No. 18-1150

In The
Supreme Court of the United States

STATE OF GEORGIA, et al.,

Petitioners,

v.

PUBLIC.RESOURCE.ORG, INC.,

Respondent.

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

BRIEF OF AMERICAN LIBRARY ASSOCIATION, ASSOCIATION OF COLLEGE AND RESEARCH LIBRARIES, ASSOCIATION OF RESEARCH LIBRARIES, AND THE AMERICAN ASSOCIATION OF LAW LIBRARIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

JENNIFER M. URBAN
Counsel of Record
ERIK STALLMAN
SAMUELSON LAW, TECHNOLOGY & PUBLIC POLICY CLINIC
UNIVERSITY OF CALIFORNIA, BERKELEY, SCHOOL OF LAW
353 Boalt Hall
Berkeley, CA 94720-7200
(510) 642-7338
jurban@law.berkeley.edu

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

INTEREST OF *AMICI CURIAE*

The American Library Association ("ALA"), the Association of Research Libraries ("ARL"), the Association of College and Research Libraries ("ACRL"), and the American Association of Law Libraries ("AALL") respectfully submit this brief in support of the Respondent, Public.Resource.Org.[1] Together, these four organizations comprise more than 100,000 libraries and 350,000 individuals.

Library associations' interest in this case is to assist this Court by explaining how libraries rely on the government edicts doctrine to provide access to, and preserve, official legal materials, and why an overly limited or uncertain government edicts doctrine would undermine libraries' ability to perform these functions.

The ALA works to promote and improve library services and the profession of librarianship, to enhance learning, and to ensure everyone has access to information. The ALA works to expand library services not only in the United States, but around the world. It is a nonprofit consisting of more than 57,000 libraries, library trustees, and friends of libraries.

The ARL is composed of libraries and archives housed at private and public universities, federal

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[1] In accordance with Sup. Ct. R. 37.6, *amici* affirm that no counsel for a party authored this brief, in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution to fund the preparation or submission of this brief. Counsel for the parties have consented to this brief.

government agencies, and large public institutions in Canada and the United States. The ARL, on behalf of its members, works to advance research, learning, and scholarly communication. It aims to foster exchanges of ideas and to advocate for policy positions that reflect the values of the library, scholarly, and higher education communities, including issues around intellectual freedom, access to information, and preservation of knowledge.

The ACRL, the largest division of the ALA, represents over 10,000 individuals and libraries. Its mission is to provide a forum and to advocate for academic and research librarians. The ACRL works to develop leaders who will improve academic and library resources and advance learning, research, and teaching.

AALL advances the profession of law librarianship and legal information and supports the professional growth of its members through leadership and advocacy in the field of legal information and information policy. AALL was founded in 1906 on the belief that people—lawyers, judges, students, and the public—need timely access to relevant legal information to make sound legal arguments and wise legal decisions. On behalf of its nearly 4,000 members, AALL promotes equitable and permanent public access to trustworthy legal information, continuous improvement in access to justice, and the essential role of law librarians and legal information professionals within their organizations and within their community to make the whole legal system stronger.

Citizens patronize libraries to access and learn about the law and their government. Citizens also rely on libraries to preserve our cultural heritage, including our nation's laws. By reaffirming the government edicts doctrine, the Eleventh Circuit's decision assists libraries in fulfilling these roles. The "force of law" standard pressed by the State of Georgia, on the other hand, would implausibly exclude important portions of the law from the public domain, and would do so in a confusing, unadministrable manner. The ensuing uncertainty would undermine libraries' ability to connect citizens with the law. *Amici* thus respectfully request that the Court affirm the Eleventh Circuit's decision that the *Official Code of Georgia Annotated* ("O.C.G.A.") falls under the government edicts doctrine, and thus is, in its entirety, not copyrightable.

SUMMARY OF THE ARGUMENT

Libraries rely on the government edicts doctrine. It provides an essential safe harbor from potential copyright liability for libraries as they fulfill their societal role of preserving and providing access to the cultural record, of which the law is a core component.

Libraries' efforts to provide access to and preserve government edicts track centuries of recognition that access to government promulgations anchors and legitimates the relationship between the government and the governed. While librarians are not legal practitioners, law libraries, public libraries, and research

libraries all help patrons access and research the law. To fulfill these responsibilities, libraries depend on a government edicts doctrine that is clear, comprehensive, and administrable. The understanding that emerges from the Eleventh Circuit's decision below, from this Court's early decisions in *Wheaton v. Peters*, *Banks v. Manchester*, and *Callaghan v. Myers*, and from centuries of tradition, meets these criteria. All describe a doctrine sufficiently comprehensive to encompass the full range of government edicts, including those that do not explicitly bind citizens but that still communicate the sovereign's priorities, preferences, and reasoning.

Georgia's proposed narrowing of the government edicts doctrine to edicts with the "force of law," however, would fulfill none of these criteria. Georgia's approach would implausibly exclude from the public domain both the O.C.G.A.—the official and authoritative version of Georgia's law—and many other important government edicts. Moreover, it would do so in a confusing, unadministrable manner that would force libraries to engage in needless and near-impossible line-drawing.

Georgia's suggested lesser alternatives to the O.C.G.A.—the LexisNexis online unannotated code, and the limited number of CD-ROMs—are manifestly insufficient. The online unannotated code requires assent to boilerplate terms of service that imply copyright liability over clearly public domain material and contravene the privacy protections that libraries extend to their patrons. While Georgia makes some CD-ROM copies of the complete O.C.G.A. available, they

are too few in number to provide meaningful access. Finally, copyright limitations, though helpful, cannot replace the government edicts doctrine.

For libraries, it is crucial that the government edicts doctrine aligns both with the sovereign's duty to communicate its value judgments, priorities, reasoning, and rules, and with citizens' right to access government edicts freely and fully. The O.C.G.A. is an edict of government. It should be available in its entirety to citizens. Neither hiring a private publisher nor merging the statutory text with annotations should allow Georgia to alter the clarity of a doctrine essential to libraries and their patrons.

