No. 18-1150

In the Supreme Court of the United States

STATE OF GEORGIA, ET AL.,
Petitioners,

v.

PUBLIC.RESOURCE.ORG.,
Respondent.

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

BRIEF FOR MATTHEW BENDER & CO., INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

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

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INTEREST OF *AMICI CURIAE*[1]

LexisNexis Group, through the publisher amicus Matthew Bender & Co., Inc. (hereinafter, together, "LexisNexis"), entered into a contract with the General Assembly of Georgia and the State of Georgia (hereinafter, together, "Georgia"). That contract requires LexisNexis to distribute for free the legally binding, statutory texts of Georgia (hereinafter, "Statutory Text") to the public, as well as to research, create, manage, publish, distribute, and update annotations to the Statutory Text (hereinafter "Annotations"), which have no legally binding effect. Pet. App. 55a–56a. Contractually, Georgia owns the copyrights in the Annotations as a "work for hire." In exchange for these services, LexisNexis maintains exclusive license to sell the Annotations at a capped fee, while providing free copies of, and public access to, the Statutory Text and Annotations to certain state and local facilities, such as libraries. Pet. App. 8a. As the author and publisher of annotations in both Georgia and many other States and U.S. Territories, LexisNexis has unique knowledge regarding the issues in this case.

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[1] Counsel for the parties have consented to this brief. Under Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondent unilaterally scanned "every word" of Annotations that took LexisNexis countless hours to create. Pet. App. 72a. Respondent then publicly posted this creative, labor-intensive work online so that anyone could download it for free. Pet. App. 72a; *see* App. 132. As the district court properly recognized below, Respondent's "misappropriation" of the painstaking, creative efforts that LexisNexis performed to create this work of authorship "destroy[ed]" the firm's ability to recover the substantial costs that it put into creating this valuable and publicly useful work. Pet. App. 72a. Respondent now proudly touts that it gave "free" law to the people, asking the courts to shield its unabashed violation of the Copyright Act's text and core purpose. This Court should decline this destructive request and should honor Georgia's right to the fruits of these publicly valuable labors.

LexisNexis devoted countless hours to creating the Annotations for Georgia, putting in precisely the type of creative, labor-intensive effort that the Copyright Clause and the Copyright Act seek to encourage and protect. LexisNexis follows a similar, time-consuming process to create annotations for many other States. For both Georgia and other States, LexisNexis' efforts generate publicly valuable resources for understanding the law, which Georgia makes available to the public for much less than it

costs consumers to buy its competitor's privately-owned annotations. Accordingly, Respondent's approach would not lead to "free" law, as Respondent and its *amici* intone. With Georgia owning a copyright in the Annotations, it has negotiated for LexisNexis to prepare the Annotations at no cost to the general public, provide free access to the Annotations in libraries, and provide discounted, negotiated fees for practitioners. Respondent's position would simply destroy the economic incentive for creating this deeply valuable work, while imposing needless costs on the public.

Respondent's argument that all of LexisNexis' work can be made available for free, without the copyright owner's consent, finds no support in the Copyright Act's text or the narrow, judicially-created government edicts exception. As a threshold matter, the Copyright Act's plain text clearly protects the Annotations as an original literary work and/or protectable derivative work, as the Copyright Office and previous, uniform caselaw have recognized for many decades. Additionally, the judicially-created government edicts exception has no application because the Annotations do not "constitute[] the authentic exposition and interpretation of the law, which[] bind[s] every citizen." *Banks v. Manchester*, 128 U.S. 244, 253 (1888). Instead, multiple Georgia statutes make clear that the Annotations have no "official weight," *Harrison Co. v. Code Revision Comm'n*, 260 S.E.2d 30, 35 (Ga. 1979), which should be the end of this case.

