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 THE STATES OF ARKANSAS, ALABAMA, ALASKA, IDAHO, KANSAS, MISSISSIPPI, NEBRASKA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, THE COMMONWEALTH OF VIRGINIA, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

ARKANSAS ATTORNEY GENERAL'S OFFICE
323 Center Street
Little Rock, Arkansas 72201
(501) 682-6302
nicholas.bronni@arkansasag.gov

LESLIE RUTLEDGE
Arkansas Attorney General

NICHOLAS J. BRONNI
Arkansas Solicitor General
Counsel of Record

VINCENT M. WAGNER
Deputy Solicitor General

DYLAN L. JACOBS
ASHER STEINBERG
Assistant Solicitors General

Counsel for Amici Curiae

[Additional Counsel Listed On Signature Page]

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

QUESTION PRESENTED

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

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INTEREST OF AMICI CURIAE

Amici are the States of Arkansas, Alabama, Alaska, Idaho, Kansas, Mississippi, Nebraska, South Carolina, South Dakota, Tennessee, Utah, Vermont, the Commonwealth of Virginia, and the District of Columbia. Amici have currently or had in the past copyrighted annotations in their official codes.

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

By invalidating those copyrights, the Eleventh Circuit's interpretation of copyright law, if adopted by this Court, would threaten the continued production of official annotated state codes. Official annotated codes are generally prepared by third-party annotators who recoup the costs of preparing those codes by selling the official annotated codes and retaining the revenues of those sales. Without copyright protection, the annotations would become freely available, and the annotators' sales would dry up. The annotators would likely

begin demanding payment for annotating state codes. At very least, such payments would raise the price of official annotated state codes and might cause some States to altogether cease production of an official annotated code. Either outcome would raise the cost of legal research for the lawyers and nonlawyers who rely on official annotated state codes as a starting point for their legal research.

SUMMARY OF ARGUMENT

The decision below holds that under certain circumstances, a State cannot copyright the annotations in its official annotated code that summarize judicial decisions and state attorney-general opinions interpreting that code. It invalidated Georgia's copyright based on its interpretation of the principle that a State cannot copyright the law itself, whether statutory or judge made. Only a work's "author or authors" can copyright it. 17 U.S.C. 201(a). And the decision below reasoned that the ultimate authors of the law are the public at large, not the legislature or judiciary. But that principle does not lead to the result below. Nonbinding annotations are not the law. They are not an exercise of popular sovereignty but only a commentary on that exercise. Therefore, they are copyrightable "original works of authorship" of the person or entity doing the commenting. 17 U.S.C. 102(a). Neither this Court nor any court of appeals had held otherwise until the decision below.

Apart from its error, affirming the decision below would upend States' code-publication arrangements, and threaten to deprive the public of a valuable, albeit nonauthoritative, legal-research tool. States use copyright protections to give third parties incentives to annotate their official codes. Under the typical arrangement, the company that produces the annotations in an official annotated code sells that code and keeps the revenues from its sale. Without copyright protections for the annotations, States would be forced to choose between paying these third parties to annotate their codes or giving up their annotated codes altogether.

The loss of annotated codes would be costly. Annotations are not themselves the law, nor authoritative guidance on it. But despite the prevalence of electronic legal research, annotated codes remain a widely used research aid. Lawyers and nonlawyers alike continue to look to the annotations as a starting point when researching state-law interpretations. Thus, the decision below ultimately threatens to deprive many States' citizens of a valuable tool.

ARGUMENT

I. The annotations in official annotated codes are copyrightable.

In holding that Georgia could not copyright the *annotations* in its official code, the Eleventh Circuit relied on a series of nineteenth-century decisions holding that—under the copyright statutes in effect at

the time—the law itself, as expressed in statutes or judicial decisions, is not copyrightable. *See Banks v. Manchester*, 128 U.S. 244 (1888) (state judicial decisions); *Howell v. Miller*, 91 F. 129, 137 (6th Cir. 1898) (Harlan, J.) (extending the principle to statutes). Notwithstanding that the copyright statutes those decisions interpreted are no longer in effect, no one today disputes that "legislative enactments, judicial decisions, administrative rulings . . . or similar types of official legal materials" cannot be copyrighted. U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices* 313.6(C)(2) (3d ed. 2017), https://www.copyright.gov/comp3 (hereinafter "*Compendium*").

