No. 18-1150

IN THE
Supreme Court of the United States

STATE OF GEORGIA, *et al.*,
Petitioners,
v.

PUBLIC.RESOURCE.ORG, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 25 MEDIA ORGANIZATIONS IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are the Reporters Committee for Freedom of the Press, American Society of Magazine Editors, Association of Alternative Newsmedia, Atlantic Media, Inc., C-SPAN, California News Publishers Association, Freedom of the Press Foundation, Gannett Co., Inc., Investigative Reporting Workshop at American University, Los Angeles Times Communications LLC, The Media Institute, MediaNews Group Inc., Meredith Corp. – Local Media Group, Mother Jones, MPA – The Association of Magazine Media, National Newspaper Association, National Press Photographers Association, The New York Times Company, The News Leaders Association, Online News Association, Quartz Media, Inc., Radio Television Digital News Association, The Seattle Times Company, Society of Environmental Journalists, Society of Professional Journalists, and the Tully Center for Free Speech (collectively, "*amici*").

Amici file this brief in support of Respondent Public.Resource.Org, Inc. ("Public Resource"). As representatives of the news media, *amici* have an interest in ensuring the public availability of government documents, especially those as important as a state's only official statutory code. Journalists frequently provide coverage of legal issues—ranging from a local newspaper reporter working the

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* state that no counsel for any party authored this brief in whole or in part, and no person other than the *amici curiae*, its members, or its counsel made monetary contributions intended to fund the preparation or submission of this brief. The parties have consented, via email, to the filing of this brief.

overnight crime beat to national correspondents writing about the work of this Court. Because many legal journalists are not themselves lawyers, access to primary legal materials like the Official Code of Georgia Annotated is essential to informing their work, and in turn to educating members of the public about the laws that govern their lives. *Amici* therefore have an interest in opposing state action that limits access to the law, including through efforts to narrow the government edicts doctrine. *Amici* also write to address the relationship between the First Amendment right of access and the government edicts doctrine, which the parties' briefing did not address.

INTRODUCTION AND SUMMARY OF ARGUMENT

This is a case about a rule that everyone agrees must be right: you can't copyright the law. The trouble is that no one seems certain why that's so. And without a clear understanding of where the government edicts doctrine comes from, delineating its scope becomes difficult. Grounding the rule in the structural protections of the First Amendment reduces confusion, harmonizes the doctrine, and helps decide this case.

By modern standards, the three 19th Century cases announcing the government edicts doctrine are thin on legal reasoning. The rule that court opinions cannot be copyrighted was first announced in the final sentence of *Wheaton v. Peters*: "It may be proper to remark that the court are unanimously of opinion, that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right." 33 U.S. 591, 668 (1834). The Court later turned this observation into a holding, and extended it to the states, in *Banks v. Manchester*, 128 U.S. 244 (1888), and *Callaghan v. Myers*, 128 U.S. 617 (1888). The reasoning of *Banks* retained the conclusory quality of the reasoning in *Wheaton* — "there has always been a judicial consensus" that judges cannot secure a copyright in the fruits of their labors. *Banks*, 128 U.S. at 253. The *Banks* Court expounded on its rationale briefly, in a sentence that the parties in this case have thoroughly dissected: "The whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all, whether it is a declaration

of unwritten law, or an interpretation of a constitution or a statute." *Id.* at 253–54.

The parties here agree that the same logic extends to statutes. The question is whether annotations that appear alongside the statutory text in the Official Code of Georgia Annotated ("OCGA") are covered as well. To answer that question, the parties and *amici* have spun various tests from the caselaw's sparse threads. Petitioners use *Banks*'s "binding every citizen" language to create a "force of law" test. Pet'rs' Br. at 32. As Respondent's brief makes clear, however, that test fails in multiple respects. The phrase "binding every citizen" in the *Banks* opinion is set off by two levels of commas, making it grammatically inessential. And a "force of law" test would produce absurd results, like copyright protection for legislative history, unenacted bills, and judicial dissents.

By contrast, the United States in its *amicus* brief proposes a test based on another portion of the same sentence from *Banks*, arguing that the rule should cover the "whole work" of legislators, while Respondent focuses on whether an edict flows from the "authority of the state." Resp't's Br. at 19. Those rules come closer to the essence of the old cases. Contrary to the United States' conclusion, application of either could lead to affirmance, given the official nature of the annotations at issue and the Georgia Legislature's role in their creation. Like the lower court, Petitioners, Respondent, and the United States all tie their proposed approaches to the text of the Copyright Act and the meaning of the word "author."

