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Code Revision Commission v. Public.Resource.Org and the Fight Over Copyright Protection for Annotations and Commentary

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**CODE REVISION COMMISSION V.
PUBLIC.RESOURCE.ORG AND THE FIGHT
OVER COPYRIGHT PROTECTION FOR
ANNOTATIONS AND COMMENTARY**

*David E. Shipley**

This Article analyzes Code Revision Commission v. Public.Resource.Org, a 2018 decision in which the U.S. Court of Appeals for the Eleventh Circuit applied the public edicts doctrine and held that Georgia's copyright on the annotations, commentary, and analyses in the Official Code of Georgia Annotated is invalid. The U.S. Supreme Court granted Georgia's Petition for a Writ of Certiorari on June 24, 2019. About a third of states claim copyright in the annotations to their codes, so the potential impact of this decision is substantial.

This Article's thesis is that the Eleventh Circuit was wrong and should be reversed. It first discusses the code revision process in Georgia and the Public.Resource.Org litigation. It next analyzes the Eleventh Circuit's three independent but related reasons for concluding that the annotations are law-like: (1) the identity of the public officials who created the work; (2) the authoritativeness of the work; and (3) the process for creating the work. This analysis is followed by a discussion of the merger doctrine, a discussion of the use of the term 'merger' in O.C.G.A. § 1-1-1, and a brief summary of Supremacy Clause concerns. This Article concludes that the Eleventh Circuit should be reversed by the United States Supreme Court.

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I. INTRODUCTION

Edicts of government, such as federal and state judicial opinions, statutes, and ordinances, are in the public domain and not subject to copyright ownership.¹ Due process requires that “citizens . . . have free access to the laws which govern them.”² Accordingly, “the law, whether in court opinions or statutes, cannot be reduced to property through copyright, whether by individuals or by the government itself.”³ These principles explain why the Copyright Office refuses to register government edicts, “including legislative enactments, judicial decisions, administrative rulings, public ordinances, or similar types of official legal materials.”⁴ At the same time, headnotes, annotations, case summaries, and other matters added by publishers are protectable,⁵ and the Copyright Office may register such annotations unless they “themselves have the force of law.”⁶ In addition, the Copyright Act extends copyright protection to derivative works⁷—that is, “work[s] consisting of editorial revisions, *annotations*, elaborations, or other modifications which, as a whole, represent an original work of authorship.”⁸

¹ CRAIG JOYCE, TYLER OCHOA, MICHAEL CARROLL, MARSHALL LEAFFER & PETER JASZI, COPYRIGHT LAW 131, 249 n.10 (10th ed. 2016) [hereinafter JOYCE ET AL.] (“It has been generally recognized . . . that . . . cases themselves are not subject to copyright protection.”). The public domain status for judicial opinions and statutes is called the “edicts of government” doctrine. Brief of Amici Curiae 119 Law Students, 54 Solo and Small-Firm Practitioners of Law, and 21 Legal Educators in Support of Respondent at 2, *Georgia v. Public.Resource.Org, Inc.*, 139 S. Ct. 2746 (2019) (No. 18-1150), 2019 WL 2121377, at *2; Leslie A. Street & David R. Hansen, *Who Owns the Law? Why We Must Restore Public Ownership of Legal Publishing*, 26 J. INTEL. PROP. L. 205, 222 (2019).

² *Georgia v. Harrison Co.*, 548 F. Supp. 110, 114 (N.D. Ga. 1982); see also *Nash v. Lathrop*, 6 N.E. 559, 560 (Mass. 1886) (explaining that justice requires free access to judicial opinions and statutes because citizens are “presumed to know the law”).

³ L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. REV. 719, 723 (1989).

⁴ U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 313.6(C)(2) (3d ed. 2017) [hereinafter COPYRIGHT OFFICE COMPENDIUM]; see also 17 U.S.C. § 105 (2012) (excluding from copyright eligibility any work of the U.S. government).

⁵ See JOYCE ET AL., *supra* note 1, at 249 n.10; Code Revision Comm’n v. *Public.Resource.Org, Inc.*, 906 F.3d 1229, 1232 (11th Cir. 2018) (stating that “all agree that annotations created by a private party generally can be copyrighted because the annotations are an original work created by a private publisher”), *cert. granted*, 139 S. Ct. 2746 (June 24, 2019) (No. 18-1150).