ARGUMENT

I. Libraries Rely on the Government Edicts Doctrine to Connect Citizens with the Law

Libraries equip citizens with the information required to participate in democracy. This is a core library function. Through their collections and services, libraries help patrons exercise their First Amendment right of access to information and "ensure that [the] constitutionally protected 'discussion of governmental affairs' is an informed one," enabling "citizen[s to] effectively participate in and contribute to our republican system of self-government." *Globe Newspaper Co. v. Super. Ct. for Cty. of Norfolk*, 457 U.S. 596, 604–05 (1982). On dedicating his presidential library, President Franklin Delano Roosevelt noted that, when

examining the recorded history of "the building of permanent institutions like libraries and museums for the use of all the people, it has been among democracies that such building has flourished"; and that the link between libraries and democracy was especially clear in the United States, "because we believe that people ought to work out for themselves, and through their own study, the determination of their best interest." Franklin Delano Roosevelt, *Speech of the President: Dedication of the Franklin D. Roosevelt Library, June 30, 1941*, 4–5 Franklin: Access to the FDR Library's Digital Collection, https://perma.cc/W4RB-GYMG (from transcript, omitting phrases included in prepared remarks but omitted from the delivered address).

Both nationally and in Georgia, citizens rely on libraries for access to information. In 2016, public libraries in the United States saw 1.35 billion visits from patrons, and library staff assisted with 245.7 million reference transactions. Institute of Museum and Library Services ("IMLS"), *Public Libraries in the United States Fiscal Year 2016* 18 (May 2019) https://perma.cc/V64N-RL6F. That same year, Georgia public libraries served over ten million people through 410 libraries. IMLS, *Georgia Public Libraries Fiscal Year 2016*, https://perma.cc/PC9W-QGK6.

Law libraries, public libraries, and research libraries all play a role in the effort to help citizens exercise their rights and responsibilities by providing access to, and preserving, government edicts.

Law libraries serve legal professionals, academics, and, in particular, community residents with pressing legal needs or simple intellectual curiosity about the law. In 2015, for example, more than 70 percent of walk-in reference requests at the Arthur Neef Law Library at Wayne State University came from individuals unaffiliated with the university, and 45 percent of those requests came from community patrons. Beth Applebaum *et al.*, *Bringing Law to the Community: Facilitating Access to Justice in Metropolitan Detroit*. Paper presented at the 2016 International Federation of Library Associations ("IFLA") World Library and Information Congress ("WLIC") Conference, Columbus, Ohio, 3 (2016), https://perma.cc/5L42-HVRA. The experience at Wayne State is typical. A 2019 survey found that 98 percent of law libraries offer reference or research services to self-represented litigants and that 70,500 of them take advantage of those services each month. Self-Represented Litigation Network, "Key Findings and Takeaways," *Open to the Public: How Law Libraries Are Serving Self-Represented Litigants Across the Country* (2019), https://arcg.is/1LfmT5.

Public libraries partner with law libraries to provide legal information to citizens. Patrons view the public library as a "comfortable entry point" to access all kinds of information, "thus making [the library] a known and comfortable place to seek legal information." Brian D. Anderson, *Meaningful Access to Information as a Critical Element of the Rule of Law: How Law Libraries and Public Libraries Can Work Together to Promote Access*. Paper presented at the 2016

IFLA WLIC Conference, Columbus, Ohio, 4 (2016), https://perma.cc/V6EH-5G4H [hereinafter "*Meaningful Access*"]. Public libraries are thus a primary gateway for citizens interacting with their government. Nearly all public libraries—97 percent—assist patrons in completing online government forms. American Library Association ("ALA"), *The State of America's Libraries 2019: A Report of the American Library Association*, 11 (Kathy S. Rosa ed., 2019), https://perma.cc/W5A3-AKKD. And more than 75 percent of American public libraries assist patrons who need to access and use online government services, providing information about, for example, "Medicare, Immigration, Social Security, and Taxes." John Carlo Bertot *et al.*, *2014 Digital Inclusion Survey: Survey Findings and Results*, Information Policy and Access Center 52 (2015), https://perma.cc/L24W-NYNY.

Access to legal information is particularly important in states like Georgia, where, according to a 2009 legal needs assessment, a majority of households experienced one or more civil legal problems, and almost three-quarters of those households attempted to solve these problems without formal legal assistance. A.L. Burruss Inst. of Pub. Serv. and Research at Kennesaw State Univ., *Civil Legal Needs of Low and Moderate Income Households in Georgia* 11–12, 25 (2009), https://perma.cc/3GUL-9SJ3 (sponsored by the Committee on Civil Justice, Supreme Court of Georgia Equal Justice Commission).

Research libraries, law libraries, and other memory institutions also preserve government edicts,

maintaining a reliable record as governments and laws change over time. Preservation, while crucial to the development of law and public institutions, is an endeavor that private publishers "may not have the interest, financial incentive or expertise" to undertake. Statement of James G. Neal, Vice President for Information Services and University Librarian, Columbia University, Before the Subcommittee on Courts, Intellectual Property and the Internet, U.S. House of Representatives Committee on the Judiciary, Apr. 2, 2014 at 2, https://perma.cc/Y9BL-R3GT (hearing on preservation and reuse of copyrighted works). For example, the Georgetown University Law Library, with contributions from many other libraries, preserves historic state legal codes in a user-friendly format. Hilary T. Seo, *Preserving Print Legal Information*, 96 Law Libr. J. 581, 588–89 (2004). Libraries also participate in projects that transform legal records into datasets for a range of uses through application programming interfaces. *See* Library Innovation Lab, *Project: Case Law Access Project*, https://perma.cc/9747-L2FV.

Through these and similar efforts, libraries serve citizens, who seek access to the law for diverse reasons. *See Veeck v. S. Bldg. Code Cong. Int'l*, 293 F.3d 791, 799 (5th Cir. 2002) ("Citizens may reproduce copies of the law for many purposes, not only to guide their actions but to influence future legislation, educate their neighborhood association, or simply to amuse."). Accordingly, partial access to the law is insufficient. To support the full range of needs and interests that prompt citizens

to seek access to the law, libraries depend on a clear, comprehensive, and administrable government edicts doctrine.