But the universal intuition animating the rule that a state cannot copyright its laws is not about authorship. It is about *access*. For instance, Judge Katsas on the United States Court of Appeals for the District of Columbia Circuit wrote separately in a related case to emphasize that "access to the law cannot be conditioned" on copyright, as "a matter of common sense." *Am. Soc'y for Testing & Materials v. Public.Resource.Org*, 896 F.3d 437, 458 (D.C. Cir. 2018) (Katsas, J., concurring) (identifying the First Amendment as a possible source for the government edicts doctrine); *see also Bldg. Officials & Code Adm'rs v. Code Tech., Inc.*, 628 F.2d 730 (1st Cir. 1980) (grounding the government edicts doctrine in "the right of the public to know the law to which it is subject"). And if the government edicts doctrine is about the rights of citizens to obtain information about their government, the First Amendment provides a more logical and legally coherent source for the rule.

In addition to securing a negative right against government censorship, the First Amendment also plays a structural role in ensuring public oversight of government. It safeguards public debate that is not only open, but also informed. For example, this Court held in a series of landmark decisions that the public has a qualified First Amendment right of access to criminal trials. And lower courts have extended that right to civil cases and court records. The same First Amendment principles animate the government edicts doctrine as it applies to the statutory law at issue in this case. As the United States argues in its brief, if the government edicts doctrine prevents copyright of judicial decisions, "it follows *a fortiori*

that the actual sources of law that judges interpret and apply — including statutory law produced by lawmakers — must be equally available." U.S. Amicus Br. at 14. Likewise, the structural protections embodied in the First Amendment require access not only to judicial proceedings, as recognized by this Court, but also to the law itself.

Understanding the First Amendment as the source of the government edicts doctrine presents several benefits. First, it provides a useful analogy to this Court's right of access cases, which relied on the complementary and related considerations of logic and experience. The cases have looked to whether materials have traditionally been open to the public and whether public access would facilitate the proper functioning of the government process in question. The Court can therefore look for guidance to its own modern caselaw, rather than trying to unwind one sentence from a 130-year-old opinion. And applying these insights here points toward public access to statutory law. The law ordering people's lives has been public historically, and the logic of self-governance, as the lower court observed, necessitates that the public have access to the laws passed in their name and governing their affairs.

Rooting the government edicts doctrine in the First Amendment also helps resolve the narrower issue in this case. The lower courts have extended the right of access from court proceedings themselves to supporting documents, which are often necessary to make sense of what happened in court. By analogy, the government edicts doctrine's right of access to statutes should extend to the official annotations of

the statutory law, which help illuminate the meaning of often opaque statutory text.

Public policy, a proper consideration under *Banks*, reinforces this conclusion. Members of the news media need access to the law, including official explanatory materials, in order to provide coverage of both court proceedings and of legislative activity. Although Georgia and the state *amici* take pains to deny that the annotations in the OCGA are authoritative, they also argue that the OCGA is an important tool for researching and understanding Georgia law. The public and press therefore need access to it, free from state-imposed restrictions, including claims of copyright.

Even if the Court chooses not to tie the government edicts doctrine directly to the First Amendment, and instead locates the rule in the meaning of the word "author" in the Copyright Act, that statute should be read to avoid a possible collision with the First Amendment's structural role. The Court should therefore deny copyright protection to the OCGA, the only official code of the State of Georgia, in order to ensure that the public has unfettered access to its laws.

ARGUMENT

I. The government edicts doctrine, grounded in the First Amendment, prohibits Georgia from copyrighting the OCGA annotations.

Like the right of access to judicial proceedings, the government edicts doctrine flows from the structural aspects of the First Amendment, providing

a clear doctrinal justification for the rule. The First Amendment not only prevents the government from infringing on protected speech, but also affirmatively requires the government to grant access to certain information. In *Richmond Newspapers v. Virginia*, this Court recognized a public right of access to criminal trials grounded in the First Amendment. 448 U.S. 555, 580 (1980). The Court held that the right of access was "implicit" in the expressly guaranteed freedoms of the First Amendment, which embody a "common core purpose of assuring freedom of communication on matters relating to the functioning of government." *Id.* at 575. Justice Brennan's concurrence emphasized that the First Amendment "has a *structural* role to play in securing and fostering our republican system of self-government." *Richmond Newspapers*, 448 U.S. at 587 (Brennan, J., concurring) (emphasis in original). "Implicit in this structural role is not only 'the principle that debate on public issues should be uninhibited, robust, and wide-open' . . . but also the antecedent assumption that valuable public debate — as well as other civic behavior — must be informed." *Id.* (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

The Court reinforced this view in *Globe Newspaper Co. v. Superior Court*, writing that a major purpose of the First Amendment was to protect free discussion of governmental affairs and "ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government." 457 U.S. 596, 604 (1982); *see also Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 505–10 (1984) (*Press-Enterprise I*). In determining

whether the right of access applied in a given circumstance, these cases identified the "two complementary considerations" of logic and experience. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 (1986) (*Press-Enterprise II*). The Court looked to whether "the place and process have historically been open to the press and the general public," as well as whether "public access would play a significant positive role in the functioning of the particular process in question." *Press-Enterprise II*, 478 U.S. at 13–14.