ARGUMENT

I. The Substantial Effort That LexisNexis Puts Into Creating The Annotations For Georgia Results In The Type Of Creative Work That The Copyright Laws Seek To Protect And Foster

In their certiorari-stage briefing, Respondent and its *amici* repeatedly invoked the notion that the public is entitled to "free" annotations. *See, e.g.*, BIO 31; Next-Generation Legal Research Platforms Et Al. Amicus Br. In Supp. Of Resp't 6; 119 Law Students E. Al. Amicus Br. In Supp. Of Resp't 3. But, of course, any work that takes effort to create is never "free"—someone will pay for its creation. *See* Campbell R. McConnell, Stanley L. Brue & Sean M. Flynn, *Economics: Principles, Problems, and Policies* 4 (18th ed. 2009) ("At the core of economics is the idea that 'there is no free lunch.' You may be treated to lunch, making it 'free' from your perspective, but someone bears a cost."); Milton Friedman, *There's No Such Thing as a Free Lunch* (1975). In recognition of this basic economic precept, "[t]he economic philosophy behind" the Copyright Clause "is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'" *Mazer v. Stein*, 347 U.S. 201, 219 (1954) (quoting U.S. CONST., art. I, § 8, cl. 8). Such economic encouragement comes from the right of copyright owners to exploit their time-limited monopolies,

including through "work made for hire" arrangements. 17 U.S.C. §§ 101, 201(b); *see Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989).

Here, LexisNexis put substantial, time-consuming work into creating a work of authorship owned by Georgia, which work is unquestionably valuable to the public. As basic economics and the core theorem underlying copyright law recognize, destroying the ability of the copyright owner to monetize these hard-earned fruits will only discourage the creation of such a publicly valuable work in the future, while harming the citizenry.

A. LexisNexis Puts A Great Deal of Effort Into Creating This Publicly Valuable, Affordable Work

1. On behalf of Georgia, LexisNexis has devoted a "tremendous" amount of time into creating the Annotations, employing "skill and analysis in reviewing a wealth of materials and drafting original materials." Pet. App. 56a, 69a. LexisNexis editor-employees began by reading case law opinions, Attorney General opinions, advisory opinions of the State Bar, law reviews, and bar journals, to identify discussion points and interpretation issues. App. 673. LexisNexis editors then analyzed these materials, most often cases, for noteworthiness. App. 597. After selecting a case for inclusion, the editors verified each to ensure validity and gain an understanding of how

the statutory provision relates to the issue being discussed. App. 597–98, 673. The editors then reviewed and drafted an entry for each source, discussing the relevant facts and holding. App. 598–99. For new rules of law, the editors created a black letter law case note. App. 598–99. The editors also selected certain cases for an in-depth review. App. 671–72. For those annotations created by editors in the specialized Prospective Case Law Enhancements group, LexisNexis forwarded the annotations to its Georgia legal specialist employees for additional review and editing. App. 672. Once LexisNexis' editors quality-checked the relevant annotation, App. 598, they selected the most on-point and specific classification from the LexisNexis taxonomy scheme for indexing, App. 672. The LexisNexis editorial staff regularly reviews these materials and selects those it deems the most noteworthy for inclusion in the Annotations. App. 673; *accord* App. 132–36 (stipulation of fact).

"Each [Annotations] volume and supplement . . . contains statutory text and non-statutory annotation text, including judicial decision summaries, editor's notes, research references, notes on law review articles, summaries of the opinions of the Attorney General of Georgia, indexes, and title, chapter, article, part, and subpart captions." Pet. App. 56a. An Annotation first sets forth the Statutory Text, followed by "Editor's notes" created and drafted by LexisNexis editors that explain historical scope and language. *See, e.g.*, App. 714. Next comes the

"Judicial Decisions" section, which is typically the heart of the Annotations, and which editors divide into subtopics. *See, e.g.*, App. 714–22. This section provides brief summaries that LexisNexis editors conclude are most helpful. *Id.* Where relevant, LexisNexis editors include "Research References," which provide summaries of other sources—such as treatises, law review articles, and legal periodicals—that, in LexisNexis' judgment, give useful insight into the meaning of the statute. App. 722.

In all, the Annotations that LexisNexis creates provide a relevant description of the application or interpretation of the Statutory Texts, as well as analysis of the legal holdings or other important authorities that, in the judgment of LexisNexis expert editors, have relevance to those provisions. Pet. App. 5a. The following is a brief sample annotation, from the 2014 edition of the Annotations, for *Cho Carwash Prop., LLC v. Everett*, 755 S.E.2d 823 (Ga. 2014), and O.C.G.A. § 34-9-260:

> Award of workers' compensation benefits was upheld because there was some evidence to support the administrative law judge's calculation of the claimant's average weekly wage under O.C.G.A. § 34-9-260(3) based on the claimant's testimony that the claimant was supposed to work from the car wash's opening until its close.

