 142 Mass. 29, 35 (1886)). The official reporter was not the *author* of anything because he did not create anything by merely compiling the judicial opinions and judicial annotations. So *Banks* did not even analyze annotations initially prepared by a reporter or publisher, like those in the OCGA. Petitioners’ assertion (Pet. 30) that *Banks* holds that “while [judicial] opinions are not copyrightable, annotations of them are” is simply wrong.

Unlike *Banks*, *Callaghan v. Myers* did concern annotations written by an official court reporter, who registered copyright to them in his own name. 128 U.S. 617 (1888). Again, the Court did not analyze which portions of the reports were “the law.” Instead, it analyzed authorship of the elements of the reports: opinions and annotations. There was no suggestion in that case that the State of Illinois created the annotations or took any part in their preparation or sought to own a copyright in any part of the reports. But the reporter could obtain a private copyright on his annotations, because he wrote them himself. *Id.* at 650.

Petitioners contend that the decision below conflicts with *Callaghan* because the *Callaghan* Court held that annotations in Illinois’ official reports of the state supreme court were copyrightable. Pet. 31. But *Callaghan* expressly applied only the “general propo-

sition” that a reporter can obtain copyright on his volumes that will cover the portions he authored. 128 U.S. at 650. The Court’s choice of the word “general” demonstrates that there are exceptions, such as where a statute prohibits such a copyright. *Id.* at 647. The Court rejected the defendant’s argument that the reporter could not be an author because he was an appointed, salaried public official. *Id.* at 650. If the defendant argued another basis for an exception to the general proposition, the Court did not find it worth mentioning.

These early precedents show that the court of appeals was correct to focus on whether the entity responsible for the annotations was exercising the sovereign power of the People. But none of the three addressed similar facts to those presented here. None of the three involved annotated official *codes*. *Wheaton* and *Callaghan* considered annotations that were prepared entirely by reporters. Nothing in either suggests that a government entity supervised the reporter’s preparation of his annotations, retained ultimate control over them or had the right to approve or disapprove of them before they were published. And in none of the three cases did the government expressly use its sovereign power and vote to “merge” the reporters’ annotations with the judicial opinions.

**B. The opinion below is consistent with the Copyright Act.**

Petitioners contend that the decision below conflicts with the Copyright Act’s plain text because “the Act expressly provides that ‘annotations’ are copyrightable.” Pet. 24-26 (citing 17 U.S.C. §§ 101, 103).

But that is a *non sequitur*. The government edicts doctrine necessarily applies to works that are otherwise copyrightable.

The boundaries of the protection afforded to the kinds of works recognized as copyrightable by the Act are defined not only by other sections of the Copyright Act but also by judge-made common law doctrines. For example, the work must be original, and originality requires some degree of creativity. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991). Some aspects of judicial case reporters are not protected by copyright because they do not satisfy even the requirement of minimal creativity. *Matthew Bender & Co. v. West Publ'g Co.*, 158 F.3d 674, 681-82 (1998). Utilitarian expressions are not subject to copyright protection because they are covered, or not, by the Patent Act. 35 U.S.C. § 101; *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 149 (1989). Likewise, copyright protects expression in a copyrighted work, not ideas. And with very limited exceptions, works that have already fallen into the public domain, such as Mr. Wheaton's annotations in his 1880s Supreme Court reports, are no longer copyrightable by anyone. Because not all annotations are copyrightable, if the state's copyright to the annotations is valid, it is not just because they are annotations.

Petitioners next argue that because the Copyright Office registered Georgia's copyrights in the OCGA's annotations, and the registration is *prima facie* evidence of the validity of a copyright, the copyright in the 2014 OCGA annotations must be valid. Pet. 26 (citing 17 U.S.C. § 410(c)). But registration is not in any sense definitive. Petitioners ignore, moreover, that apparently the application to register the 2015

volumes has languished for over three years, notwithstanding the district court’s 2017 order upholding the validity of the copyrights on annotations in the earlier OCGA editions. Petitioners’ applications to register copyright in the more recent editions have also languished in the Copyright Office.

