No. 18-1150

IN THE

Supreme Court of the United States

STATE OF GEORGIA, ET AL.,

Petitioners,

—v.—

PUBLIC.RESOURCE.ORG, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF GEORGIA, AND PROFESSOR JASON SCHULTZ IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 2 million members and supporters dedicated to defending the principles of liberty and equality embodied in the Constitution. The American Civil Liberties Union of Georgia (ACLU of Georgia) is the Georgia affiliate of the ACLU with approximately 11,000 members and 83,000 supporters.

The ACLU and ACLU of Georgia are steadfast defenders of First Amendment freedoms. Since its founding in 1920, the ACLU has appeared before this Court in numerous cases involving the First Amendment, including *Whitney v. California*, 274 U.S. 357 (1927); *Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939); *West Virginia v. Barnette*, 319 U.S. 624 (1943); *N.Y. Times, Co. v. Sullivan*, 376 U.S. 254 (1964); and *New York Times v. United States*, 403 U.S. 713 (1971). The ACLU also served as counsel for petitioners in *Association for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576 (2013), and submitted amicus briefs in support of petitioners in *Golan v. Holder*, 565 U.S. 302 (2012) and in support of respondents in *Alice Corporation Pty. Ltd., v. CLS Bank International*, 573 U.S. 208 (2014), all cases in which this Court considered the proper scope of intellectual property rights. The boundaries of the government edicts doctrine raise fundamental issues regarding the

[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than amicus curiae, its members, and its counsel, made a monetary contribution to the preparation or submission of this brief. Both parties have consented to the filing of this brief.

constitutional guarantees of freedom of speech and the right to petition. The proper resolution of this case is, therefore, a matter of significant concern to the ACLU, the ACLU of Georgia, and their members.

Professor Jason Schultz teaches and researches intellectual property at NYU School of Law. His sole interest in this case lies in the proper application of the Copyright Act and the First Amendment to government documents.

FACTUAL BACKGROUND

The Official Code of Georgia Annotated ("O.C.G.A." or "Official Code") is the only official code of Georgia. Resp. Br. 1. In addition to the text of enacted statutes, the Official Code includes "annotations, captions, catchlines, history lines, editorial notes, cross-references, indices, title and chapter analyses, and other materials," all of which are "merged with" the statutes. O.C.G.A. § 1-1-1. Through the Georgia Code Revision Commission (the "Commission")—a state body created to oversee the creation and maintenance of the Official Code—the state contracts with a private company to create the Official Code, subject to the Commission's complete editorial control.

The Commission is funded and largely staffed by the legislature. Its members, more than half of whom are state legislators, "receive the expenses and allowances authorized by law for legislative members of interim legislative committees." O.C.G.A. § 28-9-2(c). Any other funds for the Commission also "come from the funds provided for the legislative branch of state government." *Id.* In addition, the Commission is staffed by the Office of Legislative Counsel, *id.* § 28-9-4, and "[a]ll actions taken by [the C]ommission

and all contracts entered into by [it] are ratified and confirmed," *id.* § 28-9-2(d).

The Commission exercises "the ultimate right of editorial control over all material contained in the Code," provides detailed directions as to how the private party is to generate and arrange the annotations, and sets very "specific content, style, and publishing standards [for] the Code." JA 536; *see also* O.C.G.A. § 28-9-3. "If there is any disagreement as to material to be included in the Code or as to any codification, annotation or other matter of editorial content, the Publisher shall abide by and follow the decision of the Commission[.]" JA 569.

The full compilation is then "published by the authority of the state . . . as the 'Official Code of Georgia Annotated,'" and it is formally adopted by the legislature each year. O.C.G.A. §§ 1-1-1, 28-9-3. "All the contents" of the resulting Official Code are "copyrighted in the name of the State of Georgia." JA 567.