App. 599–600. No part of the above Annotation is Statutory Text or a judicial opinion, and it carries no force of law. For far more context and many more

fulsome examples, LexisNexis would urge this Court to review a portion of the 2009 edition, and 2015 supplement, of the Annotations, which LexisNexis also attached to its amicus brief before the district court below. App. 713–26.

2. The efforts that LexisNexis put into creating the Annotations are comparable to the work that it has put into creating annotations for other jurisdictions beyond Georgia. LexisNexis has created statutory annotations for approximately one third of all States, several U.S. Territories, and the District of Columbia. *See* LexisNexis, *Statutory Editorial Process*, http://www.lexisnexis.com/documents/pdf/20170303045425_large.pdf (last visited August 28, 2019). For each jurisdiction, LexisNexis undergoes a process similar to that described immediately above for Georgia. *Id.* As with Georgia, LexisNexis "analysts and editors process tens of thousands of updates to our code collection each month, especially during the times of year when many states are in session and are actively generating legislation." *Id.* These updates include "caselaw annotations to opinions, particularly seminal ones," "notes to attorney general opinions on the applicability of each section of code," "notes to treatises, law reviews, legal periodicals and encyclopedias, as well as other collateral references that pertain to the section of code in a meaningful way," and much more. *Id.* Each annotation is "continuously reviewed to ensure quality." *Id.*

3. The annotations that LexisNexis created for Georgia and other States provide an extremely valuable and affordable service to both the legal community and the broader public.

Statutory annotations are "an incredibly important research tool" and, "because often what you are trying to do is see how a statute applies, these annotations are pure gold." Shawn G. Nevers, "Don't Underestimate the Importance of Statutes," *ABA Student Lawyer*, Vol. 40, No. 2, October 2011, https://abaforlawstudents.com/2011/10/01/dont-underestimate-importance-statutes/. "By using an annotated code . . ., a researcher finds a wealth of information interpreting that statute, simply by retrieving a relevant section." Brooklyn Law Sch. Libr., *Researching Statutes: Annotated Codes,* http://guides.brooklaw.edu/c.php?g=330891&p=2222835 (last visited Aug. 28, 2019); *accord* 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), https://tinyurl.com/y6xhrcg3; Patrick Meyer, *Law Firm Legal Research Requirements and the Legal Academy Beyond Carnegie*, 35 WHITTIER L. REV. 419, 445 (2014).

Pursuant to the contract with Georgia, as the owner of the Annotations, LexisNexis sells hard copies of the Annotations as well as sub-licenses for electronic access to the Annotations, which provide the public access to this valuable work for much less than its competitor,

Thompson West, charges for its own, separate, privately-owned annotations. Thompson West recoups the substantial funds that it invests to create its own annotations by selling its annotations for Georgia laws at $2,570 per copy, more than six times the contractual cap of $404 per copy that LexisNexis can charge for the Georgia-owned Annotations. Pet. App. 7a; App. 532. Similarly, Thompson West creates and then sells its privately-owned statutory annotations for many of the same States that LexisNexis prepares its State-owned annotations. *See generally* Kendall F. Svengalis, Legal Information Buyer's Guide & Reference Manual (2019). As with Georgia, Thompson West's prices are significantly higher in other States than what LexisNexis charges for other State-owned annotations. *See, e.g.*, *id.* at 890 (Arkansas: $558 for State-owned annotations, $3,773 for private owned); *id.* at 901 (Delaware: $659 for State-owned annotations, $1,488 for private owned); *id.* at 913 (Idaho: $515 for State-owned annotations, $1,507 for private owned); *id.* at 943 (Mississippi: $583 for State-owned annotations, $3,619 for private owned); *id.* at 986 (Tennessee: $365.17 for State-owned annotations, $1,784 for private owned).