II. The Government Edicts Doctrine Is Sufficiently Comprehensive and Comprehensible to Support Libraries' Mission to Connect Citizens with the Law

Citizens depend on the government to fulfill its duty to communicate freely and fully the sovereign's value judgments, priorities, reasoning, and rules. In turn, libraries depend on a clear and comprehensive government edicts doctrine to preserve and provide access to those rules, and to the judgments and reasoning behind them. The doctrine must be sufficiently comprehensive to enable libraries to provide full and accurate versions of official government promulgations to their patrons, and to compile a reliable record of government activities and decisions. And the doctrine must be sufficiently comprehensible for libraries to administer it. Traditional conceptions of the government edicts doctrine dating back centuries, *see generally* Br. of R Street Institute *et al.* as *Amici Curiae* (providing a historical perspective spanning Ancient Rome to 1887 Virginia); this Court's previous decisions, *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834), *Banks v. Manchester*, 128 U.S. 244 (1888), and *Callaghan v. Myers*, 128 U.S. 617 (1888); and the Eleventh Circuit's decision below, all meet these requirements. Georgia's proposed reformulation of the doctrine to cover only

the portions of government edicts with the "force of law," however, does not.

A. The government edicts doctrine encompasses entire official government edicts

To serve their patrons, libraries must provide the entirety of publications that embody government edicts: the official documents that are suitable for citing to a court, that bolster citizens' understanding of government statements on the law, and that reveal the sovereign's motivations and reasoning. Accordingly, documents designated by the government as official, authoritative statements of and about the law must be fully accessible as promulgated, without copyright liability risk attaching to some constituent parts.

This Court's decisions are consistent with these requirements. For example, the Court in *Callaghan* recognized a fundamental difference between the work of a private-party reporter who independently prepared and published a volume of law reports and the official, authoritative work of judges. *See* 128 U.S. at 647. Whereas the reporter could assert copyright in his creative, but nonauthoritative, additions, "there can be no copyright in the opinions of judges, or in the works done by them *in their official capacity as judges*." *Id.* (emphasis added).

This Court's previous decisions also reach entire edicts. The Court in *Wheaton* unanimously stated that

"no reporter has or can have any copyright in the written opinions delivered by this court." 33 U.S. at 668. The Court in *Banks* clarified that this does not mean only portions of written opinions. *See* 128 U.S. at 253. Rather, "[t]he *whole work* done by the judges constitutes the authentic exposition and interpretation of the law," and thus is "free for publication to all." *Id.* (emphasis added). Similarly, the Copyright Office's 1961 Copyright Law Revision Report explains that extending the bar against copyright in federal government publications to the states was unnecessary because the "judicially established rule would still prevent copyright in the text of State laws, municipal ordinances, court decisions, and *similar official documents*." *Copyright Law Revision: Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law*, 87th Cong., 1st Sess. (H.R. Judiciary Comm. Print 1961) at 129 (emphasis added). This formulation—the edict as the whole official document—is necessary to make the law accessible and useful. "For all practical purposes, 'the law' is the cumulative embodiment of . . . institutions' decision making as reflected in particular documents: statutes, regulations, and cases"; in short, "[t]he particular documents matter." Leslie A. Street & David R. Hansen, *Who Owns the Law? Why We Must Restore Public Ownership of Legal Publishing*, 26 J. Intell. Prop. L. 205, 210 (2019).

The O.C.G.A. fits comfortably within this understanding. The O.C.G.A.—in its entirety, including the annotations—has considerable informational and authoritative clout. Created under the auspices of the

State of Georgia,[2] enacted by its General Assembly, "published by the authority of the state," with the statutory portion "merged with annotations, captions . . . chapter analyses, and other materials," O.C.G.A. § 1-1-1 (2000), and held out specifically as the only "official" code of Georgia,[3] the O.C.G.A. is most plausibly understood as the government of Georgia's authentic and reliable statement of what the state considers the law to be and how it should operate.[4] As the Eleventh Circuit observed in its opinion below, "it would be only natural for the citizens of Georgia to consider the annotations as containing special insight into the meaning of the statutory text." *Code Revision Comm'n v.*

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[2] That Georgia authorized the Code Revision Commission, which then contracted with LexisNexis, to draft and publish the O.C.G.A., does not alter the analysis. The agreement between Georgia and LexisNexis makes clear that the O.C.G.A. is a work for hire. J.A. 535. Under the Copyright Act of 1976, "the employer or other person for whom the work [for hire] was prepared is considered the author for purposes" of copyright. 17 U.S.C. § 201(b). Should Georgia outsource the preparation and publication of government edicts to private parties, that is its choice. But where "[t]here is a distinct understanding, a contract, that he is to do the work for his compensation, and not to claim a copyright," *Wheaton*, 33 U.S. at 616, the service of an agent does not make the edict any less a promulgation of the state.

[3] Georgia describes the O.C.G.A. as the "first complete and *official* recodification of the laws of Georgia since the Code of 1933") J.A. 233 (emphasis added). The O.C.G.A. also bears the Great Seal of the State of Georgia, J.A. 713, and is to be "known" and "cited as the 'Official Code of Georgia Annotated.' " O.C.G.A. § 1-1-1 (2000).

[4] For example, the annotations convey key information regarding how courts and law enforcement, through the Attorney General, interpret statutes. J.A. 490.

Public.Resource.Org, Inc., 906 F.3d 1229, 1250 (11th Cir. 2018). It is no wonder that the Northern District of Georgia, ruling on Georgia's prior attempts to claim copyright in the O.C.G.A., warned that "attorneys who cite the [unofficial] publication do so at their peril." *Gen. Ass'y v. Harrison Co.*, 548 F. Supp. 110, 117 (N.D. Ga. 1982), *vacated*, 559 F. Supp. 37 (N.D. Ga. 1983).