Accessing and reproducing portions of the Official Code is necessary to litigate in federal and state courts in Georgia, which require that litigants cite to the Official Code in court filings. *See* O.C.G.A. § 1-1-8; 11th Cir. R. 28–1(k) (requiring that citations comply with the Bluebook); The Bluebook: A Uniform System of Citation T.1.3, at 259 (Columbia Law Review Ass'n et al. eds., 20th ed. 2015) (requiring that citations refer to the Official Code). "[A]nyone citing [any other compilation of Georgia law] will do so at his peril if there is any inaccuracy in that publication or any discrepancy between" the Official Code and that compilation. *Georgia v. Harrison Co.*,

548 F. Supp. 110, 115 (N.D. Ga. 1982), *vacated as moot*, 559 F. Supp. 37 (N.D. Ga. 1983).

The Respondent in this case, Public.Resource.org, Inc. ("Public Resource"), is a nonprofit organization that aims to improve public access to government records and primary legal materials. In 2013, Public Resource purchased the current volumes of the print Official Code and made a digital copy available to the public via its website. The public can access the Official Code on Public Resource's website for free—or else purchase a copy from Georgia for more than $400. JA 628.

Georgia is not the only state that claims a copyright in its annotated code. While a majority of states do not, twenty-two other states, as well as Puerto Rico, the Virgin Islands, and the District of Columbia, partake in the practice.[2] Some states

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[2] *See* Registration No. TX0008658347 (copyright for Code of Alabama Annotated); Registration No. TX0008570445 (same for Alaska Statutes Supplement Volume); Registration No. TX0008590841 (same for Arkansas Code Annotated); Registration No. TX0008381033 (same for Colorado Revised Statutes Special Supplement); Registration No. TX0008551825 (same for Delaware Code Annotated); Registration No. TX0008588533 (same for Idaho Code); Registration No. TX0008430948 (same for Cumulative Supplements to the Kansas Statutes Annotated); Registration No. TX0008588805 (same for Annotated Code of Maryland); Registration No. TX0008269291 (same for Minnesota Statutes Supplement); Registration No. TX0008588394 (same for Mississippi Code); Registration No. TX0008489689 (same for Revised Statutes of Nebraska Cumulative Supplement); Registration No. TX0008532691 (same for New Hampshire Revised Statutes Annotated); Registration No. TX0008600436 (same for New Mexico Statutes Annotated); Registration No. TX0008533641 (same for General Statutes of North Carolina Annotated); Registration No. TX0008589858 (same for North Dakota

additionally hold copyrights in subsets of their statutes. For example, New Mexico holds a copyright in its official election guide, a compilation of annotated statutes concerning elections and voting rights. *See* Registration No. TX0005041799.

Moreover, annotated codes are but one example of the government records and legal materials in which states assert a copyright. Michigan holds a copyright in the Constitution of Michigan, Registration No. TX0002908667, and the constitution and executive orders of South Dakota are copyrightable by statute. S.D. Codified Laws § 2-16-6(b), (d). Michigan statutes also suggest that the status of every bill and resolution that is introduced in the state, as well as relevant legislative and fiscal analyses, may be copyrightable. Mich. Comp. Laws § 4.1204a(3) (noting that Internet access to legislative calendar and notices of committee meetings "does not alter or relinquish any copyright . . . of this state relating to any of the information made available under this section"); *id.* § 4.1204d(3) (same for house fiscal bill analyses); *id.* § 4.1204e(3) (same for introduced bills and their status).

Century Code); Registration No. TX0008555142 (same for General Laws of Rhode Island Supplement); Registration No. TX0008549132 (same for Code of Laws of South Carolina Annotated); Registration No. TX0008625275 (same for South Dakota Codified Laws); Registration No. TX0008588806 (same for Tennessee Code Annotated); Registration No. TX0008530993 (same for Vermont Statutes Annotated); Registration No. TX0008613009 (same for Code of Virginia); Registration No. TX0008604570 (same for Wyoming Statutes Annotated); Registration No. TX0008566647 (same for District of Columbia Official Code); Registration No. TX0008545032 (same for Laws of Puerto Rico Annotated); Registration No. TX0008475282 (same for Virgin Islands Code Annotated).