⁶ COPYRIGHT OFFICE COMPENDIUM, *supra* note 4, § 313.6(C)(2).

⁷ See 17 U.S.C. § 103 (2012) (providing copyright in a derivative work “only to the material contributed by the author . . . as distinguished from the preexisting material employed in the work”).

⁸ *Id.* § 101 (emphasis added).

This dichotomy between the public domain status of judicial opinions and statutes and the copyrightability of annotations and commentary seemed fairly well-settled⁹ until 2018 when the United States Court of Appeals for the Eleventh Circuit decided *Code Revision Commission v. Public.Resource.Org, Inc.*¹⁰ The Official Code of Georgia Annotated (O.C.G.A.), currently produced by LexisNexis, includes research tools like annotations and legislative history along with Georgia’s uncopyrightable statutes,¹¹ and the Eleventh Circuit held that this annotated version of the Official Code of Georgia is public domain material that cannot be copyrighted by Georgia.¹² Notwithstanding clear statements by the Georgia General Assembly that these annotations and summaries are not part of the law,¹³ the Eleventh Circuit opined that the annotations are law-like and are unprotectable by copyright because they are “an exercise of sovereign power.”¹⁴ Georgia sought review, and the United States Supreme Court granted certiorari on June 24, 2019.¹⁵

⁹ All parties to the *Public.Resource.Org* litigation and *amici* assert that there is “confusion and perceived inconsistency” surrounding the scope of the government edicts doctrine such that “outcomes are difficult to predict.” See Reply Brief for the Petitioners at 1–2, in *Georgia v. Public.Resource.Org, Inc.*, 139 S. Ct. 2746 (2019) (No. 18-1150), 2019 WL 2297303, at *1–*2 [hereinafter Petitioners’ Reply Brief] (internal quotations omitted). This Article asserts that the distinction between annotations and statutes/judicial opinions is in fact well-established but agrees that there is uncertainty and inconsistency surrounding the availability of copyright protection for privately drafted codes and standards which have been adopted by, incorporated in, or referenced in statutes and ordinances. See *infra* notes 77–108 and accompanying text.

¹⁰ 906 F.3d 1229 (11th Cir. 2018).

¹¹ Street & Hansen, *supra* note 1, at 223–24.

¹² *Public.Resource.Org*, 906 F.3d. at 1232.

¹³ See *id.* at 1233–34; see also *infra* notes 52–58 and accompanying text.

¹⁴ *Public.Resource.Org*, 906 F.3d at 1232–33, 1243. The court acknowledged that the annotations lacked the force of law. *Id.* at 1233.

¹⁵ *Georgia v. Public.Resource.Org, Inc.*, 139 S. Ct. 2746 (June 24, 2019) (No. 18-1150). *Public.Resource.Org* and several *amica* supported the petition for certiorari filed by the Code Revision Commission. See Adam Liptak, *Accused of ‘Terrorism’ for Putting Legal Materials Online*, N.Y. TIMES (May 13, 2019), <https://www.nytimes.com/2019/05/13/us/politics/georgia-official-code-copyright.html> (“[I]n an unusual move, . . . *Public.Resource.Org* also urged the court to hear the dispute, saying that the question of who owns the law is an urgent one”); Kyle Jahner, *Firms, Lawyers, States Want High Court to Weigh in on Annotations*, BLOOMBERG L. NEWS (May 30, 2019, 4:46 AM), <https://news.bloomberglaw.com/ip-law/firms-lawyers-states-want-high-court-to-weigh-in-on-annotations> (noting that “[n]early 200 law students, solo practitioners, and legal educators” submitted a brief in support of *Public.Resource.Org* while “[t]hirteen associations, nonprofits[,] and coalitions . . . urged the justices to take the case, but stopped short of picking a side”).