The O.C.G.A. is thus illustrative of the fact that, as *amici* Arkansas *et al.* note, "litigants' ability to understand the laws that govern them would be seriously hampered" without "official annotated state codes." Br. for Arkansas *et al.* as *Amici Curiae* at 22. Indeed, those states maintain that "unofficial annotated codes are no substitute for official annotated codes" and "relying on an unofficial code for statutory text is a risky business." *Id.* at 22–23. Accordingly, when patrons enter libraries looking for the law of Georgia, libraries should be able to give them full and free access, in its entirety, to Georgia's official, authoritative, governmental statement on the law: the O.C.G.A.

B. The government edicts doctrine reaches official edicts of government regardless of whether they carry the "force of law"

Though the O.C.G.A. comports with the traditional understanding and purpose of the government edicts doctrine, Georgia's proposed reimagining of the doctrine to include only edicts with the "force of law," Pet. Br. 40, does not. To participate freely in democratic

processes, citizens need—and thus libraries need to be able to provide—unfettered access to government promulgations. This certainly includes promulgations that clearly carry the "force of law." But it also includes others, whether or not they are legally binding. Accordingly, this Court has held to be freely available both edicts that bind citizens with the "force of law," and those with broader functions. *See Banks*, 128 U.S. at 253 (applying the government edicts doctrine to non-binding elements of published judicial opinions); *Wheaton*, 33 U.S. at 668 (remarking that neither the reporter nor judge can hold copyright in judicial opinions).

The Court made clear in *Banks* that the "judicial *consensus*" from the time of *Wheaton*, that no copyright can be secured in the work of judges acting in their judicial capacity, extends beyond the binding portions of opinions. *Banks*, 128 U.S. at 253 (emphasis in original). What is "free for publication to all" includes "the statements of cases and headnotes prepared by [judges]," *id.*, as well as factual summaries, reasoning, *dicta*, concurrences, and dissents, *see* Pet. Br. 47–48. None of these elements prescribe specific commands in and of themselves, yet all are integral to the "authentic exposition and interpretation" of the law. *Code Revision Comm'n*, 906 F.3d at 1251 (internal citations omitted). They reveal judicial reasoning, connect decisions to past cases, and make the law usable and understandable.

Nor do judicial opinions stand alone. As the United States points out, "it follows *a fortiori* that the actual sources of law that judges interpret and apply . . . must be equally available." Br. for United States as *Amicus Curiae* at 20. This includes not only those legislative texts with prescriptive commands, but also those that reflect lawmakers' argumentation, judgments, reasoning, cultural values, and moral views. The United States offers, for example, "the text of unenacted bills, floor statements concerning legislation, committee reports, and similar materials" as examples of uncopyrightable "materials produced [by] a legislator discharging his lawmaking duties" that "must be freely available as a matter of public policy." *Id.* at 21 (citing *Banks*, 128 U.S. at 253).

Recognizing such edicts' democratic and historical value, libraries depend on the government edicts doctrine to preserve and provide access to edicts that blend legally binding and nonbinding material. For example, the Legislative History Project from the Mississippi College School of Law Library provides "an online video archive of legislative debate in the state of Mississippi." The Superseded Oregon Revised Statutes ("ORS") 1953–1993 Digitization Project provides a publicly accessible, free archive of superseded editions of the ORS, containing all laws and changes to laws enacted by the Legislative Assembly. And the William A. Wise Law Library at the University of Colorado Law School preserves journals from the Colorado House and Senate that record nonbinding government actions, such as state resolutions disagreeing with

federal legislation. *See*, *e.g.*, S.J.M. No. 1: Memorializing the Congress of the United States Not to Repeal Present Provisions of the Federal Reserve Act Which Require the Federal Reserve System to Maintain a Gold Reserve Equal to Twenty-Five Per Cent of Its Notes Outstanding, Journal of the House of Representatives, State of Colorado, 43rd Gen. Assemb., 1st Extraordinary Sess. 24–25 (Colo. 1961), http://hdl.handle.net/10974/journals:38060.

To these we can add many more nonbinding edicts that should be preserved and to which library patrons need full and unfettered access. Examples include governmental statements on societal issues that reveal officials' reasoning, value choices, and policy preferences, such as "senses of the legislature," nonbinding resolutions, executive proclamations, and similar materials. Recent examples from Georgia include a state senate resolution urging electronic publication and delivery of reports to the General Assembly "in order to conserve taxpayer resources" that stems from the state senate's self-identified role "as stewards of taxpayer funds" with a "responsibility to conserve resources and eliminate waste," S. Res. 214, 155th Gen. Assemb., Reg. Sess. (Ga. 2019); a gubernatorial proclamation declaring September 2–8, 2018, "Adult Education and Family Literacy Week," recording that "[a]pproximately 32 million Americans cannot read or write," and that "roughly 1.1 million individuals over the age of 18 [in Georgia] have not completed high school" or

the equivalent, and suggesting methods of countering low literacy, including "greater support for literacy programs through public libraries and by strengthening [volunteer programs]," Proclamation of Governor of the State of Georgia Nathan Deal, *Adult Education and Family Literacy Week*, Aug. 3, 2018; and a proclamation declaring January 5, 2018, UGA FOOTBALL FRIDAY. Proclamation of Governor of the State of Georgia Nathan Deal, *UGA Football Friday*, Jan. 4, 2018.

Government edicts, then, take myriad forms—but all stem from legislative, executive, or judicial officials speaking as representatives of the sovereign People.[5] Though the gubernatorial proclamations described above are all "strictly honorary and . . . not legally binding," they nonetheless contribute to Georgia citizens' understanding of key elements of their society, government, and governmental representatives' activities on their behalf.[6] By these lights, citizens can

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[5] By contrast, state government works that do not involve the government speaking on behalf of the people do not necessarily fall under the government edicts doctrine. For this reason, *Arkansas et al.*'s worry that examples like the Georgia Department of Natural Resources' *Creatures of the Night—Georgia's Giant Sea Turtles*, or the Mississippi Authority for Educational Television's *Cookin' Cajun: Seafood*, will be defined as government edicts, is misplaced. *See* Br. for Arkansas *et al.* as *Amici Curiae* at 7–8 (internal citations omitted).