In addition, several states have registered copyrights in other materials necessary to meaningfully access their courts. Michigan and Colorado hold copyrights in their court rules, Registration No. TX0007944431 (copyright for the Colorado Court Rules); Registration No. TX0002690933 (copyright for the Michigan Reports Court Rules), and at least one county in Illinois copyrights its court forms, *see* Cook Cty. Cir. Ct. Local Rule 10.8 (publisher's note). States also hold copyrights in materials used to train state employees, including law enforcement and corrections officers. *See* Registration No. PAu003790161 (copyright for the Oregon Department of Corrections' training film, *Cell Extraction*); Fla. Stat. § 943.146 (allowing Department of Law Enforcement to copyright "all curricula developed for basic and postbasic [*sic*] training in the disciplines of law enforcement, corrections, and correctional probation"). In some states, agencies like the Housing Authority can copyright their work. *See, e.g.*, Or. Rev. Stat. § 421.444. And the relevant statutes of some states are so broad that they allow the state to copyright any publication the state issues or creates. *See, e.g.*, Nev. Rev. Stat. § 344.070; *id.* § 218F.730; 71 Pa. Stat. and Cons. Ann. § 636.

SUMMARY OF ARGUMENT

The First Amendment must inform consideration of this case. As this Court has repeatedly recognized, the copyright regime is compatible with the First Amendment only because it includes built-in First Amendment protections. These include not only the idea/expression dichotomy

and the fair use doctrine, but also the longstanding government edicts doctrine, pursuant to which certain government materials are "not the proper subject of private copyright." *Callaghan v. Myers*, 128 U.S. 617, 649–50 (1888). This doctrine is necessary to protect speech at the heart of the First Amendment: reproduction, distribution, and receipt of government work. To satisfy the First Amendment, which exists "to protect the free discussion of governmental affairs," *Mills v. Ala.*, 384 U.S. 214, 218 (1966), the government edicts doctrine must encompass all works that the government creates or adopts in the discharge of its core governance duties—making laws, enforcing laws, and interpreting laws.

The government edicts doctrine has never been limited to works that carry the force of law. Just as, pursuant to the doctrine, the government cannot hold a copyright in "*whatever work* [judges] perform in their capacity as judges," *Banks v. Manchester*, 128 U.S. 244, 253 (1888) (emphasis added), it cannot hold a copyright in whatever work legislators and executives perform in their capacities as lawmakers and administrators. In other words, the government cannot copyright works that it creates or adopts when it makes, enforces, or interprets the law. This includes not only statutes and the holdings of court opinions, which have the force of law, but also materials that more broadly reflect the core functioning of government, such as the text of proposed bills, the content of public housing applications and program descriptions, official voter guides, and court rules and forms. Such works reflect the essence of governing, and are distinct from those that the government creates or adopts solely for

profit, such as town slogans, local histories, and tourism brochures.

Holding otherwise would give state governments the exclusive ability to reproduce, distribute, and create derivative works from materials that reflect the essence of governing. This would include the power to hide the government's work behind a paywall or to seek licensing fees for its use—not only putting a price on the raw materials of democracy (here, more than $400), but also limiting access to those who can afford that price. And it would include the power to prevent the public from copying and distributing the government's work. These powers would obstruct the core purposes of the First Amendment with regard to government documents. Recognizing the full scope of the government edicts doctrine to encompass all works that the government creates or adopts when making, enforcing, or interpreting the law is necessary to avoid this result.

In this case, Georgia seeks to enforce a copyright in the O.C.G.A., the state's only official code. A state commission, funded and largely staffed by the legislature, is responsible for creating the O.C.G.A., and the legislature adopts it annually—all in the state government's discharge of governance duties. Although a private individual or entity could copyright such an annotated version of the code created without the editorial control, funding, and authority of the state, the state itself cannot hold a copyright in the O.C.G.A. without running afoul of the First Amendment.

ARGUMENT

I. THE FIRST AMENDMENT LIMITS WHAT STATUTORY COPYRIGHT LAW MAY PROHIBIT SPEAKERS FROM REPRODUCING, DISTRIBUTING, PERFORMING, OR DISPLAYING.

The federal government's authority to award copyrights stems from Article I, section 8, clause 8 of the Constitution, which gives Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Under the current Copyright Act, 17 U.S.C. § 101 *et seq*., the "exclusive right" includes prohibitions on the acts of reproduction, distribution, performance, display, and producing derivative works by others. 17 U.S.C. § 106.

Like all legislative powers conferred by Article I, the federal government's power to confer copyrights is limited by the First Amendment. *See Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985) (recognizing possibility that copyright laws would impermissibly restrict freedom of speech if they applied to ideas); *cf. First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978) (the First Amendment "prohibit[s] government from limiting the stock of information from which members of the public may draw").