The theory behind that rule under existing copyright law, however, is unclear. As Judge Katsas recently observed in an unrelated lawsuit against Public Resource: "Today, the *Banks* rule might rest on at least four possible grounds: the First Amendment; the Due Process Clause of the Fifth Amendment; Section 102(b) of the Copyright Act, which denies copyright protection to [ideas], or Section 107 of the Act, which sets forth the fair-use doctrine." *Am. Soc'y for Testing & Materials v. Public.Resource.Org, Inc.*, 896 F.3d 437, 458-59 (D.C. Cir. 2018) (Katsas, J., concurring) (citation omitted). To this list of theories, the decision below adds a fifth: that laws and judicial decisions do not qualify as original works of authorship under Section 102(a) of the Copyright Act because their authors are constructively the people at large in a Nation where the people are sovereign. Pet. App. 11a-12a (citing 17 U.S.C. 102(a)).

As Georgia explains, annotations in annotated codes are copyrightable under *any* of these theories. Pet. Br. 43-54. But the Eleventh Circuit's citizen-authorship theory provides a particularly compelling argument for the copyrightability of the annotations in Georgia's or any other State's official annotated code. Relying on *Banks* and other nineteenth-century decisions, the Eleventh Circuit made copyrightability depend on whether a given governmental action is properly characterized as an exercise of popular sovereignty. Assuming for argument's sake that the Eleventh Circuit's theory is correct, because annotations are not exercises of popular sovereignty, they are copyrightable.

A. In 1888, when this Court decided *Banks*, the copyright statute then in effect provided copyright protections to "the author" of a work. 128 U.S. at 252. Interpreting that term, the *Banks* Court held that a copyright in the decisions of the Ohio Supreme Court, "taken out in the name of the state," was invalid because the justices of that court were not the decisions' authors in the sense in which the copyright statute used that term. *Id.* at 253. The Court explained that "[i]n no proper sense can the judge who, in his judicial capacity, prepares the opinion or decision . . . be regarded as their author," and that "[j]udges . . . have no pecuniary interest or proprietorship, as against the public at large, in the fruits of their judicial labors." *Id.* One month later in *Callaghan v. Myers*, 128 U.S. 617 (1888), the Court, distinguishing *Banks*, held that a state-employed court reporter *was* "an author, within

the meaning of the act of Congress," of the annotations he included in his books of reported decisions. *Id.* at 647.

Although the copyright statute that *Banks* and *Callaghan* interpreted is no longer in effect, today's Copyright Act continues to afford copyright protections using the same term—"author"—that the *Banks* Court interpreted. The Copyright Act provides that "[c]opyright protection subsists . . . in original works of authorship," 17 U.S.C. 102(a), and that "[c]opyright in a work . . . vests initially in [its] author or authors," *id.* 201(a). "'In adopting the language used in the earlier act, Congress must be considered to have adopted also the construction given by this Court to such language, and made it a part of the enactment.'" *Helsinn Healthcare S.A. v. Teva Pharm. USA, Inc.*, 139 S. Ct. 628, 634 (2019) (quotation marks omitted) (quoting *Shapiro v. United States*, 335 U.S. 1, 16 (1948)). Whatever its theoretical underpinnings, therefore, the *Banks* doctrine continues to have vitality under the current Copyright Act.

The decision below interpreted *Banks*'s holding that judges are not authors of their opinions to rest on the principle that, "in our democracy," "the People [are] the constructive authors . . . of the law." Pet. App. 19a. As Georgia notes, Pet. Br. 45 n.15, and even the decision below acknowledged, Pet. App. 20a, *Banks* did not expressly rely on that rationale. While *Banks* certainly held that judicial opinions were *not* "authored" by judges, it did not say they *were* authored by the people. Rather, *Banks* simply reasoned that as a matter of

"public policy," judicial decisions must be "free for publication to all" because they "bind[] every citizen." 128 U.S. at 253. Only nearly a century later did courts begin to discern in *Banks* a "metaphorical concept of citizen authorship." *Bldg. Officials & Code Adm'rs v. Code Tech., Inc.*, 628 F.2d 730, 734 (1st Cir. 1980) (*BOCA*); *accord Veeck v. S. Bldg. Code Congress Int'l, Inc.*, 293 F.3d 791, 799 (5th Cir. 2002) (en banc).

Though this "metaphorical concept" does not appear in *Banks* itself, decisions like *BOCA* and *Veeck* apply it to determine a particular government work's copyrightability under *Banks*. They ask whether a work is constructively authored by the people to decide whether it can be copyrighted by the government. But as even the decision below conceded, the fact that "the People are sovereign" does not extinguish States' right to copyright any State-produced work. Pet. App. 19a.