The First Amendment's structural role also underlies the government edicts doctrine — and requires access to the statutory law. If the First Amendment requires public access to criminal trials so that citizens may oversee and participate in government, then citizens must also have access to the laws that organize their society (and that form the basis of those criminal trials). Only then can the First Amendment fulfill its structural purpose in "assuring freedom of communication on matters relating to the functioning of government," "securing and fostering our republican system of self-government," and informing "valuable public debate." *Richmond Newspapers*, 448 U.S. at 575; *id.* at 587 (Brennan, J., concurring). And although most law today is statutory, for much of this country's history, the codification of certain laws in statutes worked in parallel with the development of other legal areas through the common law in court. *See* Charles M. Cook, The American Codification Movement: A Study of Antebellum Legal Reform (1981). Guaranteeing access to one but not the other would be nonsensical.

Looking to the considerations of experience and logic leads inexorably to the same conclusion — citizens must have access to statutes. Public dissemination of legal codes enjoys a rich historical tradition, even in eras when most of the public was illiterate. Public access to the law gave citizens notice of the rules of conduct with which they needed to comply and allowed for public oversight of justice. In the 18th century BCE, Hammurabi (or someone acting in his name) displayed his legal code on a stele in order to create a public space for contemplation of his commands. The inscription suggests "a necessary and vital relationship between the king's divinely mandated obligation to provide just ways for his people and the opportunity of his people to have access to the written and public account of what constituted those just ways." Kathryn E. Slanski, *The Law of Hammurabi and Its Audience*, 24 Yale J. of L. & Human. 97, 109–10 (2012). In ancient Greece, codified laws initially served as instruments for aristocrats to enforce the existing social hierarchy, but ultimately became the "very core" of the *polis*, creating a political identity for the citizen community in assembly — the origins of democracy. Karl-J. Holkeskamp, *Written Law in Archaic Greece*, 38 Proceedings of the Cambridge Phil. Soc'y 87, 106–07 (1992).

Legislators in colonial America began codifying and publicizing their statutes after realizing that their neighbors had no idea what laws had been passed. In 1710, the Pennsylvania assembly began publishing its laws twice per week, in part so "interested groups could appeal acts before the end of a session." Alison G. Olson, *Eighteenth-Century*

Colonial Legislatures and Their Constituents, 79 J. of Am. Hist. 543, 543–67 (1992). Massachusetts started publicizing its legislative journals in 1715, in part to rally support in a conflict with the governor. Publication of the laws had begun to facilitate equal access to justice. *Id.* "Pennsylvanians annoyed with what they thought to be unfair practices on the part of flour inspectors in the 1760s confronted the inspectors with copies of the laws." *Id.*

The Constitution was published in a newspaper two days after it was signed. Pa. Packet and Daily Advertiser, Sept. 19, 1787. Shortly thereafter, on September 24 and September 25, the Pennsylvania assembly "ordered the printing of 3,000 copies of the Constitution in English and 1,500 copies of the Constitution in German to be distributed throughout the state for the inhabitants thereof." Mulligan et al., *Founding Era Translations of the U.S. Constitution*, 31 Const. Comment. 1, 3 (2016). As James Madison put it, "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both." Letter from James Madison to W.T. Barry (Aug. 4, 1822), in 9 The Writings of James Madison 103 (G. Hunt ed., 1910). Taken together, this history demonstrates a clear tradition of public access to law.

Turning to logic, many of the same factors that the Court considered in holding that criminal trials must be open also apply to statutes. Like open trials, access to the law promotes both fairness and the appearance of fairness. *Press-Enterprise I*, 464 U.S. at 508. Public dissemination of the law provides an important check on the legislature, restraining potential abuses of power. *Globe Newspaper Co.*, 457

U.S. at 606. Access to the laws that govern every individual's life is also paramount for self-governance. As the Court wrote in *Richmond Newspapers*, "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." 448 U.S. at 572. Although the court below based its holding in the meaning of the statutory term "author," rather than the First Amendment, much of its analysis sounded in the same register as that of *Richmond Newspapers*: "[T]he people, as the reservoir of all sovereignty, are the source of our law" and "there are strong public policy interests in giving the public unfettered access to the law." Pet App. 3a, 22a. In sum, both experience and logic support public access to the statutory law.