As this Court has frequently noted, copyright law generally promotes First Amendment values by encouraging free expression. *See, e.g.*, *Golan v. Holder*, 565 U.S. 302, 328 (2012) (noting that the Framers "saw copyright as an engine of free

expression" because it "supplies the economic incentive to create and disseminate ideas") (internal marks omitted); *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003). In this manner, despite its speech-restrictive aspects, copyright is intended to benefit the public. *See, e.g.*, *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (copyright's "ultimate aim is . . . to stimulate artistic creativity for the general public good"); *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) ("The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.").

At the same time, "some restriction on expression is the inherent and intended effect of every grant of copyright," *Golan*, 565 U.S. at 327–28, and copyright law and the First Amendment do not always work in tandem. Recognizing this potential tension, this Court has rejected the idea that copyrights are "categorically immune from challenges under the First Amendment." *Eldred*, 537 U.S. at 221 (internal marks omitted); *cf. Matal v. Tam*, 137 S. Ct. 1744, 1760 (2017) (describing as "most worrisome" the implication that "the system of copyright registration . . . eliminates all First Amendment protection").

For the most part, this tension is resolved by the fact that "copyright law contains built-in First Amendment accommodations." *Eldred*, 537 U.S. at 219; *see also Golan*, 565 U.S. at 328. These include the fair use doctrine, which affords "latitude for scholarship and comment," and the "idea/expression dichotomy," which "strikes a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still

protecting an author's expression." *Harper & Row*, 471 U.S. at 560 (referring to these as "First Amendment protections"); *see also Int'l News Serv. v. Associated Press*, 248 U.S. 215, 234 (1918) (recognizing that "the history of the day" is "ordinarily . . . *publici juris*"). Other copyright principles, such as the first-sale doctrine, which ensures that libraries can share their materials with patrons, have also long provided critical First Amendment protections and helped preserve the proper balance between copyright and free speech. *See* 17 U.S.C. § 109(a); *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 350–51 (1908). Thus, the First Amendment must inform consideration of this case.

II. THE GOVERNMENT EDICTS DOCTRINE ACTS AS A SAFEGUARD TO PROTECT FIRST AMENDMENT RIGHTS.

Like the idea/expression dichotomy, fair use, and the first-sale doctrine, the government edicts doctrine is a "First Amendment protection" built into the copyright regime. *Harper & Row*, 471 U.S. at 560. It is necessary because speech responding to the work of government lies at the heart of First Amendment protection, and the doctrine therefore prohibits the government from holding a copyright in any works that the government creates or adopts in the discharge of its core governance duties—making, enforcing, or interpreting the law.

"The [First Amendment's] expressly guaranteed freedoms share a common core purpose of assuring freedom of communication on matters relating to the functioning of government." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980). In fact, "there is practically universal

agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." *Mills*, 384 U.S. at 218; *see also Watts v. United States*, 394 U.S. 705, 708 (1969) (recognizing that our "profound national commitment" to debate "may well" include criticism of "government and public officials") (quoting *N.Y. Times, Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). This right "of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes." *Mills*, 384 U.S. at 218–19.

Allowing states to exert private property rights over materials that are central to understanding "candidates, structures and forms of government, [and] the manner in which [the] government is operated," *id.* at 218, and which form "the basic data of governmental operations," *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 492 (1975)—including not only statutes and court opinions, but also the text of proposed bills, legislative history, court rules and forms, official voter guides, and trainings for police officers—would deeply frustrate these First Amendment purposes. "Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records[.]" *Id.* at 495. The freedom "to publish that information appears . . . to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business." *Id.*

Granting the government a copyright in works it creates or adopts in the discharge of its core

governance duties would allow it to determine who can speak, and what people can say, about government work. Because use of a copyrighted work is typically prohibited without the express permission of the copyright holder based upon payment of licensing fees, every single individual who wants to engage in informed discussion of the functioning of government based on the content of the government's work would theoretically have to ask the government's permission first. And the government, like other copyright holders, may refuse to grant such permission. Even if the government chooses to give permission, the licensing fees may prove prohibitive for many potential speakers, including those who are attempting to petition the government directly through litigation or advocacy directed at a legislature or state government agency.