Indeed, in enacting the Copyright Act Congress went out of its way to not exclude from protection all works created by the States. *See* Pet. Br. 27-29. And as the Copyright Office instructs, the fact that a work "was prepared by an officer or employee of a state . . . while acting within the course of his or her official duties" does not exclude that work from protection. *Compendium*, *supra*, 313.6(C)(2). For good reason: No one would contend, for example, that such works as the Georgia Department of Natural Resources' *Creatures of the Night—Georgia's Giant Sea Turtles*,[1] or the Mississippi Authority for Educational Television's *Cookin'*

[1] Copyright Registration No. PA0000121964 (Dec. 1, 1981).

Cajun: Seafood,[2] are expressions of popular sovereignty, authored by the people of Georgia or Mississippi. Not even the rationale of the decision below would invalidate a copyright in works like those.

B. Whether or not the decision below correctly interpreted *Banks*, taken on its own terms, that interpretation does not lead to the invalidation of Georgia's copyright in its annotations. According to the decision below, the question posed by the *Banks* rule is whether a particular work is a "product of the direct exercise of sovereign authority" and thus is authored by the people as sovereign. Pet. App. 25a. That framing resolves this case. For the annotations in Georgia's annotated code, comprising summaries of judicial and state attorney-general opinions interpreting statutes, are in no sense an exercise of popular sovereignty. They are nonbinding glosses on the law. And Georgia's citizens can in no way be deemed the "ultimate authors of the annotations," which merely describe the citizen-authored law. Pet. App. 4a. The same is true elsewhere. In no State's official annotated code are the annotations themselves "constructively authored by the People" of that State. Pet. App. 26a.

To understand the sheer implausibility of the holding in the decision below that official code "annotations . . . are attributable to the constructive authorship of the People," Pet. App. 53a, it helps to review

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[2] Copyright Registration No. PA0000297843 (Aug. 18, 1986).

some examples of what those annotations actually say. Here is an example from Georgia's annotated code:

> Insurer's failure to file a notice of cancellation with the Georgia Department of Motor Vehicle Safety (DMVS) did not render the insurer liable under the direct action statute, former O.C.G.A. § 46-7-12, because the former insurer had never obtained a permit of authority under former O.C.G.A. § 46-7-3 to operate as carrier in Georgia, the insurer could not have filed either a certificate of insurance or a notice of cancellation with the DMVS. *Kolecnik v. Stratford Ins. Co.*, No. 1:05-cv-0007-GET, 2005 U.S. Dist. LEXIS 34956 (N.D. Ga. Nov. 28, 2005) (decided under former O.C.G.A. § 46-7-3).[3]

And here is one from Arkansas's annotated code:

> In a prosecution for selling and offering for sale nursery stock infected with a disease in violation of a rule of the State Plant Board, the state was not required to show that the sale was made with knowledge that the trees were so affected. *Jacobs v. State*, 155 Ark. 95, 243 S.W. 952 (Ark. 1922).[4]

The *Banks* rule—to the extent it rests on a "metaphorical concept of citizen authorship"—always requires a bit of analytical suspended disbelief. *BOCA*, 628 F.2d at 734. But suggesting that Georgia's or Arkansas's

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[3] Ga. Code Ann. 40-1-57.

[4] Ark. Code Ann. 2-16-203.

citizens are the constructive authors of these elaborate annotations strains the imagination.

These annotations are not the law, or even interpretations of it, authoritative or otherwise. They are merely one annotator's fact-laden description of how a court decided a particular case. *See* Ark. Code Ann. 1-2-115(c) ("All . . . annotations . . . set out in this Code are given for the purpose of convenient reference and do not constitute part of the law."); Ga. Code Ann. 1-1-7 (describing the effect of Georgia's annotations in identical terms). Another annotator could describe that decision quite differently, and indeed other annotators do. *Compare Jacobs*, 243 S.W. at 952 (reporter describing *Jacobs* as holding that in a prosecution for sale of diseased nursery stock, "the state was not required to show a criminal intent" whatsoever), *with* Ark. Code Ann. 2-16-203 (describing *Jacobs* as only holding that the state did not need to prove knowledge of disease). Which description is correct is a matter of interpretation. And while the code's annotation is published by the State, no citizen could reasonably believe that its annotation has any authority that an unofficial annotation lacks, nor even any additional persuasive force in a court. The only authoritative statement on the matter is contained in the decision itself (or subsequent judicial decisions interpreting it). Official annotations are useful glosses on authoritative interpretations of the law—not themselves authoritative interpretations of the law.