Surprisingly, petitioners now also assert that only federal edicts of government works are exempt from copyright and that Congress intended state works to be copyrightable. Pet. 25. Specifically, they contend that the Copyright Act’s description of “works of the United States Government” makes clear by negative implication that state-sponsored works are covered by copyright. *Id.* There is a presumption, however, against change in the common law. A statute will be construed to alter the common law only when that disposition is clear. *See, e.g., Midlantic Nat’l Bank v. N.J. Dep’t of Envtl. Prot.*, 474 U.S. 494, 501 (1986). There is no such disposition in the 1909 or 1976 Acts. On the contrary, the Copyright Office’s *Copyright Law Revision Study No. 33*, prepared in 1961 for the Subcommittee on Patents, Trademarks, and Copyrights (Study 33), describes how a 1906 draft of the relevant section expressly prohibited copyright in “official acts, proceedings, laws, or ordinances of public authorities—federal, state, or municipal—or judicial decisions.” Study 33 at 31. The same report explains that, in hearings, there was a suggestion that copyright in the text of state edicts should be expressly prohibited “lest the statute be deemed to overturn the common law prohibition in this regard.” *Id.* (citing *Hearings Before Joint Comm. on Patents on S. 6330 and H.R. 19853*, 59th Cong., 1st Sess. 133-35 (1906)). That sug-

gestion was dropped, however, “apparently on the assumption that the statute would not remove the common law prohibition as to the text of State laws and court decisions.” *Id.* at 32.

As discussed above, *Howell* and subsequent cases applied the edicts of government doctrine to state statutes. *Banks* and *Callaghan* applied it to state judicial opinions. The Copyright Office’s 1961 Register’s Report told Congress that under the present copyright law even though the provision in the 1909 Act only applied to the federal government, “[t]he judicially established rule ... still prevent[s] copyright in the text of State laws, municipal ordinances, court decisions, and similar official documents.” U.S. Copyright Office, *Copyright Law Revision: Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law*, 87th Cong., 1st Sess. 129 (1961). And even though the edicts of government doctrine is not codified as to the states, the Copyright Office recognizes that it applies to state and local governments, not just to the federal government: “As a matter of longstanding public policy, the U.S. Copyright Office will not register a government edict that has been issued by any state ....” U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices* § 313.6(C)(2) (3d ed. 2017).

Petitioners assert that the Copyright Office’s 1961 Report nevertheless recommended not extending the prohibition in 17 U.S.C. § 105 to works of state governments. The reason offered is that states lacked adequate printing facilities and therefore relied on copyright to motivate private publishers to print and disseminate state works at the publisher’s own expense. Pet. 26. Petitioners imply that the Copyright

Office made this recommendation in the 1961 report that “served as a foundation for the modern Copyright Act.” *Id.* But the report itself explains that the suggestion to extend the prohibition on states copyrighting informational publications was made “[d]uring the preliminary consideration of the 1909 act.” *Report of the Register of Copyrights, supra*, at 130. The only reason the Copyright Law Revision Report even includes the historical reason that the states lacked printing facilities is that the office had tried to find the reasons why copyright is prohibited for the federal government’s publications. *Id.* The same report discusses the legislative history of the same prohibition in the Printing Law of 1895. Any argument that the states needed copyright in 1909 as an incentive for private publishers to print their codes is of limited relevance 110 years later. Today, anyone with access to the internet, including the state itself, can readily disseminate a state’s legal materials. Indeed, that is how this dispute arose.

**C. The ruling below is properly grounded in principles of due process and respect for the Rule of Law.**

Civilized nations have long embraced the concept of the Rule of Law—the principle that prescribed law, rather than the whims and desires of any individual, should govern society. The law is our central protection against tyranny and injustice. Only if the law is truly free and available can the state reasonably expect people and enterprises to obey the law, know their rights under the law, and evaluate and improve the law.