[6] Governor Brian P. Kemp, Office of the Governor, *Proclamations*, https://perma.cc/Y3KP-Q74H. Georgia proclamations reflect both citizen opinion and gubernatorial judgment. All "require an in-state sponsor" and are issued "at the discretion of the governor

observe and judge their government. As ably articulated by Georgia's then-governor in a proclamation declaring the third week of September, 2018, "Constitution Week," "[p]opular sovereignty is the foundation by which our government was created by and for the people, while the rule of law requires that the government be guided by a set of laws, rather than by any individual or single group." Proclamation of Governor of the State of Georgia Nathan Deal, *Constitution Week*, Aug. 7, 2018.

Governor Deal's "Constitution Week" proclamation is a case in point. It does not command specific action; it communicates democratic tenets. Though it does not carry the "force of law," it is precisely the kind of government edict citizens require to understand their elected officials' reasoning and values, and thus precisely the kind of government edict libraries need to preserve and make accessible.

Like these nonbinding legislative, administrative, and executive promulgations, and like judicial opinions with their mix of binding and nonbinding material, the O.C.G.A. is an edict that falls squarely within the tradition of "authentic exposition[s] and interpretation[s] of the law" by a government. *See Banks*, 128 U.S. at 253. Citizens of Georgia deserve no less access to the O.C.G.A. than citizens accessing any other government edict of their state.

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as a courtesy to Georgia residents to recognize . . . a cause of significant statewide interest." *Id*.

C. A government edicts doctrine limited to materials that carry the "force of law" would be incomprehensible and unadministrable

Georgia's attempts to define the O.C.G.A. out of the government edicts doctrine by proposing that the doctrine cover only edicts with the "force of law," and by attempting to disassemble the O.C.G.A. into "enacted statutes" and "annotations," Pet. Br. 40–41, is out of step with precedent and practice. It also imperils citizens' ability to comprehend the government edicts doctrine and libraries' ability to administer it.

The trouble begins with Georgia's attempt to interpret the case law as placing in the public domain only those government edicts that carry the "force of law." Besides being at odds with this Court's precedents, this would be unworkable. As Georgia correctly observes, attempting to selectively apply copyright protection to certain judicial opinions, or portions of judicial opinions, would be administratively unfeasible. Pet. Br. 47–48. Some portions of judicial opinions have the force of law; some portions do not. *Id*. It is not always straightforward to disentangle holdings from *dicta*, legally relevant facts from mere description, or legally relevant from legally irrelevant portions of concurring and dissenting opinions. *Id*. Citizens seeking to know "what the law is" as construed by a court, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803), need access to the complete articulation of the court's findings and reasoning. Accordingly, Georgia recognizes that the "rule that all judicial opinions are

uncopyrightable . . . constitutes sensible public policy" and provides a "clear administrable standard." Pet. Br. 48 (internal citations and quotations omitted).

Confusingly, however, Georgia then asserts that none of this reasoning applies to the O.C.G.A. *See id.* at 48–49. But it is unclear how attempting to disaggregate the O.C.G.A. differs meaningfully from attempting to disaggregate court decisions. Indeed, Georgia's attempts to filter the copyrightable from the uncopyrightable by "enacting" some portions of the O.C.G.A. and not others only creates uncertainty. To wit: State Bill 52, § 54 enacts "the text of Code sections and title, chapter, article, part, subpart, Code section, subsection, paragraph, subparagraph, division, and subdivision numbers and designations as contained in the Official Code of Georgia Annotated," 2019 Bill Text GA S.B. 52, § 54(a), Pet. App. 1a, but not

> [a]nnotations; editorial notes; Code Revision Commission notes; research references; notes on law review articles; opinions of the Attorney General of Georgia; indexes; analyses; title, chapter, article, part, and subpart captions or headings . . . catchlines of Code sections or portions thereof . . . ; and rules and regulations of state agencies, departments, boards, commissions, or other entities which are contained in the Official Code of Georgia Annotated. . . .

Id. at § 54(b).

This is perplexing. While it seems likely that some of the material was chosen not to be enacted in an

attempt to preserve copyright in portions of the O.C.G.A. after *Harrison*, the specific choices remain less than predictable. It is puzzling, for example, that the section numbers and designations are enacted, but the captions and headings are not; any distinction here between components with the force of law and those without is unclear, at best. It is unlikely that libraries or their patrons could distinguish them. It is also a dubious proposition that they should try: Georgia's enactment choices fail to reflect the official annotated code's importance and authority, as described by Georgia, and as described by the state *amici*. *See* Pet. Br. 48–49, Br. for Arkansas *et al.* as *Amici Curiae* at 19.[7] In the end, Georgia has simply rendered the law less usable and understandable, without clarifying what, in fact, the law is. Libraries could not administer, and patrons could not understand, such a confused and constrained version of the government edicts doctrine.

This is not the way the government edicts doctrine has to work according to existing precedent, nor is it the way the doctrine should work. Comparing Georgia's proposal with the "enacted" and "unenacted" portions of the federal code illustrates the point. As with Georgia's O.C.G.A., portions of the United States Code ("U.S. Code") are enacted into "positive law", 1 U.S.C. § 204(a); other portions are not. The Congressionally enacted,

[7] Moreover, Georgia courts view the annotations as persuasive. *See*, *e.g.*, *Hogan v. State*, 730 S.E.2d 178, 179 (Ga. Ct. App. 2012); *DeCastro v. State*, 470 S.E.2d 748, 752 (Ga. Ct. App. 1996); *Dominiak v. Camden Tel. & Tel. Co.*, 422 S.E.2d 887, 889 (Ga. Ct. App. 1992). Surely the citizens of Georgia should have access to persuasive authority that they paid to create.

positive law titles of the U.S. Code are federal statutes; the non-positive law titles are editorial compilations. Office of the Law Revision Counsel, *Positive Law Codification*, https://perma.cc/GMY-4UYD8. Enacted, positive law titles provide legal evidence of the law in all courts; non-positive law titles provide only *prima facie* evidence of the law. *See U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 n.3 (1993). Under Georgia's proposed test, libraries would have to determine whether a non-positive law title is sufficiently authoritative to carry the "force of law" to know if the government edicts doctrine applies. This is a legal nicety that librarians are not equipped to evaluate.[8] Fortunately, because § 105 of the Copyright Act dedicates all United States government works to the public domain, they do not have to try. 17 U.S.C. § 105. U.S. Code titles, regardless of enactment status, are free to use. And unsurprisingly, libraries preserve and provide public access to myriad federal government