Given this lack of authority, the people cannot be sensibly described as the authors of official

annotations. Grant the decision below the principle that the American people are deemed the authors of the law for copyright purposes because they—and not the government—are the ultimate lawmakers. Pet. App. 19a-20a. Even so, the people are not law annotators.

It would be perfectly correct for a citizen to say, "We the People of Arkansas, through our legislature, have made selling diseased trees a crime"; or to say, "We the People of Georgia, through our legislature, have imposed direct liability in certain circumstances on motor carriers' insurers." But it would be absurd for a citizen to say, "Although our Supreme Court may disagree with our interpretation, we the People of Arkansas, through a private annotator hired by our Code Revision Commission, have interpreted a decision of our Supreme Court as holding that our diseased tree law does not require the State to prove knowledge of disease." And it would be still more absurd for a citizen to say, "We the People of Georgia, through a private annotator hired by our Code Revision Commission, have interpreted an unpublished decision of a federal district court as predicting that, under our repealed motor-carrier-insurer liability law, an insurer that never obtained a permit of authority would not be held liable."

C. Because that understanding of the people's relation to official annotations is so absurd, no court had ever held, in the Nation's long history of official annotated codes and judicial reporters, that the people are

the authors of official annotations for copyright purposes until the decision below.

To the contrary, this Court has twice held that annotations by a government-employed, official court reporter are copyrightable works of the reporter. *See Callaghan v. Myers*, 128 U.S. 617, 645, 647-50 (1888); *Wheaton v. Peters*, 33 U.S. 591, 667-68 (1834) (holding that this Court's opinions could not be copyrighted, but remanding for a trial on whether its official reporter's annotations were copyrighted in accord with statutory registration requirements). That is because—as every opinion of this Court reiterates—annotations of opinions are not the law even when a government employee prepares them, although the opinions themselves are the law. *See*, *e.g.*, *United States v. Stitt*, 139 S. Ct. 399, 402 n.* (2018) ("The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader.") (citing *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337 (1906)).

The only apparent exception proves the rule, as the contrast between *Banks*'s and *Callaghan*'s treatment of syllabi and headnotes demonstrates. In *Banks*, this Court held that syllabi and headnotes prepared by Ohio Supreme Court Justices themselves were not copyrightable. *See Banks*, 128 U.S. at 253. That is because Ohio Supreme Court syllabi and headnotes, at that time, were a collective work of "the judges concurring in the opinion" just as much as the opinion itself, *id.* at 250, and were deemed the controlling expression of that court's holdings. *See Pioneer Tr. Co. v. Stich*, 73

N.E. 520, 522 (Ohio 1905) (holding that as between dicta in opinion and "the holding . . . as expressed in the syllabus," "[t]he syllabus controls"); *Hixson v. Burson*, 43 N.E. 1000, 1003 (Ohio 1896) ("reluctantly overrul[ing] the second [headnote of the] syllabus" of an 1880 Ohio Supreme Court decision).

Just one month after *Banks*, this Court appeared to reverse course, holding that the Illinois Supreme Court's official reporter's syllabi and headnotes were copyrightable. *See Callaghan*, 128 U.S. at 645, 647-50. Within a short time frame, therefore, the Court held both that the public officials who created Ohio's syllabi and headnotes were not authors for copyright purposes, *see Banks*, 128 U.S. at 253, and that the "public officer" who created Illinois's syllabi and headnotes was an author for copyright purposes, *Callaghan*, 128 U.S. at 645. And the Court reached the latter holding in spite of the copyright infringer's argument that the reporter—as "a sworn public officer, appointed by the authority of the government which creates the court of which he is made the reporter, and . . . paid a fixed salary for his labors"—"was not an author, within the meaning" of the copyright statute in effect. *Id.* at 646-47.

Both the judges in *Banks* and the reporter in *Callaghan* were equally public officials, equally engaged in official-capacity work when they produced the syllabi and headnotes whose copyrightability was in dispute. So there is only one possible explanation for the discrepancy between *Banks* and *Callaghan*: Ohio's syllabi were law and therefore ultimately attributable to

the people, while Illinois's syllabi were true annotations of law and therefore attributable only to the reporter who wrote them. Because Georgia's annotations here closely resemble the Illinois syllabi in *Callaghan*, they are copyrightable. The decision below was incorrect to hold otherwise.

II. Affirming the decision below would upend States' code-production practices and threaten to deprive the public of a valuable research tool.