This would obstruct the public's ability to freely discuss government affairs, including by restricting distribution of information, which "is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved." *Martin v. City of Struthers*, 319 U.S. 141, 146–47 (1943); *see also Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) ("Liberty of circulating is as essential to [the freedom of speech] as liberty of publishing[.]") (quoting *Ex parte Jackson*, 96 U.S. 727, 733 (1877)). And it would obstruct the equally protected right to receive information and ideas. *See, e.g.*, *Bd. of Educ. v. Pico*, 457 U.S. 853, 866–67 (1982); *Kleindienst v. Mandel*, 408 U.S. 753, 762–63 (1972); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive

information and ideas."); *Martin,* 319 U.S. at 143 (the First Amendment "embraces the right to distribute literature and necessarily protects the right to receive it") (citation omitted).

Granting states authority to copyright such materials would also undermine the right to petition—individuals' ability "to express their ideas, hopes, and concerns to their government," *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 388 (2011), which similarly ranks "high in the hierarchy of First Amendment values," *Lozman v. City of Riviera Beach*, 138 S. Ct. 1945, 1955 (2018). By holding a copyright in court forms and court instructions, as well as any materials individuals must cite to comply with those forms and instructions, states could prohibit litigants from using these materials, or require them to pay a licensing fee to do so. The greatest impact would almost certainly be felt by *pro se* individuals, prisoners seeking redress, and attorneys who represent indigent clients.

Neither fair use nor the idea/expression dichotomy is sufficient to avoid these troubling results. The idea/expression dichotomy—which ensures that "every idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication" by "mak[ing] only [expression] eligible for copyright protection," *Eldred*, 537 U.S. at 219; *see also Golan*, 565 U.S. at 328—covers some government edicts, but it does not reach all works that are core to public governance. For example, it likely covers code volumes that constitute the bare statutes as enacted, but it is uncertain whether it encompasses works that express the government's views of what the law is or should be, like the legislature's own notes or

annotations on the statutes or Attorney General opinions; that reflect the processes of government, like the text of proposed but not enacted bills, legislative testimony, and court forms; and that more broadly encompass acts of governance, like trainings for police officers and other public employees. All of these constitute the raw materials for core political speech about "matters relating to the functioning of government." *Richmond Newspapers*, 448 U.S. at 575.[3] But determining whether they are not copyrightable because of the idea/expression dichotomy would require case-by-case analysis, and would typically be expensive to litigate.

Similarly, the fair use doctrine—which serves as a defense to copyright claims, but does not define the scope of what can be copyrighted—is insufficient to protect the First Amendment interests present in this case. "Fair use is a mixed question of law and fact" and the "analysis must always be tailored to the individual case." *Harper & Row,* 471 U.S. at 552, 560. The analysis of whether a particular use is fair includes consideration of its "purpose and character"; "the nature of the copyrighted work"; "substantiality of the portion used in relation to the copyrighted work as a whole"; and "the effect on the potential market for or value of the copyrighted work." *Id.* at 560–61; *see also* 17 U.S.C. § 107. Because this defense is heavily fact-dependent and may require going to trial, it cannot ensure the breathing space

[3] To the extent that there are concerns about the confidentiality or inaccurate representation of certain government materials, copyright is not a necessary or proper means for addressing them. Other doctrines, such as classification, executive privilege, and prohibitions on fraud and forgery, can address them.

that the First Amendment needs to survive when it comes to government edicts—materials that either are or reflect the subject of our most protected speech. In addition, if one's right to access such materials, including court rules and forms, depends on defending against litigation, it is far from a meaningful right.

For the First Amendment to serve its core purposes of enabling and protecting "uninhibited, robust, and wide[ ]open" debate on public issues, *Watts*, 394 U.S. at 708, and the "bringing about of political and social changes desired by the people," *Roth v. United States*, 354 U.S. 476, 484 (1957), speakers cannot be chilled from reproducing and distributing the contents of works that are or reflect the functioning of government. If left with fair use alone, speakers may self-censor out of concern that a jury will find that their speech does not satisfy the criteria of fair use. Indeed, the third and fourth fair use factors—amount of the total work reproduced, and effect on the copyrighted work's potential market—are likely to caution against a finding of fair use where, as will be common for core political speech, speakers reproduce and distribute the entirety of particular government materials. For example, individuals criticizing a legislator's statements on the congressional floor may begin by quoting the legislator in full to keep their criticism fair and informed; litigants seeking to petition the judiciary must access court forms and rules in full in order achieve their purpose; and a public employee union arguing that its members are sufficiently trained may want to show the full breadth of training materials in order to make its point. In each of these

cases, though they describe core protected speech, fair use may prove difficult to establish.