B. Destroying The Economic Value Of This Work Will Not Make It "Free," But Will, Instead, Impose Substantial Costs On The Public

The entirety of the economic benefit that LexisNexis receives for creating this publicly valuable

work for Georgia is the exclusive right to sell the Annotations at a contractually capped fee. LexisNexis has a similar contractual arrangement with many other States. If Georgia's copyright is destroyed and LexisNexis thereby loses its exclusive right to sell the Annotations, LexisNexis will no longer create those Annotations unless Georgia pays for this work, likely with taxpayer funds.

1. The "economic" incentive owned by Georgia that "encourage[s]," *Mazer*, 347 U.S. at 219, LexisNexis to create and continuously update the Annotations comes *entirely* from the contractual right to sell the Annotations for a contractually capped fee, by lawfully licensing Georgia's registered copyright in the Annotations. Pet. App. 72a; *accord* App. 675 ("sole revenue to recoup these costs").

LexisNexis' contract with Georgia involves two types of works. First, LexisNexis must create and give copies of the unannotated Statutory Text to the public for free. Pet. App. 57a. LexisNexis satisfies this obligation by providing online access to the Statutory Texts and the Georgia Constitution via a link to the State of Georgia website located at www.legis.ga.gov. Pet. App. 57a. This publication includes free Statutory Text and numbering, numbers of titles, chapters, articles, parts and subparts, captions and history lines. The online electronic version of Georgia's laws includes robust features and capabilities, such as "terms and connectors" searching and "natural language" searching. Online Georgia code users may also print

copies of the Statutory Text, save copies to their hard drive in PDF format, or e-mail copies to others. App. 671. Neither Georgia nor LexisNexis claim any copyright in the Statutory Text.

Second, LexisNexis must research, create, manage, publish, and distribute the Annotations, App. 671–73, using the above-described process, *see supra* pp. 4–7. LexisNexis must then provide free CD-ROM copies of these Annotations to 60 state and local facilities throughout Georgia, such as libraries, which the public may access without charge. Pet. App. 8a.

In exchange for performing these publicly valuable functions, Georgia, as owner of the Annotations, has licensed LexisNexis "the exclusive right to publish and sell the O.C.G.A. as a printed publication, on CD-ROM and in an online version, and Lexis/Nexis receives income from its sales of the O.C.G.A." Pet. App. 58a. In particular, under this license, LexisNexis has the exclusive, contractual right to sell a copy of the annotations at a price cap of $404.00 (as of 2016). Pet. App. 7a.

Again, LexisNexis' exclusive, contractual right to sell the Annotations provides the *entirety* of the economic incentive for the firm to create this valuable work of authorship. Pet. App. 72a; App. 674–75.

2. If anyone can copy the Annotations (as well as similar state-owned annotations that LexisNexis prepares for other States) without violating Georgia's

copyright for this valuable, labor-intensive work of authorship, LexisNexis "would lose all incentive to" provide the above-described functions, under its contract with Georgia. App. 674. Accordingly, LexisNexis would no longer provide free versions of the Statutory Text, create the Annotations themselves, or make the Annotations available for free to certain state and local facilities. *See supra* pp. 10–11. And, since LexisNexis would no longer create the Annotations, the only available annotations would be those created by Thomson West, which cost customers six times more than what LexisNexis charges. *See supra* p. 9. The harms would be both public and private, as Georgia and LexisNexis would have lost a significant portion of the benefit of the bargain that they struck for LexisNexis to create the Annotations (as well as similar statutory annotations for other States).

If the Eleventh Circuit's ruling is allowed to stand, LexisNexis would continue to offer the services it currently provides without charge, under its contract with Georgia, only if "it were directly paid for such services." App. 674. It is notable that so few States have chosen the model of paying for the creation of annotations, either by paying a third party such as LexisNexis or using its own staff. *See* Jennifer Gilroy & Abby Chestnut, *Who Owns the Law? The Colorado Perspective on Copyright and State Statutes* (Apr. 6, 2017), https://legisource.net/2017/04/06/who-owns-the-law-the-colorado-perspective-on-copyright-and-state-statutes/. This strongly suggests that many States that currently make State-owned annotations available for

an affordable price under contracts with LexisNexis, like the contract at issue here, may not see it as worth the substantial taxpayer expense to create annotations if forced to pay for such creation. Accordingly, in all likelihood, the approach that Respondent urges would result in a significant diminution of publicly valuable, affordable information about the law, contrary to the misguided policy goals that Respondent and its *amici* seek to forward with their "free" annotations mantra. There would be fewer annotations of State laws and those that exist would be more expensive than those LexisNexis makes available at reasonable prices now.