The decision below held that annotations in a State's official annotated code are not copyrightable under a triple-factor test of its own invention. It strained to suggest that these three factors made Georgia's annotations unusual—remarkable, even. *See*, *e.g.*, Pet. App. 42a (touting the annotations' "potent cachet" as "undeniable and . . . impossible to ignore"); Pet. App. 40a (claiming that legislature's decision to print statutes and their annotations together in single "merged" code "imbues [the annotations] with an official, legislative quality," caused the "attributes" of statutes and annotations alike to be "intermingled" and "their distinct character altered," and ultimately created a "unified . . . single edict"). But there is nothing Georgia-specific or unusual about the factors on which the Eleventh Circuit relied. Rather, they are largely present in the case of every copyrighted annotated state code. A decision by this Court affirming the decision below on its reasoning would likely invalidate the copyrights in all of them.

Twenty-three States (including Georgia), two territories, and the District of Columbia copyright the annotations in their official annotated codes. *See* Appendix A, *infra*. Were those copyrights invalidated, States' cost of making official annotated codes likely would substantially increase. Those codes may even disappear altogether.

A. The decision below, if adopted by this Court, would likely invalidate every copyright in an official annotated state code.

To hold that Georgia's official annotated code is uncopyrightable, the decision below relied on three main factors. Public Resource appears to defend that novel three-factor test. *See* BIO 32 (arguing that the "Rule of Law" requires that annotations created in such a fashion be in the public domain); *see also* BIO 4-8 (approvingly discussing Eleventh Circuit's reliance on these "critical markers"); BIO 27 (inaccurately claiming that the annotations here are different from the copyrightable annotations in *Callaghan* and *Wheaton* because the latter purportedly lacked the features of Georgia's annotations relied upon below).

Although the decision below couched these factors in Georgia-specific terms, all three would apply equally to the official annotated code of almost any State. First, the Eleventh Circuit noted that an agent of a branch of Georgia's government with lawmaking authority supervised preparation of the annotations. Pet. App. 30a. Something similar could be said of nearly any State

with an official annotated code. Second, the court relied on the annotations' ostensibly "authoritative weight," Pet. App. 46a, particularly as evidenced by their placement in the official state code, Pet. App. 39a-42a. And third, it pointed to the fact that Georgia adopted its official annotated code through "bicameralism and presentment." Pet. App. 51a. But annotations in an official annotated state code will *by definition* be found within the State's official code and be adopted by the State's legislative process. Because the three factors relied upon by the decision below would apply to virtually any official annotated state code, its reasoning threatens to invalidate the copyright in any such code.

The first factor on which the Eleventh Circuit relied to hold that Georgia's annotations are not copyrightable is that their preparation is supervised by a commission that is "largely composed of officials from the legislative branch" and is "an agent of the Georgia General Assembly." Pet. App. 30a. According to the Eleventh Circuit, if the preparation of annotations is supervised by legislative or judicial officials, "it is substantially more likely that the work is constructively authored by the people" because those officials have lawmaking authority. Pet. App. 36a-37a. This factor would be satisfied in the case of virtually every copyrighted annotated state code. As is true in Georgia, outside contractors generally prepare the annotations to those codes. *See* Pet. App. 27a-28a. But those contractors almost invariably prepare them under the supervision of legislative-branch or judicial-branch officials,

including state legislators or state-court judges themselves in many cases. *See* Appendix B, *infra* (listing statutes that lay out the States' approaches to this task).

The second factor on which the Eleventh Circuit relied to hold that Georgia's annotations are not copyrightable is their ostensibly "authoritative weight." Pet. App. 46a. The Eleventh Circuit gave a secondary and a primary reason for concluding Georgia's annotations "carry authoritative weight." *Id.* The secondary reason is simply a factual error. The Eleventh Circuit cited a number of Georgia state-court cases that relied on official *comments* compiled in Georgia's annotated code. Pet. App. 43a-44a. But, as Georgia has explained, it claims no copyright in those comments. Pet. Br. 41 n.12. The annotations in which Georgia asserts copyright are annotations that summarize judicial and state attorney-general opinions, and the Eleventh Circuit cited no case (as none exists) where a Georgia court even cited the Georgia code's annotations of Georgia courts' opinions, or those of the state attorney general.

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

because "the official codification of Georgia statutes contains . . . annotations . . . they are to be read as authoritative in a way that annotations ordinarily are not." Pet. App. 42a. Whatever might be said of this peculiar reasoning on its merits, it applies by definition to every State that chooses to include annotations in its official statutory code.[5]

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

[5] The Eleventh Circuit also made much of Georgia's particular use of the word "merge" in a statute providing that "the 'statutory portion of [its code] *shall be merged* with annotations . . . and other materials.' " Pet. App. 39a (quoting Ga. Code Ann. 1-1-1). But while the use of that particular word in this context may be less than universal, the idea it expresses is not; all it means is that Georgia's codifiers are to print the annotations alongside the respective statutes they annotate, rather than in separate volumes of annotations. All annotated codes are so arranged.

statutes by the provisions [of those reenactments].'" Pet. App. 6a (quoting 2015 Ga. Laws 9, sec. 54).