While First Amendment principles may not be disturbed by giving "would-be users [the choice between] pay[ing] for their desired use of the author's expression, or else limit[ing] their exploitation to 'fair use' of that work" when it comes to the expression of private authors, *Golan*, 565 U.S. at 333, that balance is disrupted when the "author's expression" constitutes works that the government creates or adopts when making, enforcing, or interpreting the law. The fair use factors—purpose, nature, amount, and markets—do not speak to the need of all individuals to have access to the work of their government. This need is universal and does not lend itself to a factor-specific balancing test like fair use.

The government edicts doctrine is the safety valve for avoiding these First Amendment problems. "[T]here has always been a judicial *consensus* . . . that no copyright could . . . be secured in the products of the labor done by judicial officers in the discharge of their judicial duties." *Banks*, 128 U.S. at 254; *cf. Cox*, 420 U.S. at 492 ("What transpires in the court room is public property.") (quoting *Craig v. Harney*, 331 U.S. 367, 374 (1947)). Similarly, since at least 1834, litigants have recognized that "[i]t would be absurd for a legislature to claim the copyright [in its laws]" in part because "[s]tatutes never were copyrighted." *Wheaton v. Peters*, 33 U.S. 591, 616 (1834); *see also Howell v. Miller*, 91 F. 129, 137 (6th Cir. 1898) (Harlan, J.) ("no one can obtain the exclusive right to publish the laws of a state"); *Gilmore v. Anderson*, 38 F. 846 (C.C.S.D.N.Y. 1889) (indicating that, at common law, official speeches

and letters were not protectable under the public policy rule).

III. TO SATISFY THE FIRST AMENDMENT, THE GOVERNMENT EDICTS DOCTRINE MUST ENCOMPASS ALL WORKS THAT THE GOVERNMENT CREATES OR ADOPTS WHEN MAKING, ENFORCING, OR INTERPRETING THE LAW.

The government edicts doctrine has never been limited to works that carry the force of law—nor can it be, if it is to serve as a built-in First Amendment protection for the copyright regime. Our system of government, and our First Amendment rights, recognize that some of the most effective and important political speech centers on government works that lack the force of law—including support for or opposition to bills before they pass, "debate on the qualifications of candidates" up for office, and discussion of "public issues" more broadly. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995); *see also N.Y. Times*, 376 U.S. at 270; *Roth*, 354 U.S. at 484. These discussions will inevitably quote, thereby reproducing and distributing, the relevant bills, candidates' legislative speeches, and other government work—that is, "the basic data of governmental operations," *Cox*, 420 U.S. at 492.

The government edicts doctrine is similarly not so limited. More than 100 years ago, this Court recognized "that no copyright could . . . be secured in the products of the labor done by judicial officers in the discharge of their judicial duties." *Banks*, 128 U.S. at 253. Far from being limited to only the holdings of a case—the only portions of judicial opinions that squarely carry the force of law—this

rule extends to "[t]he whole work done by . . . judges." *Id.* "[W]hatever work [judges] perform in their capacity as judges" cannot be copyrighted. *Id.* As applied in *Banks*, this means that the syllabus, head-notes, and names of counsel, written by judges, cannot be copyrighted. *Id.* at 247. And its logic equally extends to dicta, concurrences, and dissents, as well as jury instructions, court rules, and court forms.

To satisfy the First Amendment, the government edicts doctrine must analogously apply to the legislative and executive branches, which are equally the topics of our most protected speech. *See* U.S. Br. 20. Any materials that legislators create in their capacity as lawmakers—such as the text of proposed bills that have not passed, official legislative and fiscal analyses, legislative calendars, the transcripts of legislative proceedings, and legislators' statements in support of or opposition to bills—cannot be copyrighted. The same is true for any materials that executives create in their capacity as administrators—including, for example, public housing guides and forms, official voter guides, and trainings for law enforcement officers and regulatory records.