That the form of the access restriction at issue is a state government claiming copyright in a statute book, rather than the sealing of the courtroom, is irrelevant. The practical effect is the same: The public is denied access to information to which it has a First Amendment right. Just as First Amendment speech rights limit the scope of copyright protection through the fair use doctrine, so too must the copyright laws comply with the First Amendment's structural access guarantees. While fair use is a defense to copyright infringement, the First Amendment's structural role limits what documents a government can copyright in the first place. The public's right of access to the law prohibits a state from copyrighting its statutory text. Petitioners' brief fails to recognize the distinction between fair use and the right of access, and their passing First Amendment analysis is therefore incomplete. *See* Pet'rs' Br. at 53.

The First Amendment thus requires that the statutory law be public. And deriving the government edicts doctrine from the First Amendment's structural role also helps resolve the narrower issue in this case — whether Georgia can copyright not the binding statutory text itself, but rather the official annotations that accompany it.

Here, the lower courts' application of this Court's right-of-access precedents is instructive. The circuit courts have resoundingly held that the right of access applies not only to trial proceedings, but also to court records. *See, e.g.*, *In re Providence Journal Co.*, 293 F.3d 1 (1st Cir. 2002); *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83 (2d Cir. 2004); *United States v. Antar*, 38 F.3d 1348 (3d Cir.1994); *Doe v. Pub. Citizen*, 749 F.3d 246 (4th Cir. 2014); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165 (6th Cir. 1983); *Grove Fresh Distrib., Inc. v. Everfresh Juice Co.*, 24 F.3d 893 (7th Cir.1994); *In re Search Warrant*, 855 F.2d 569 (8th Cir. 1988); *Associated Press v. U.S. Dist. Court*, 705 F.2d 1143 (9th Cir. 1983); *U.S. v. Ochoa-Vasquez*, 428 F.3d 1015 (11th Cir. 2005). This is for a simple reason: Access to such records is necessary to understand what is transpiring in the proceedings. *See, e.g.*, *Brown & Williamson*, 710 F.2d at 1177 (observing that "court records often provide important, sometimes the only, bases or explanations for a court's decision"); *see also Associated Press*, 705 F.2d at 1145 (*quoting Globe Newspaper Co.*, 457 U.S. at 606) (finding that court records "are often important to a full understanding of the way in which 'the judicial process and the government as a whole' are functioning").

Just as courts have applied the right of access to court records because they are necessary for understanding court proceedings, so too should this Court apply the government edicts doctrine to official annotations, promulgated in the name of the state, that are important for understanding statutory text. Indeed, Georgia and its state *amici* admit that the OCGA is an important research tool that facilitates the public's "ability to understand the laws." States' Amicus Br. at 22. Especially for non-lawyers (but also for lawyers), statutes can be opaque and confusing. Of course, the summaries of cases interpreting those statutes might also be difficult to parse, but the two together are more likely to convey meaning than either on its own. In fact, the OCGA's very first annotation advises readers that relying on an unofficial code could lead to "peril." Pet. App. 41a (citing Ga. Code Ann. § 1-1-1 (Judicial Decisions)). Georgia has only one official code, and it must be public in its entirety.

Petitioners make their own competing analogy. *Callaghan* held that a statutorily appointed reporter of Illinois Supreme Court decisions could claim a copyright in his own marginal notes, but not the substance of the opinions. 128 U.S. at 649–50. Georgia therefore argues that it can hold a copyright in the annotations, just not the statutory text. Respondent ably distinguishes that case in its brief, explaining that the reports in question were published in the name of the reporter, not in the name of the state. Resp't's Br. at 31–33.

And practically speaking, the fact pattern here is a far cry from marginalia in an 1888 law report. Georgia today has only one official code, statutorily

created by merging the text of the statutes with the official annotations. If Georgia may copyright part of the OCGA, that will deny meaningful access to all of it. As the next Section explains, access to the unofficial, unannotated code online or to the annotated code at certain libraries is no substitute for public access to the official code without the significant barrier to access that a copyright claim from the state government presents. Because the government edicts doctrine, grounded in the First Amendment, prohibits copyrighting statutes, and because the annotations of the OCGA are part and parcel of the state's official codification of its statutes, no copyright may be maintained in the OCGA.