[8] Librarians already encounter difficulty as they work to provide meaningful access to legal information without impermissibly providing legal advice. *See* Susan Drisko Zago, *Riding Circuit: Bringing the Law to Those Who Need It*, 12 Fla. A&M Univ. L. Rev. 1, 25 (2016) ("The chilling effect of current rules on unauthorized practice of law serves as a barrier to more librarian involvement."). For example, the Dougherty County Law Library staff cannot "provide legal advice . . . [or] interpret case law." Lisa R. Pruitt *et al.*, *Legal Deserts: A Multi-State Perspective on Rural Access to Justice*, 13 Harv. L. & Pol'y Rev. 15, 73 (2016). And yet, this is precisely what Georgia's proposed rule would require a librarian to do simply to reproduce a government edict: interpret the text of the entire official document to determine which portions carried the force of law and which do not.

legal materials.[9] The result should be exactly the same for the O.C.G.A. under the government edicts doctrine—lay people should not have to understand the difference between "enacted" and "unenacted" titles in order to know whether or not they can freely use their state government's authoritative statements of the law.

An example from Louisiana illustrates both the potential benefits of the government edicts doctrine and the confusion an overly formalistic or constrained conception of the doctrine can sow. Via Louisiana's Public Document Depository Program, the state library system provides a scanned, machine-readable version of the state's Code of Government Ethics as it

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[9] There are copious examples; a few follow. These projects are diverse, but have in common that the libraries involved do not need to worry about copyright impediments, because federal works are clearly and administrably in the public domain. The Edmon Low Library at the University of Oklahoma provides digital public access to Kappler's Indian Affairs, Laws, and Treaties. The State Law Library of Mississippi preserves the Public Papers of the Presidents. The Paul M. Hebert Law Center, Louisiana State University, Baton Rouge, collects and preserves the Federal Register. The Jerome Hall Law Library at Indiana University collects and preserves the Code of Federal Regulations, the United States Reports, Statutes at Large, the United States Code, Revised Statutes, the Weekly Compilation, Public Papers, the Congressional Record and predecessors, and the Monthly Catalog. The University of Notre Dame Kresge Law Library collects and preserves the Code of Federal Regulations. The William A. Wise Law Library at the University of Colorado preserves the Journals of the Continental Congress. The Thurgood Marshall Law Library, University of Maryland School of Law preserves and provides permanent public access to historical and current publications of the United States Commission on Civil Rights.

was originally printed, bearing the seal of Louisiana's Secretary of State. *See*, *e.g.*, State of Louisiana Code of Government Ethics (2017), http://digital.state.lib.la.us/digital/collection/p267101coll4/id/32649/rec/4. Much like the versions of the O.C.G.A. that Public.Resource.Org makes available, it is complete, usable, and available online. Print copies also may be purchased for five dollars. *Id*. (front matter). However, the inside front cover disclaims: "The text of this book was provided by the House statutory database, which is used for drafting legislation. Those who need to consult the *official* statutory database including historical information, refer to West's Louisiana Statutes Annotated or LexisNexis Louisiana Annotated Statutes." *Id*. (emphasis added). While Louisiana has designated not one but two "official statutory databases," it has not said whether the official code is West's Louisiana Statutes Annotated or LexisNexis Louisiana Annotated Statutes. It is unclear whether the version used for "drafting legislation" itself has the force of law and therefore, under Georgia's proposed test, would be within the scope of the government edicts doctrine. A robust government edicts doctrine, however, allows libraries to make the Louisiana Code of Ethics available without the risk associated with answering these questions incorrectly.

By contrast, Georgia and its *amici*'s strained attempts to recast the O.C.G.A.'s official status only create confusion. The Arkansas *et al. amici* claim, by turn, that "no citizen could reasonably believe that its

annotation has any authority that an unofficial annotation lacks," Br. for Arkansas *et al.* as *Amici Curiae* at 10, but that "unofficial annotated codes are no substitute for the official annotated codes," *id.* at 22, and that to rely on an unofficial code is a "risky business." *Id*. at 23. The United States argues that the term "Official" does not provide "the OCGA's *annotations* any special legal status," Br. for United States as *Amicus Curiae* at 28 (emphasis in original), and ignores all other indications of the O.C.G.A.'s official status, though they are many.[10] Matthew Bender goes so far as to opine that, while some states may use the term "official" to indicate that a "work is binding," for Georgia, "official" "may only be a marketing tool." Br. for Matthew Bender & Co., Inc., as *Amicus Curiae* at 24.

In light of Georgia's many indications of the O.C.G.A.'s singularly official nature, these arguments are unpersuasive. More troublingly, if successful, they would confound the public's ability to rely on the government edicts doctrine. If Georgia's *amici* cannot parse consistently the O.C.G.A.'s "official" designation,

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[10] For example, in addition to using the term "official" in the title and publishing it "with the authority of the state," the General Assembly designated the O.C.G.A. as the foundation and reference point for all future legislation: "Any reference in any local or special law of [Georgia] to any Act or resolution of the General Assembly . . . shall be construed to be a reference to . . . the Official Code of Georgia Annotated." J.A. 83. Further, Georgia has not promulgated any other official code, and, therefore, the O.C.G.A. remains the only official version of the law. *See Code Revision Comm'n*, 906 F.3d at 1233.

what parts of the code it refers to, or agree on how authoritative it is, how can libraries and ordinary citizens determine its significance, or identify official versus unofficial and binding versus nonbinding components? Citizens and libraries should be able to rely on authoritative legal pronouncements emanating from their government and labelled "official" as manifestations of the government's voice. Permitting Georgia to disavow the importance of its own statements establishing the official status of the O.C.G.A. would do nothing to produce an administrable rule. It would only make the law less accessible, less usable, less understandable, and more inconsistent.