II. The Copyright Act Rewards This Creative "Work For Hire" By Protecting The Annotations From Unauthorized Copying

As a creative work of authorship, the Annotations are unquestionably protected by the Copyright Act's plain text. And while Respondent seeks to rely upon the judicially-created government edict's exception to the Act, that exception is plainly inapplicable.

A. The Copyright Act's Plain Text Protects The Annotations

"The Copyright Act (Act), 17 U.S.C. § 101 *et seq.*, grants copyright protection to original works of authorship." *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663 (2014) (citing 17 U.S.C. § 102(a)). A "work of authorship" includes, as relevant here, non-dramatic "literary works," such as "books" "expressed

in words." 17 U.S.C. §§ 101, 102(a). It also protects "derivative work[s]," such as a "work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship." *Id.* §§ 101, 103(a). "The copyright in a . . . derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work . . ." *Id.* § 103(b). And while the Copyright Act specifically excludes from copyright protection "any work of the United States Government," no similar exclusion applies to works of the States or their subunits. 17 U.S.C. § 105.

There is no doubt that the Annotations fall within the statutory text as an original non-dramatic literary work and/or protectable derivative work. *See* 1 Howard B. Abrams & Tyler T. Ochoa, *The Law of Copyright* § 2:57 (Oct. 2018 Update); Jason B. Binimow, Annotation, *Copyright in and Fair Use of Statutory Annotations and Case Headnotes*, 38 A.L.R. Fed. 3d Art. 6 (2019). As described in detail above, *see supra* pp. 4–6, the Annotations consist of detailed summaries and editorial organization of caselaw, and other materials interpreting the Statutory Text, as well as other editorial work found nowhere other than the Annotations. LexisNexis engages in a time-consuming, creative process to generate these original elements as a work for hire for Georgia, which owns the copyright. *See supra* pp. 4–7. The Annotations are thus an original "literally work[]," 17 U.S.C. §§ 101, 102(a), and/or protectable "derivative work" as

"editorial revisions, annotations, [or] elaborations" of other materials, *id.* §§ 101, 103(a). Georgia has only claimed a copyright in the "material contributed by the author" of the Annotations and not the Statutory Text, judicial opinions, Attorney General opinions, or law review articles that the Annotations organize and summarize. *Id.* § 103(b).

The Copyright Office has unambiguously explained that "[a] legal publication that analyzes, annotates, summarizes, or comments upon a legislative enactment, a judicial decision, an executive order, an administrative regulation, or other edicts of government may be registered as a nondramatic literary work," and lists as an example "[a]nnotated codes that summarize or comment upon legal materials issued by a federal, state, local, or foreign government." *U.S. Copyright Office, Compendium of U.S. Copyright Office Practices* § 717.1 (3d ed. 2017), https://www.copyright.gov/comp3/. The Copyright Office has registered the Annotations, *see, e.g.*, Registration Nos. TX0008253115 (Aug. 9, 2016), TX0008520098 (Aug. 4, 2017), as well as other State-owned annotations, *see, e.g.*, Registration No. TX0008001813 (Mar. 13, 2015) (New Mexico), Registration No. TX0008633448 (Sept. 17, 2018) (Alabama), Registration No. TX0008570445 (Mar. 22, 2018) (Alaska), TX0008590841 (June 11, 2018) (Arkansas), TX0008381033 (Feb. 16, 2017) (Colorado), TX0008551825 (Jan. 16, 2018) (Delaware), TX0008588533 (Mar. 13, 2018) (Idaho),

TX0008430948 (Jan. 9, 2017) (Kansas), TX0008588394 (Apr. 3, 2018) (Mississippi), TX0008532691 (Aug. 28, 2017) (New Hampshire), TX0008600436 (Dec. 4, 2017) (New Mexico), TX0008555142 (Jan. 16, 2018) (Rhode Island), TX0008549132 (Oct. 18, 2017) (South Carolina), TX0008625275 (Aug. 7, 2018) (South Dakota), TX0008588806 (Mar. 19, 2018) (Tennessee), TX0008530993 (Nov. 23, 2017) (Vermont), TX0008604570 (Feb. 12, 2018) (Wyoming).