Therefore, in reaching the conclusion that Georgia "adopted" its annotations through bicameralism and presentment, all the Eleventh Circuit ultimately relied upon is the fact that *the law originally designating Georgia's annotated code as its official code* was adopted through bicameralism and presentment. Pet. App. 47a (citing Ga. Code Ann. 1-1-1). This again is true of every official annotated state code. Every State or territory that has chosen to make its official code an annotated code did so through a law enacted through bicameralism and presentment (with the exception of Nebraska, which has a unicameral legislature).[6]

In sum, two of the three factors on which the Eleventh Circuit relied to hold that Georgia's annotations are not copyrightable are true, by definition, of every official annotated state code. And the third factor is true of virtually every official annotated state code in which the State (or the annotators with which it contracts) holds a copyright. Therefore, the decision below, if adopted by this Court, would at the very least threaten—and likely invalidate—every copyright in an official annotated state code.

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

B. Official code annotations' copyrightability is vital to their continued production and enhanced public understanding of the law.

As Georgia explains in its brief, States use copyright protections to facilitate the affordable production of official annotated codes. Pet. Br. 55-56. With one exception, each of the amici States has contracted with a third party to prepare its code's annotations.[7] That third-party annotator is willing to prepare the annotations at an affordable rate (and in some cases at no cost at all) because it receives the revenues from the code's sale. If States lost their copyrights in their codes' annotations, those annotations would be reproduced by actors like the respondent, the annotators' revenue stream from their sale of codes would dry up, and the annotators would demand to be paid more (or at all) for their work. At that point, amici States would be faced with the difficult choice of paying substantial sums to third parties to create annotations for dozens of volumes of code, or making their official codes unannotated.

If States opted to make their official codes unannotated, the public would lose a valuable legal-research tool. Although annotations are not authoritative

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

simply because they appear in an official code, the legal community still uses them heavily, even in this age of electronic legal research. For example, one recent survey of hundreds of lawyers found that a majority of the lawyers surveyed frequently or very frequently use the annotations in annotated codes to find cases relevant to their research. Am. Ass'n of Law Libraries Special Interest Section, *A Study of Attorneys' Legal Research Practices and Opinions of New Associates' Research Skills* 29 (2013), *available at* https://tinyurl.com/y6xhrcg3. The researchers found no statistically significant difference between younger and older lawyers' uses of annotations. *See id.*

Another recent study of hundreds of law-firm librarians found that 70% of those librarians believed that knowing how to use print codes remains an essential skill. Patrick Meyer, *Law Firm Legal Research Requirements and the Legal Academy Beyond Carnegie*, 35 Whittier L. Rev. 419, 445 (2014). And 36% believed that lawyers should *usually* use print-based codes for statutory research. *Id.* at 443. Indeed, many advise their firm's lawyers to begin their legal research in annotated codes. *See id.* at 468, 482.

Outside the legal community, the need for annotated codes is even greater. *Pro se* litigants, including prisoners, do not often have access to (or know how to use) expensive electronic legal research services like Westlaw or Lexis. With the help of annotated codes, however, they can find cases that interpret a statute that affects their interests, read brief summaries of those cases' holdings, and look those cases up in

reporters or on the Internet, where most courts' opinions are now freely available. Absent official annotated state codes, *pro se* litigants' ability to understand the laws that govern them would be seriously hampered. Indeed, this Court once summarily affirmed a decision holding that a state that provided its prisoners with unannotated state codes denied them reasonable access to the courts because, in part, "[t]here [we]re no annotated codes" in the state prisons. *Gilmore v. Lynch*, 319 F. Supp. 105, 110 (N.D. Cal. 1970), *aff'd sub nom. Younger v. Gilmore*, 404 U.S. 15 (1971).[8]

If States stopped producing official annotated codes, annotated codes would still exist. But unofficial annotated codes are no substitute for official annotated codes. One of the drafters of the legislation that created Georgia's official code recently observed that "creating only an unannotated version would force lawyers to purchase [two] versions"—the official unannotated version to ensure accurate citation to the code, and the unofficial annotated version for the annotations. Elizabeth Holland, *Will You Have to Pay for the O.C.G.A.?: Copyrighting the Official Code of Georgia Annotated*,

[8] This Court has since held that prisoners do not have "an abstract, freestanding right to a law library" and "cannot establish [a due process violation] simply by establishing that [their] prison's law library . . . is subpar." *Lewis v. Casey*, 518 U.S. 343, 351 (1996). Rather, a prisoner must show that "the alleged shortcomings in the library . . . hindered his efforts to pursue a legal claim." *Id.* Public Resource is mistaken, then, in suggesting that *Gilmore* is support for its claim of a due-process right of free access to annotations in official annotated codes. BIO 34. What *Gilmore* does show, however, is this Court's recognition of annotated codes' profound utility.