In the end, Georgia's "force of law" test is infeasible. It is inconsistent with how library patrons access and use the law and how libraries facilitate access to and preserve the law. The resulting blurred and artificial boundaries would create uncertainty and impede libraries from providing access to government edicts. Georgia's goal is to reclaim an enforceable copyright in some portion of the O.C.G.A. But the result would be incoherence.

III. Georgia's Proposed Alternatives to a Freely Available O.C.G.A. Are Inadequate

Georgia variously proposes that the lesser unannotated code offered by LexisNexis and the CD-ROM copies of the O.C.G.A. available in a limited number of

public facilities, serve to fulfill its duty to provide the law to the citizenry. But these alternatives fall short of providing meaningful access to the official, authoritative law of the State of Georgia. Nor do copyright limitations and exceptions suffice to bridge that gap.

A. The LexisNexis unannotated code fails to provide meaningful citizen access to Georgia law

It is undisputed that the unannotated Georgia code is in the public domain. Pet. Br. 3. Yet it is available only in digital form and only under LexisNexis's terms and conditions. The terms and conditions are both restrictive and vague, and their attempt to disclaim application to the noncopyrightable government edict is illusory. In addition, the stark differences between the O.C.G.A. and the unannotated, unofficial code demonstrate that the unofficial version is no substitute for the O.C.G.A.

The Georgia Code website directs a user who attempts to gain access to the unannotated code to a LexisNexis page, which is then blocked by a clickwrap terms and conditions box warning that usage of the code is subject to the LexisNexis Terms & Conditions. LexisNexis, *Code of Georgia - Free Public Access*, http://www.lexisnexis.com/hottopics/gacode/default.asp (last visited Oct. 14, 2019). The user trying to access the unannotated statute is then confronted by a bewildering mix of statements about legal obligations and potential copyright liability. For example, LexisNexis

acknowledges that the terms "do not apply to the Statutory Text and Numbering," but also states that the State of Georgia "reserves the right to claim and defend the copyright in any copyrightable portions of the site." J.A. 182 ("Code of Georgia Free Public Access"). Unlike the specified text and numbering excluded from LexisNexis' terms and conditions, the claimed "copyrightable portions" of the unannotated code, if any, are unspecified. *Id.* This leaves users' liability risk when using the unannotated code unclear. Once the user accepts the terms, the clickwrap box disappears, leaving users no reference to guide them as to what may or may not be protected by copyright when they are actually using the unannotated code. Instead, what users do see is a notice at the bottom of each page containing an individual statutory provision, claiming "Copyright 2019 by The State of Georgia All rights reserved [sic]."

The terms and conditions also undermine the government edicts doctrine directly. While the terms and conditions apply only to copyrightable portions of the unofficial code on LexisNexis's website, they also purport to prohibit a user from "copy[ing], modify[ing], [or] reproduc[ing]" the copyrighted materials for "commercial, non-profit or public purposes." *See* J.A. 165. This leaves out libraries trying to make use of the law for non-profit, public purposes; lawyers trying to make use of the law for their clients; businesses trying to use the law to understand their obligations; and the list goes on.

Especially worrying for libraries, the terms and conditions limit users' privacy rights, undermining

libraries' longstanding commitment to patron privacy. Under the ALA Library Bill of Rights, libraries "protect people's privacy, safeguarding all library use data, including personally identifiable information." ALA, *Library Bill of Rights* (Jan. 29, 2019), https://perma.cc/C86F-G8ST. This protection extends to the many patrons who use libraries as a gateway to access legal resources online. Nationally, approximately one-third of library patrons view their local libraries as internet gateways, with higher percentages of young, minority, and low-income patrons using libraries for internet access. John B. Horrigan, Pew Research Ctr., *2. Library Usage and Engagement* (Sept. 9, 2016), https://perma.cc/3XVA-8HKS. However, the LexisNexis terms contravene libraries' privacy efforts, incorporating a Privacy Policy that gives LexisNexis the right to collect information about users and their use of the service, and to combine this information with additional information from third parties. LexisNexis, *Privacy Policy, 2. Information We Collect* (effective date May 25, 2018), https://perma.cc/5TFK-E9MZ.

These privacy issues indicate that "free" access to the unannotated code is not without cost. They also lay bare the practical impossibility of the theoretical disaggregation that Georgia's proposed cabining of the government edicts doctrine requires. Users either accept LexisNexis' terms and conditions, or they do not. LexisNexis either tracks usage, or it does not. There simply is no way for a user to say "I accept these terms and conditions, except with respect to statutory text and numbering, and possibly other elements the State

of Georgia does not claim as its copyrightable subject matter."

Moreover, the unannotated code is plainly inferior to the official government edict. Georgia acknowledges as much on the unofficial and unannotated code's website, cautioning that "the latest print version of the O.C.G.A. is the authoritative version; and in case of any conflict between the materials on this website and the latest print version of the O.C.G.A., the print version shall control." J.A. 190. The dissimilarity is apparent from the outset, but users without access to the O.C.G.A. would have no way to know this. They would not know, for example, that the first volume of the O.C.G.A. begins not with "§ 1-1-1. Enactment of Code," but with the Constitution of the United States of America, followed by the Constitution of the State of Georgia. O.C.G.A. vol. 1, 1–1103 (2007); O.C.G.A vol. 2, 1–1114 (2007). The reader of the O.C.G.A. can access and understand the legal context and authority that grounds Georgia's official statutes. The reader of the LexisNexis unannotated code, however, cannot even look at consecutive code sections at the same time.

B. The Matthew Bender/Georgia allocation scheme for CD-ROM copies of the O.C.G.A. is inadequate

The CD-ROM copies of the O.C.G.A. sprinkled throughout Georgia pursuant to the state's agreement with Matthew Bender & Company, J.A. 501–05, in no way bridge the gap in access left by the online

unannotated code. The allotment of sixty-four copies still leaves Georgia citizens in at least ninety-five counties[11] with no access to the State's official code. *See* GeorgiaGov, *Georgia Facts [Infographic]*, https://perma.cc/JA7F-VRCW. And even at institutions that secure a CD-ROM copy, only one individual can look at the O.C.G.A. at any given time without, under Georgia's preferred formulation, potentially infringing Georgia's right to public performance. Accordingly, the Eleventh Circuit correctly rejected Georgia's argument that the court "ought not be concerned about public access" because it provided copies to more than sixty different Georgia locations. *Code Revision Comm'n*, 906 F.3d at 1247 n.2.