The ramifications of this ruling are substantial. The Eleventh Circuit eviscerated an established distinction in the edicts of government doctrine and arguably invalidated the copyright in official annotated state codes nationwide.¹⁶ The decision also undermines the copyright incentive for states to contract with third-party publishers to prepare the annotations, analyses, and commentary about the unprotectable statutory provisions in their codes. This is because the revenue third-party publishers currently receive from the sale of codes will dry up if entities like Public.Resource.Org (PRO) can freely copy a code's annotations and commentary in addition to the code's unprotected statutory portions.¹⁷ And “[w]ithout sales of copyright-protected annotated codes, companies like Lexis[Nexis] also would not agree to publish unannotated statutes for free online.”¹⁸

This Article argues that the Eleventh Circuit, which has been aggressive in applying *Feist Publications, Inc. v. Rural Telephone Service Co.*¹⁹ to restrict the scope of copyright protection for directories, taxonomies, catalogs, and other low authorship works,²⁰ got it wrong in *Public.Resource.Org* and should be reversed. It went too far by constructively repealing several provisions in the Georgia

¹⁶ See Petitioners' Reply Brief, *supra* note 9, at 11 (“About one-third of states claim copyright in annotations to their statutes.”); Brief of the States of Arkansas, Alabama, Idaho, Kansas, Mississippi, South Carolina, South Dakota, and Tennessee as Amici Curiae in Support of Petitioners at 4, in *Georgia v. Public.Resource.Org, Inc.*, 139 S. Ct. 2746 (2019) (No. 18-1150), 2019 WL 1532020, at *4 [hereinafter Brief of the States] (noting that “[t]he annotations in the official annotated codes of twenty-two [s]tates . . . , two territories, and the District of Columbia are copyrighted” and possess similar “characteristics of the annotations in Georgia”); Kyle Jahner, *Justices to Decide Whether States Can Copyright Annotated Laws*, BLOOMBERG L. NEWS (June 24, 2019, 9:34 AM), https://www.bloomberglaw.com/document/XDGS00QG000000?bna_news_filter=ip-law&jcsearch=BNA%25200000016b515ed16ca5ff7ddf09da0003#jcite (discussing the case's potential effect on states who have similar agreements with Westlaw or LexisNexis).

¹⁷ Brief of the States, *supra* note 16, at 10–11; *but see* Eric E. Johnson, *The Misadventure of Copyrighting State Law*, 107 KY. L.J. 593, 601–07 (2018) (criticizing the efforts of several states, including Georgia, to assert copyright in the codes).

¹⁸ Petitioners' Reply Brief, *supra* note 9, at 11; *but see* Derek E. Bambauer, *Paths or Fences: Patents, Copyrights, and the Constitution*, 104 IOWA L. REV. 1017, 1073–77 (2019) (discussing some of the problems with copyright protection for state legislative materials, including Georgia's claim of protection for the Code's annotations).

¹⁹ 499 U.S. 340 (1991).

²⁰ JOYCE ET AL., *supra* note 1, at 249 n.11; *see generally* David Shipley, *Thin but Not Anorexic: Copyright Protection for Compilations and Other Fact Works*, 15 J. INTELL. PROP. L. 91, 98–130 (2007) (discussing Eleventh Circuit's application of *Feist*).

Code and disregarding established precedent.²¹ Instead, the copyright infringement claim against PRO should have been squarely resolved in Georgia's favor. The state's infringement claim against PRO does not fit within the seemingly inconsistent, hard to reconcile cases involving privately drafted codes and standards that are made part of, or referenced in, a statute or ordinance enacted by a governmental entity.²² Moreover, the Georgia legislature clearly distinguished its unprotectable public domain statutes from the Code's copyrightable commentary and annotations when the Code was first revised almost forty years ago.²³ The U.S. District Court for the Northern District of Georgia stated that "[t]he entire O.C.G.A. is not enacted into law by the Georgia legislature and does not have the force of law."²⁴ It emphasized that the Georgia General Assembly had passed three different statutes that unequivocally indicate "that the O.C.G.A. contains both law and commentary," thereby distinguishing unprotected statutory material from copyrightable annotations and commentary.²⁵

By ruling against Georgia in its copyright infringement claim against PRO, the Eleventh Circuit tossed aside these distinctions. The fundamental question to be resolved by the U.S. Supreme Court is whether the government edicts doctrine should encompass creative works in a code, such as annotations and commentary, that

²¹ The U.S. Supreme Court has previously held "that the reporter of a volume of law reports can obtain a copyright for it as an author." *Callaghan v. Myers*, 128 U.S. 617, 650 (1888). Ten years later, the Sixth Circuit, relying on *Callaghan*, upheld the copyrightability of annotations in a government-approved publication of Michigan's statutes. *See Howell v. Miller*, 91 F. 129, 138 (6th Cir. 1898).