Cases going back more than a century have consistently held—at least before the Eleventh Circuit's decision—that such works of authorship are protected by copyright law. *See Howell v. Miller*, 91 F. 129 (6th Cir. 1898); *W.H. Anderson Co. v. Baldwin Law Pub. Co.*, 27 F.2d 82 (6th Cir. 1928); *Lawrence v. Dana*, 15 F. Cas. 26, No. 8136 (C.C.D. Mass. 1869); *accord* James E. Hawes & Bernard C. Dietz, *Copyright Registration Practice* § 13.11 (May 2019 Update).

B. The Judicially-Created Government Edicts Exception Is Inapplicable

Respondent has never offered a meaningful response to the Copyright Act's plain text protection of the Annotations; indeed, it has conceded that substantively similar works owned by private firms are protected by the Act. *See* BIO 3; *accord* Pet. App. 62a ("Defendant itself has admitted that annotations in an unofficial reporter would be copyrightable[].").

Respondent has, instead, dismissed the Act's plain terms as a "*non sequitur*," BIO 28, seeking to rely upon the 19th-century, judicially-created government edicts exception to that statutory text. This exception, however, applies only to *legally binding* works, such as judicial opinions, statutes, and regulations, because "access to the law cannot be conditioned on the consent of a private party, just as it cannot be conditioned on the ability to read fine print posted on high walls." *Am. Soc'y for Testing & Materials v. Public.Resource.Org, Inc.*, 896 F.3d 437, 458–59 (D.C. Cir. 2018) (Katsas, J., concurring). This "public policy" exception, *Banks*, 128 U.S. at 253, has no application to the Annotations.

1. This Court recognized the government edicts exception in three cases in the 19th Century, which held that judicial opinions cannot be copyrighted under the Copyright Act of 1790, but annotations to those opinions prepared by reporters can be copyrighted. In *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834), this Court—in the course of remanding for trial a dispute as to whether this Court's first reporter had taken the proper steps to copyright its annotations—remarked that even if the jury found that the reporter had properly secured such a copyright in its annotations, no one had a copyright to the underlying opinions themselves: "the court are unanimously of opinion[] that no reporter has or can have any copyright in the written opinions delivered by this court." *Id.* at 668. Next, in *Banks v. Manchester*, 128 U.S. 244 (1888), this Court held that

a state supreme court's opinions could not be copyrighted because, under the "public policy" that this Court had announced in *Wheaton*, "[t]he whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all." *Id.* at 253. Finally, in *Callaghan v. Myers*, 128 U.S. 617 (1888), this Court held that a court reporter had the right to copyright annotations, such as headnotes, syllabi, and summaries of counsel's arguments, to state supreme court opinions. *Id.* at 645–50. "[A]lthough there can be no copyright" in judicial opinions, "there is no ground of public policy on which a reporter . . . can, in the absence of a prohibitory statute, be debarred from obtaining a copyright . . . cover[ing] the matter which is the result of his intellectual labor." *Id.* at 647.

2. This Court should carefully confine the government edicts exception to the core rationale and holding in *Wheaton*, *Callaghan*, and *Banks*—foreclosing copyright only for works that are "the authentic exposition and interpretation of the law, which[] bind[] every citizen," *Banks*, 128 U.S. at 253—for at least three reasons.

First, the government edicts doctrine is not found in the statutory text of the Copyright Act, and such judicially-created exceptions should typically be read narrowly, as a necessary corollary to the principle that courts generally "may not engraft . . . exceptions

onto the statutory text." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 527 (2019).

As this Court has explained when addressing the 19th-century-era, judicially-created exceptions for "[l]aws of nature, natural phenomena, and abstract ideas" to the Patent Act, courts should "tread carefully" when dealing with these "implicit exception[s]" to broad statutory terms, lest those court-created exceptions "swallow" the Patent Act. *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 573 U.S. 208, 216–17 (2014) (citations omitted). In the course of declining to use this doctrine to exclude categorically business method patents from the Patent Act's reach, for example, this Court explained that "[w]hile these exceptions [to the Patent Act] are not required by the statutory text, they are consistent with the notion that a patentable process must be 'new and useful[,]' [a]nd, in any case . . . have defined the reach of the statute as a matter of statutory *stare decisis* going back 150 years." *Bilski v. Kappos*, 561 U.S. 593, 601–02 (2010) (quoting 35 U.S.C. § 101). This Court further explained that it "has not indicated that the existence of these well-established exceptions gives the Judiciary carte blanche to impose other limitations that are inconsistent with the text and the statute's purpose and design." *Id.* at 603.