II. Shielding portions of the OCGA with copyright protection burdens journalism and harms the public interest.

Access to the OCGA matters for lawyers, members of the public, and the press. Georgia and the state *amici* argue strenuously that the OCGA is not authoritative, in order to skirt the government edicts doctrine. But they undercut their own argument by then also asserting a public policy interest in the existence of official annotated codes.

The states' *amicus* brief calls the OCGA and other official annotated codes like it a "valuable legal-research tool," which surveys suggest is used by a majority of lawyers "frequently or very frequently" to find relevant case law. States' Amicus Br. at 21–22. And the states go so far as to acknowledge that "[o]utside the legal community, the need for annotated codes is even greater." *Id.* Pro se litigants and other

citizens seeking to learn about the law rely on annotations to "find cases that interpret a statute that affects their interests" and "read brief summaries of those cases' holdings." *Id.* Absent access to official annotated codes, citizens' "ability to understand the laws that govern them would be seriously hampered." *Id.* And while unofficial annotated codes may be available, "unofficial annotated codes are no substitute for official annotated codes." *Id.* Within the OCGA itself, the code's very first annotation cites favorably to a case warning that "[a]ttorneys who cite unofficial publications of the 1981 Code do so at their own peril." Pet. App. 41a (citing Ga. Code Ann. § 1-1-1 (Judicial Decisions)). *Amici*'s point exactly.

If the only non-perilous way for lawyers, the public, and the press to learn about the laws of Georgia is to read the OCGA, then public policy considerations strongly cut against restricting access to the official statute book through copyright protection, or otherwise.

Members of the news media have an especially strong interest in access to the OCGA. Journalists who report on legal issues, whether by working the crime beat, investigating corporate malfeasance, or covering the courts, often must read and understand the law. But they are not usually trained lawyers themselves, and especially at smaller and non-profit news organizations, they rarely have ready access to sophisticated legal resources. As such, public access to the OCGA and other official annotated codes like it could be immensely beneficial to journalists' knowledge of the law, and by extension, the public's own understanding.

When Brendan Keefe, an investigative reporter for NBC affiliate WXIA 11 Alive emailed Wane Allen, Legislative Counsel to the Georgia General Assembly, asking to inspect the current OCGA, Allen denied the request, telling Keefe to inspect the OCGA at a public library or buy a copy from Lexis "like anyone else." Joint App. 161; *see also* Brendan Keefe & Lindsey Basye, '*If You Don't Know What the Law Is, Can You Obey It?': Ga. Fights to Keep State Laws off the Internet*, 11 Alive (Sept. 20, 2019), https://perma.cc/9RQV-S3ER. The press cannot fulfill its essential role of informing the public and holding government officials accountable in our democratic system when reporters are shut out from important government documents.

Allen's suggested alternative avenues for access do not change this conclusion. The availability of the statute books at a number of public libraries is better than nothing. But it is of little consequence to people who do not live near one of those libraries or to people who are subject to Georgia's laws based on their contacts with the state but who live somewhere else entirely. And providing copies of the OCGA at libraries is also a matter of grace. If this Court holds that the annotations may be copyrighted, Georgia could amend its agreement with Lexis to stop providing copies to libraries at any time, without legal consequence.

As for the suggestion that members of the public or the news media should buy a copy of the OCGA "like anybody else," that purchase is beyond the means of many, if not most, Georgians. Although Georgia argues that its arrangement with Lexis ensures the affordability of the OCGA, it still costs

more than $400. And other states' official copyrighted codes are even more expensive. For example, the official Michie's Annotated Code of Maryland is listed on Lexis's website for more than $2,000. To borrow a historical reference from Judge Katsas, access to a state's official laws cannot be reserved for those rich enough to pay hundreds of dollars for them, "just as it cannot be conditioned on the ability to read fine print posted on high walls." *Am. Soc'y for Testing & Materials*, 896 F.3d at 458 (citing Suetonius, Gaius Caligula ¶ XLI, in The Lives of the Caesars (J.C. Rolfe trans., Macmillan Co. 1914) ("[H]e . . . had the law posted up, but in a very narrow place and in excessively small letters, to prevent the making of a copy.")).

Public policy generally favors access to all public records. Here, Petitioners seek to copyright not just any public record, but a state's official code, the annotations to which are essential for the public and press to make meaningful sense of the actual statutes. Public policy considerations, including the interests of the news media, cut strongly against permitting state claims of copyright in this case.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge the Court to affirm the judgment of the Court of Appeals.

Respectfully submitted,

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