26 J. Intell. Prop. L. 99, 111 (2019). Indeed, the decision below noted in support of its holding that relying on an unofficial code for statutory text is a risky business. Pet. App. 41a.

Moreover, as Georgia explains in its brief, while States require the contractors that prepare their official codes to sell them at an affordable rate, unofficial codes are typically far more expensive. Pet. Br. 11, 55. In States where the publishers of unofficial annotated codes have no official annotated code for competition, an annotated code can be a five-figure purchase. *See*, *e.g.*, Thomson Reuters, West's Florida Statutes Annotated, *available at* https://tinyurl.com/y2os7ryo. In States like Georgia that have official annotated codes, an annotated code can cost as little as $400. Pet. Br. 11. Allowing copyrights to subsist in *official* annotated codes ensures that an invaluable research aid will remain within the means of small firms and solo practitioners, the clients they serve, and the general public.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

LESLIE RUTLEDGE
Arkansas Attorney General

NICHOLAS J. BRONNI
Arkansas Solicitor General
Counsel of Record

VINCENT M. WAGNER
Deputy Solicitor General

DYLAN L. JACOBS
ASHER STEINBERG
Assistant Solicitors General

ARKANSAS ATTORNEY GENERAL'S OFFICE
323 Center Street
Little Rock, Arkansas 72201
(501) 682-6302
nicholas.bronni@arkansasag.gov

Counsel for Amici Curiae

STEVE MARSHALL
Alabama Attorney General

KEVIN G. CLARKSON
Alaska Attorney General

LAWRENCE G. WASDEN
Idaho Attorney General

DEREK SCHMIDT
Kansas Attorney General

JIM HOOD
Mississippi Attorney General

DOUGLAS J. PETERSON
Nebraska Attorney General

ALAN WILSON
South Carolina
Attorney General

JASON R. RAVNSBORG
South Dakota
Attorney General

HERBERT H. SLATERY III
Tennessee Attorney General
and Reporter

SEAN D. REYES
Utah Attorney General

THOMAS J. DONOVAN, JR.
Vermont Attorney General

MARK R. HERRING
Virginia Attorney General

KARL A. RACINE
Attorney General for the
District of Columbia

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APPENDIX A

State	Registration No.	Date
Alabama	TX0008663448	Sept. 17, 2018
Alaska	TX0008570445	Mar. 22, 2018
Arkansas	TX0008590841	June 11, 2018
Colorado	TX0008381033	Feb. 16, 2017
Delaware	TX0008551825	Jan. 16, 2018
District of Columbia	TX0008566647	Apr. 23, 2018
Idaho	TX0008588533	Mar. 13, 2018
Kansas	TX0008430948	Jan. 9, 2017
Maryland	TX0008239025	June 30, 2016
Minnesota	TX0008269291	Oct. 5, 2015
Mississippi	TX0008588394	Apr. 3, 2018
Nebraska	TX0008489689	Aug. 1, 2016
New Hampshire	TX0008532691	Aug. 28, 2017
New Mexico	TX0008600436	Dec. 4, 2017
North Carolina	TX0008533641	Dec. 19, 2017
North Dakota	TX0008589858	Mar. 20, 2018
Puerto Rico	TX0008545032	Dec. 8, 2017
Rhode Island	TX0008555142	Jan. 16, 2018
South Carolina	TX0008549132	Oct. 18, 2017
South Dakota	TX0008625275	Aug. 7, 2018
Tennessee	TX0008588806	Mar. 19, 2018
Vermont	TX0008530993	Nov. 23, 2017
Virginia	TX0008613009	May 10, 2018
Virgin Islands	TX0008475282	May 24, 2017
Wyoming	TX0008604570	Feb. 12, 2018

APPENDIX B

State	Annotation Preparation Process
Alabama	Ala. Code 29-5A-22 (code commissioner supervises compilation of code); Ala. Code 29-5A-1(a) (legislative council appoints code commissioner); Ala. Code 29-6-1(a) (legislative council is comprised of state legislators).
Alaska	Alaska Stat. 24.20.070(b) (revision of code is a responsibility of legislative council); Alaska Stat. 24.20.020 (legislative council is comprised of state legislators); Ark. Code Ann. 1-2-303(a)(1) (code revision commission supervises revision of code).
Arkansas	Ark. Code Ann. 1-2-303(a)(1) (code revision commission supervises revision of code); Ark.Code Ann. 1-2-301(b) (majority of members of commission are members of state legislature, while the balance of members are appointed by the state supreme court).
Colorado	Colo. Rev. Stat. 2-5-101-02 (revisor of statutes, under supervision and direction of legislative committee, supervises preparation of code).