The government edicts exception to the Copyright Act is certainly not "required" by any statutory text. *Id.* at 601–02; *compare Am. Soc'y*, 896 F.3d at 458–59 (Katsas, J., concurring) (suggesting four "possible

grounds" for this exception, with only two being related to the text), *and* Pet. App. 11a–12a (invoking 17 U.S.C. § 102(a)'s "original works of authorship" language), *with Banks*, 128 U.S. at 253 (referring to "public policy" and "judicial *consensus*"). As an implicit exception—found, at most, in the penumbras of the text—the government edicts exception should be read to hue closely to the core holding in *Wheaton*, *Callaghan*, and *Banks*: applying only to works that are "the authentic exposition and interpretation of the law, which[] bind[] every citizen," *Banks*, 128 U.S. at 253, such as judicial opinions, laws, and regulations.

Second, a broader construction of this judicially-created exception to remove the Copyright Act's protection from works that do not bind the public would undermine the Act's core purposes. The Act's protections are "intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired." *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). Any expansion of this exception to cover otherwise protected, non-dramatic works of authorship, beyond the narrow bounds articulated in *Wheaton*, *Callaghan*, and *Banks*, would undermine the economic incentive to create those works, contrary to the Act's central design. For example, as explained above, *see supra* pp. 10–13, judicially destroying Georgia's ownership rights would take away LexisNexis' incentive to create such works for hire for

Georgia in the future, imposing needless costs on the public.

Third, expanding the exception beyond the category of legally-binding works would introduce unpredictability into the Copyright Act's protection, including as to registered copyrights. "Because copyright law ultimately serves the purpose of enriching the general public through access to creative works, it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible." *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994). Engrafting a multi-factor balancing test—such as whether the work is "sufficiently law-like," Pet. App. 26a—onto the Copyright Act would introduce grievous uncertainty into this sensitive area of law. In the present case, for example, the Eleventh Circuit employed a three-factor analysis to reject Georgia's registered and previously certain copyright in the Annotations, *see infra* pp. 22–24, and thereby destroyed the economic value that Georgia fairly expected to be able to enjoy and license to LexisNexis, in exchange for the "tremendous" amount of skilled time and effort that it put into creating the Annotations, Pet. App. 56a, 69a. Introducing such uncertainty into copyright law, writ large, would threaten untold numbers of extant registered and unregistered copyrights owned by dozens of States and the basis of significant contractual arrangements, while discouraging firms from contracting with States to create such works in the future (unless, of course, they receive upfront

payments, at the taxpayers' expense). *See supra* pp. 10–13.

3. The reasons that the Eleventh Circuit offered for extending this government edicts inquiry beyond simply asking whether the work is legally binding find no grounding in *Wheaton*, *Callaghan*, and *Banks* or the Copyright Act's text.

The Eleventh Circuit first thought it important to consider "who made" the work. Pet. App. 26a. But this consideration is only relevant to the extent that it is used to determine if the person or body that "made" the work had the authority to make that work legally binding and did, in fact, exercise that authority to make the work legally binding. So, for example, in *Banks*, when this Court explained that "[t]he whole work done by the judges constitutes the authentic exposition and interpretation of the law, which[] bind[s] every citizen," 128 U.S. at 253, it was referring to the work done by judges that is "binding"—opinions—not non-binding works that judges may craft, such as writing books or giving speeches. As discussed below, *see infra* pp. 24–26, the Annotations "made" by LexisNexis are not legally binding. To the extent that the Eleventh Circuit's "who made" the work inquiry goes beyond asking whether the person or body who made the work had the authority to make it legally binding and did, in fact, use that authority to make it legally binding, the inquiry is a needless distraction, creating uncertainty

without any grounding in *Wheaton*, *Callaghan*, and *Banks* or the Copyright Act's text.