The distribution scheme for the CD-ROM copies reflects a deeper inadequacy: Matthew Bender and Georgia have not come close to providing genuine public access to the O.C.G.A. It is somewhat encouraging that sixteen of the sixty-four copies found their way to university and community college libraries, *see* J.A. 501–05, which do regularly provide legal information to members of the public. But, as the CD-ROM copies cannot be put online, this only results in access for citizens who can travel to those libraries.

The remaining CD-ROM copies are even less practically accessible. Under the allocation scheme, Matthew Bender and Georgia parceled out the bulk of the

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[11] The list of libraries provided with CD-ROM copies of the O.C.G.A. contains duplicate entries for two libraries: Douglas County Law Library and Hall County Law Library. *See* J.A. 501–05.

copies to county courthouse law libraries, J.A. 501–05, along with a few sheriffs' offices and police stations. *Id.* Sheriffs' offices are not places citizens visit to research the law, and, if they provide public access at all, may intimidate citizens researching potential legal violations. And though the public may be allowed to view the O.C.G.A. at public courthouses, there are practical barriers to access. Many courthouse libraries are set up for legal professionals and often lack full-time staff who could assist members of the public.

Worse, the allocation scheme almost entirely ignores community public libraries, which were not designated by the Code Revision Commission as "State Government Subscribers," J.A. 501–05, 557. It appears that only one copy of the O.C.G.A. has been allocated to any facility within the Georgia Public Library Service. *See* Georgia Public Library Service, *All Public Library Facilities*, https://perma.cc/A75D-BAYS (search returning only the Cherokee County Law Library as a public library facility receiving a CD-ROM copy).

This is a loss to the public. Ordinary citizens are far more likely to visit community public libraries to find the law than they are courthouses or law enforcement offices. Local public libraries are familiar, "comfortable place[s] to seek legal information," have longer hours than courthouses, and are neutral sources of information. *See* Anderson, *Meaningful Access* at 4. On a regular basis, ALA member institutions help patrons access the law for a range of needs that require more than bare statutory text. For example, patrons of an ALA member in Texas regularly use legal materials provided by the library for legal issues, including to

force a lawyer to release a property deed transfer record, to challenge traffic tickets, to prove landlords violated the law, and to fight for child custody. Another ALA member in Missouri sent sections of the Missouri statutes to a patron who had written from the nearby state mental health facility, seeking assistance locating statutes to secure his release.

Clarifying that *all* libraries can freely provide copies of the O.C.G.A. would make Georgia law much more accessible. A proper construction of the government edicts doctrine is one that does not pose a barrier to libraries connecting their patrons to official and usable publications of the law.

C. Copyright limitations and exceptions are not substitutes for the government edicts doctrine

Libraries rely on copyright limitations and exceptions to serve their patrons. But though they are certainly helpful, relevant copyright limitations and exceptions do not substitute for the government edicts doctrine. For example, fair use decisions may allow libraries to provide one-eighth of a page, or "snippets" of the legal texts, *see Authors Guild v. Google, Inc.*, 804 F.3d 202, 209, 229 (2d Cir. 2015), but may limit copies of videos of floor speeches to a smaller fraction, *see Fox News Network, LLC, v. TVEyes, Inc*., 883 F.3d 169 (2d Cir. 2018) (holding that fair use did not permit a search

database of television news broadcasts to provide users with access to ten-minute clips).

Similarly, § 108(c) of the Copyright Act allows for preservation copies, but with limits that may be impractical or unnecessary. 17 U.S.C. § 108(c). Section 108(c)'s exception applies only to works that are damaged or deteriorating, which means that the right to preserve does not apply until the original becomes potentially unreliable. *See* Statement of Gregory Lukow, Chief, Packard Campus for Audio Visual Conservation, Library of Congress, Before the Subcommittee on Courts, Intellectual Property and the Internet, U.S. House of Representatives Committee on the Judiciary, Apr. 2, 2014 at 8, https://perma.cc/84ZN-E2XP (hearing on preservation and reuse of works). Finally, § 108(c) requires the library first to attempt to obtain a replacement at a reasonable price, imposing both a financial and administrative burden. *See* 17 U.S.C. § 108(c). Fair use may extend the boundaries of the statutory exemption, but so far those boundaries have only been tested in one circuit. *See Google, Inc.*, 804 F.3d 202; *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014).

Because government edicts belong to the public domain, with none of these restrictions, the government edicts doctrine provides an essential safe harbor. It allows libraries and their patrons freely to access, understand, and use authoritative government statements. When they do so, libraries and library patrons participate in a centuries-old tradition: governments fulfill their duties to communicate public values, proclaim sovereign decisions, and promulgate binding legal

rules; citizens respond with support, disagreement, and civic participation. *See generally* Br. for R Street Institute *et al.* as *Amici Curiae.*

Copyright should not invade this relationship between the People and the sovereign. Nor would there be a policy benefit to expanding copyright to cover nonbinding edicts. Affirming that the O.C.G.A. is a government edict will not prevent private publishers from producing works like West's Code of Georgia Annotated, nor from claiming and exploiting copyright protection in any original annotations they author. It is only when the government speaks that an edict is produced. And when the government speaks, the people must be able to hear and respond. Accordingly, both copyright policy and public policy favor reaffirming a government edicts doctrine that supports libraries' work to connect the government's stated value judgments, priorities, reasoning, and rules with the people from whom it derives its authority.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Eleventh Circuit's decision be *affirmed*.

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JENNIFER M. URBAN
Counsel of Record
ERIK STALLMAN
SAMUELSON LAW, TECHNOLOGY & PUBLIC POLICY CLINIC
UNIVERSITY OF CALIFORNIA, BERKELEY, SCHOOL OF LAW
353 Boalt Hall
Berkeley, CA 94720-7200
(510) 642-7338
jurban@law.berkeley.edu