Put simply, the government cannot obtain a copyright in any works it creates or adopts when making, enforcing, or interpreting the law.[4] Such

[4] While individuals may be able to obtain a copyright in similar types of materials—for example, the head-note or syllabus of a case—when those materials are "the result of [their] intellectual labor" rather than that of judges, *Callaghan*, 128 U.S. at 647, this Court has noted that the result may change where, as here, "legislation of the state . . . direct[s] that the proprietary right which would exist in [the individual author] should pass to the

works are created or enacted only by the government and carry consequences unique to the government, including incarceration, eligibility for benefits, and access to courts. And they are motivated by the essence of governing, rather than by the economic monopoly a copyright guarantees.[5] Access to such information is essential "to ensure that [the] constitutionally protected 'discussion of governmental affairs' is an informed one" so that "the individual citizen can effectively participate in and contribute to our republican system of self-government." *Globe Newspaper, Co. v. Super. Ct. for Norfolk Cty.*, 457 U.S. 596, 604–05 (1982) .

IV. THE ENTIRETY OF GEORGIA'S OFFICIAL CODE, INCLUDING ITS ANNOTATIONS, CONSTITUTES A GOVERNMENT EDICT AND IS THEREFORE NOT COPYRIGHTABLE.

Georgia creates the O.C.G.A. in the discharge of its core governance duties, including making and interpreting the law. The Commission, which is funded and largely staffed by the state legislature, is

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state . . . or that the copyright should be taken out for or in the name of the state[.]" *Id*.

[5] For this same reason, copyright incentives are not necessary for the creation of such works. While their creation must also be funded, copyright is not a substitute for taxation, and copyright doctrine is not the proper battleground for budgetary concerns. "If the services of any author or compiler employed by the Government require to be compensated, payment should be made in money frankly and properly appropriated for that purpose, and the resulting book or other publication in whole and as to any part should be always at the free use of the people." *Senate Committee Report on Printing*, S. Rep. No. 1473-36, at 2 (1900)).

tasked with the legislative duties of revising, codifying, and recodifying the Code, as well as preparing "annotations, . . . summaries of the opinions of the Attorney General of Georgia, . . . Code Revision Commission notes, . . . and other material as the commission determines to be useful to users of the Code." O.C.G.A. § 28-9-3. Although the Commission contracts with a private company to create the Official Code in the first instance, that company's work is subject to the Commission's "ultimate right of editorial control" and the state's detailed, specific directions regarding both the content and style of the annotations. JA 536.

Georgia also enacts the O.C.G.A. in the discharge of its core governance duties. Pursuant to O.C.G.A. § 1-1-1, the Official Code's annotations are "merged with" the statutory portion of the text, resulting in a single, unified edict. And the full compilation is "published by the authority of the state . . . as the 'Official Code of Georgia Annotated'" and formally adopted by the legislature each year. *Id.* §§ 1-1-1, 28-9-3. Indeed, litigants must cite to the Official Code when referring to Georgia's statutory law before state and federal courts.

Banks v. Manchester, decided more than 100 years ago, rejected a copyright claim in the context of a very similar statutory scheme. There, Ohio statutes "provide[d] for the appointment of a reporter by the supreme court of th[e] state, to report and prepare for publication its decisions" and specified "the mode of doing such printing and binding, under a contract to be made by the secretary of state . . . authorized . . . by a resolution of the general assembly." *Banks*, 128 U.S. at 245–46. For each case, the publisher included "the syllabus or head-note, the statement of the case,

the names of the counsel for the respective parties, and the opinion or decision of the court." *Id.* at 251. Considering those facts, this Court held that the Copyright Act "do[es] not cover the case of the state of Ohio in reference to what [the private publisher] undertook to obtain a copyright for, for the benefit of that state," because it is judges "who, in [their] judicial capacity, prepare[ ] the opinion or decision, the statement of the case, and the syllabus, or head-note." *Id.* at 252–53.

So, too, here. If the annotations were not created or adopted by the government while making, enforcing, or interpreting the law, but rather were materials reflecting the views of private parties, they could be copyrighted. But, under the government edicts doctrine, the state cannot hold a copyright in its Official Code. Ruling otherwise would mean that the public cannot freely access, reproduce, or distribute the Official Code—actions that are necessary for uninhibited public discussion about the workings of government.

CONCLUSION

For the reasons stated above, the judgment of the United States Court of Appeals for the Eleventh Circuit should be affirmed.

Respectfully Submitted,

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