For example, the Eleventh Circuit put great weight on the amount of "control" that Georgia allegedly exercises over LexisNexis' creation of the Annotations. Pet. App. 29a. But as the Eleventh Circuit otherwise recognized, the General Assembly does not individually enact each separate annotation as part of the ordinary legislative process. Pet. App. 47a. In fact, while the contract between LexisNexis and Georgia is detailed, there was no record evidence that Georgia ever reviews, revises, or approves any annotation, rather than generally approving the Annotations wholesale. There was also no record evidence that Georgia reviews the periodic pocket-part updates that LexisNexis sends out quarterly and makes available on-line. Nothing in *Wheaton*, *Callaghan*, and *Banks* or the Copyright Act's text gives any significance to such often nuanced matters.

The Eleventh Circuit also looked at whether the work was an "'authoritative source[] on the meaning of" state law. Pet. App. 38a. Under *Banks*, the relevant "authoritative[ness]" of a government work is whether it is "the authentic exposition and interpretation of the law, which[] bind[s] every citizen." 128 U.S. at 253. Going beyond this inquiry to consider how the State brands the work—does it call it "official" or not?—introduces an unfocused inquiry, divorced from any holding or reasoning in *Wheaton*, *Callaghan*, and *Banks* or the Copyright

Act's text. After all, what one State calls "official" could mean that the work *is* binding on "every citizen," while in another State, this may only be a marketing tool label. In Georgia, for example, it is clear beyond any doubt that the "official" designation does not make the Annotations binding on anyone. *See infra* pp. 24–26. Again, the ultimate inquiry under *Wheaton*, *Callaghan*, and *Banks* is whether the work is *in fact* legally binding, meaning that the Eleventh Circuit's "authoritative[ness]" gloss adds only needless confusion and uncertainty.

Finally, the Eleventh Circuit considered the "process by which" the work was made, including whether it was "prepared . . . outside of the normal channels of the legislative process" or "voted on" by the legislature. Pet. App. 47a–48a. As with the first factor—"who made" the document—this factor is relevant only to the extent that the body took the steps legally necessary under state law to make the work "the authentic exposition and interpretation of the law, which[] bind[s] every citizen." *Banks*, 128 U.S. at 253. Here, it is undisputed that the Annotations do not bind anyone. Beyond that, delving into the "process by which" the work is created is yet another distraction, which finds no grounding in *Wheaton*, *Callaghan*, and *Banks* or the Copyright Act's text.

4. Under a proper analysis of whether the Annotations are legally binding, the Annotations

clearly fall outside of the scope of the narrow, judicially-created government edicts exception.

"The Georgia General Assembly has passed not just one but three different statutes to make clear" that the Annotations lack legal force. Pet. App. 63a. In O.C.G.A. § 1-1-1, the Assembly explained that only the "statutory portion" of Georgia laws "have the effect of statutes enacted by the General Assembly of Georgia." O.C.G.A. § 1-1-7 provides that "title and chapter analyses do not constitute part of the law and shall in no manner limit or expand the construction of any Code section," and that "[a]ll historical citations, title and chapter analyses, and notes set out in this Code are given for the purpose of convenient reference and do not constitute part of the law." And 2014 Ga. Laws 883, § 54/2015 Ga. Laws 18–19, § 54 provide that "Annotations; editorial notes; Code Revision Commission notes; research references; notes on law review articles . . . except as otherwise provided in the Code . . . which are contained in the Official Code of Georgia Annotated are not enacted as statutes by the provisions of this Act."

The Supreme Court of Georgia has reached the same conclusion, consistent with this emphatic statutory text. "[T]he inclusion of annotations in an 'official' Code [does] not . . . give the annotations any official weight." *Harrison*, 260 S.E.2d at 35.

Given that the State of Georgia has made clear that the Annotations are not "the authentic exposition

and interpretation of the law, which[] bind[s] every citizen," *Banks*, 128 U.S. at 253, the government edicts doctrine is entirely inapplicable. Accordingly, this Court should honor the Copyright Act text's clear protection of the Annotations.

CONCLUSION

This Court should reverse the Eleventh Circuit's judgment.

Respectfully submitted,

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