The People, not state governments, own the law because “[t]he citizens are the authors of the law, and therefore its owners, regardless of who actually drafts

the provisions, because the law derives its authority from the consent of the public, expressed through the democratic process.” *Bldg. Officials & Code Adm. v. Code Tech., Inc.*, 628 F.2d 730, 734 (1st Cir. 1980). Citizens also must have free access to the laws that govern them to satisfy the notice requirement of the Due Process Clause. *Id.* “The principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.” *United States v. Lanier*, 520 U.S. 259, 265 (1997) (alteration and citation omitted); *see also Reynolds v. United States*, 565 U.S. 432, 442 (2012) (convicted sex offenders, aware of complexities, lacunae, and difficulties, might reach different conclusions about whether new registration requirements applied to them, absent a clarifying opinion from the Attorney General).

Justices of this Court have also recognized that certain kinds of official annotations carry great weight in interpreting rules and statutes. *Tome v. United States*, 513 U.S. 150, 167 (1995) (Scalia, J., concurring in part and in the judgment) (Advisory Committee’s Notes to the Federal Rules of Evidence); *Schiavone v. Fortune*, 477 U.S. 21, 31 (1986) (Advisory Committee’s comments to the Federal Rules of Civil Procedure); *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (agency’s interpretation of its own regulations).

Here, the Georgia Legislature not only commissioned and supervised the annotations but merged them with the statutes to create one edict. Pet. App. 40a-41a. The court below correctly found that “any understanding of the statutory text arrived at without reference to the annotations is axiomatically incorrect.” *Id.* at 41a. The court also noted almost a dozen instances in which courts treated the annotations as

authoritative. *Id.* at 43a-44a. Petitioners quibble that those cases relied on comments Georgia Bar state committees authored and that petitioners are not asserting copyright in those comments (although you cannot tell that from their complaints or other assertions of copyright in all non-statutory portions of the OCGA). That argument misses the point that courts, and presumably the public, refer to the OCGA's annotations, as the Legislature intended, to fully understand the statutes.

The Legislature, through the Commission, decided what kinds of annotations the merged OCGA would include. Today petitioners call them mere research tools. But in 1982, before Michie began publishing the first OCGA, the Legislature touted them with pride. Legislative Counsel “in charge of the Code Revision Division” Terry McKenzie described to Georgia State Bar Journal readers why various categories of annotations would help to using the Code. Resp. C.A. App. 265-67. Multiple indexes enable searching for Acts by their popular names, and a local law index “represents a significant historical resource.” *Id.* at 266. History lines help readers trace each code section back to its origin. *Id.* The Code includes editorial notes “where the editors or the Commission feel that such notes would be helpful.” *Id.* Along with judicial decisions, the OCGA contains summaries of opinions of the attorney general and references that direct the user to *American Jurisprudence*, *Corpus Juris Secundum*, *American Law Reports*, and *Uniform Laws Annotated*. *Id.* at 267. In October 2015, the Commission pleaded that the annotations include “analysis and

guidance” and that the judicial summaries are “valuable to attorneys and others researching the Code.” *Id.* at 105, 110.

Petitioners’ amici go even further to show the annotations’ importance to understanding the law. The amici States (at 11) characterize analogous annotations in their codes as “a valuable legal research tool” that “the legal community still uses ... heavily.” Moreover, “[a]bsent official annotated state code, *pro se* litigants’ ability to understand the laws that govern them would be severely hampered.” *Id.* at 12-13 (citing *Gilmore v. Lynch*, 319 F. Supp. 105, 110 (N.D. Cal. 1970), *aff’d sub nom. Younger v. Gilmore*, 404 U.S. 15 (1971)). Amicus Matthew Bender (Lexis) agrees that “[a]nnotations provide great benefit to the public’s understanding of the law.” Bender Br. 2, 4 (citing *The Federalist No. 62* (James Madison) at 323-24 (George W. Carey & James McLellan eds., 2001)). They are “pure gold.” *Id.* at 5 (citation omitted). For all these reasons, the OCGA’s annotations are necessary for a citizen to get the most of out of the OCGA. For some Georgia citizens, this may be the difference between understanding how to comply with the law and having to guess, risking lawsuits, fines or even jail. The Due Process Clause and the Rule of Law require that the public have unfettered access to all parts of the OCGA.

**CONCLUSION**

Certiorari should be granted and the judgment affirmed.

Respectfully submitted,

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