State	Annotation Preparation Process
Delaware	Del. Code Ann. tit. 1, sec. 210(b) (revisors of statutes, in consultation with legislative council, supervise preparation of code); Del. Code Ann. tit. 29, sec. 1101 (legislative council is comprised of state legislators).
Kansas	Kan. Stat. Ann. 77-133 (revisor of statutes supervises preparation of code); Kan. Stat. Ann. 46-1211(a) (revisor is appointed by legislative coordinating council); Kan. Stat. Ann. 46-1201(a) (legislative coordinating council is comprised of state legislators).
Maryland	Md. Code Ann., State Gov't 2-1258(a)(1)(i) (executive director of department of legislative services supervises preparation of annotated code); Md. Code Ann., State Gov't 2-1203(a) (executive director is appointed by president of the state senate and speaker of state house).
Minnesota	Minn. Stat. 3C.08 (revisor of statutes supervises preparation of code); Minn. Stat. 3C.01 (legislative coordinating commission appoints revisor); Minn. Stat. 3.303 (legislative coordinating commission is comprised of state legislators).

State	Annotation Preparation Process
Mississippi	Miss. Code Ann. 1-1-107 (legislative committee supervises preparation of code); Miss. Code Ann. 1-1-103 (committee is comprised of state legislators).
Nebraska	Neb. Rev. Stat. 49.702 (revisor of statutes supervises preparation of code); Neb. Rev. Stat. 50-401.01(1)-(2) (revisor of statutes is appointed by executive board of legislative council, which is comprised of state legislators).
New Hampshire	N.H. Rev. Stat. Ann. 17-A:1 (director of legislative services supervises preparation of code); N.H. Rev. Stat. Ann. 17-A:2 (director of legislative services is appointed by legislative committee).
New Mexico	N.M. Stat. Ann. 12-1-3 (New Mexico compilation commission supervises preparation of code); N.M. Stat. Ann. 12-1-2 (commission is presided over by the state supreme court's chief justice or a justice he designates, and includes the director of the legislative council service).
North Carolina	N.C. Gen. Stat. 164-10 (legislative services office supervises preparation of code).

State	Annotation Preparation Process
Puerto Rico	P.R. Laws Ann. tit. 2, sec. 223 (leaders of legislature supervise preparation of code).
Rhode Island	R.I. Gen. Laws 43-4-18 (office of law revision supervises preparation of code); R.I. Gen. Laws. 22-11-3.2 (legislative committee appoints director of office of law revision).
South Carolina	S.C. Code Ann. 2-13-60 (code commissioner supervises preparation of code); S.C. Code Ann. 2-13-10 (legislative council appoints code commissioner); S.C. Code Ann. 2-11-10 (legislative council is comprised of state legislators).
South Dakota	S.D. Codified Laws 2-16-6 (code commission supervises preparation of code); S.D. Codified Laws 2-16-3 (majority of code commission members are state legislators or appointees of legislative research council).
Tennessee	Tenn. Code Ann. 1-1-105 (code commission supervises preparation of code); Tenn. Code Ann. 1-1-101 (code commission is comprised of state supreme court's chief justice, two members appointed by him, a director of the general assembly's office of legal services, and the state's attorney general).

State	Annotation Preparation Process
Vermont	Vt. Stat. Ann. tit. 2, secs. 421-23 (legislative council supervises preparation of code); Vt. Stat. Ann. tit. 2, sec. 402 (legislative council consists of state legislators).
Virginia	Va. Code Ann. 30-146 (code commission supervises preparation of code); Va. Code Ann. 30-145 (code commission is comprised of a mix of state legislators, state-court judges, former state legislators, appointees of leaders and committees of the state legislature, and executive-branch officials).
Virgin Islands	V.I. Code Ann. tit. 2, sec. 210 (code revisor supervises preparation of code); V.I. Code Ann. tit. 2, sec. 209 (code revisor is appointed by president of the legislature).