²² *See Code Revision Comm'n v. Public.Resource.Org, Inc.*, 906 F.3d 1229, 1238–39 (11th Cir. 2018) (explaining how lower courts have applied *Callaghan* and reached inconsistent results); Petition for a Writ of Certiorari at 3, in *Georgia v. Public.Resource.Org, Inc.*, 139 S. Ct. 2746 (2019) (No. 18-1150) [hereinafter *Georgia's Petition for Writ of Certiorari*] (describing "the lower courts' considerable confusion regarding the government edicts doctrine"); *see also infra* notes 77–108 and accompanying text.

²³ *See infra* notes 52–58 and accompanying text.

²⁴ *Code Revision Comm'n v. Public.Resource.Org, Inc.*, 244 F. Supp. 3d 1352, 1356 (N.D. Ga. 2017).

²⁵ *Id.* at 1356–57. Additionally, the publication agreement between Georgia and LexisNexis provides that Georgia's "copyrights shall cover all copyrightable parts of the Code." *Public.Resource.Org*, 906 F.3d at 1233–34. *But see generally* Christina M. Frohock, *The Law as Uncopyrightable: Merging Idea and Expression Within the Eleventh Circuit's Analysis of "Law-Like" Writing*, 73 MIAMI L. REV. 1269 (2019) (writing in support of the Eleventh Circuit's decision and suggesting that the same result can be reached through a merger doctrine argument).

are acknowledged to lack the force of law.²⁶ This Article, in explaining why the Eleventh Circuit incorrectly concluded that the government edicts doctrine covers the O.C.G.A.'s annotations and commentary, first discusses the code revision process in Georgia and the *Public.Resource.Org* litigation. Next, this Article analyzes the Eleventh Circuit's reasons for concluding that the annotations are law-like: (1) the identity of the public officials who created the work; (2) the authoritativeness of the work; and (3) the process for creating the work. This analysis is followed by a discussion of the merger doctrine, the use of the term "merger" in O.C.G.A. § 1-1-1, and a brief summary of Supremacy Clause concerns. This Article ultimately concludes that the Supreme Court should reverse the Eleventh Circuit.

II. CODE REVISION IN GEORGIA

In 1976, "the Georgia General Assembly . . . created the Code Revision Study Committee to study the need for a recodification of the Georgia code."²⁷ This committee concluded that there should be an official publication of the Code and recommended that this publication be controlled by the state.²⁸ The legislature then created the Code Revision Commission, authorizing it to carry out several tasks, including contracting with a publisher to revise the 1933 Code and the state's subsequently enacted laws.²⁹ For several

²⁶ Georgia's Petition for Writ of Certiorari, *supra* note 22, at I.

²⁷ *Georgia v. Harrison Co.*, 548 F. Supp. 110, 112 (N.D. Ga. 1982).

²⁸ *Id.*; Elizabeth Holland, *Will You Have to Pay for the O.C.G.A.?: Copyrighting the Official Code of Georgia Annotated*, 26 J. INTELL. PROP. L. 99, 109–115 (2019) (noting that "[t]he [Georgia] legislators wanted control over the annotations to ensure that the explanations of the law reflected what the General Assembly . . . actually meant").

²⁹ Under O.C.G.A. § 28-9-3 (2019), the Code Revision Commission is authorized

(9) [t]o prepare, or provide for the preparation of, and to include in the Code such annotations, historical notes, research references, notes on law review articles, cross-references, summaries of the opinions of the Attorney General of Georgia, editor's notes, Code Revision Commission notes, comments, commentaries, rules and regulations, indexes, tables, and other material as the commission determines to be useful to users of the Code;

(10) [t]o provide for the publication of annotated or unannotated versions of the Code, or both;

(11) [t]o provide for the publication of volumes containing the Constitution of the United States, the Constitution of the State of Georgia, and an index of local and special laws, general laws of local application, and home rule ordinances; [and]

....

decades the Harrison Company published unofficial versions of the 1933 codification under various titles, including “Code of Georgia Annotated,” “Georgia Code Annotated,” and “Georgia Code Unannotated.”³⁰

After hearing presentations from five law publishers, including Harrison, the Code Revision Commission entered into a ten-year contract with the Michie Company “to codify, revise, index, print, bind, and deliver according to the directions of the Commission 500 sets of a revised and recodified code of Georgia, which was to be designated as the ‘Official Code of Georgia Annotated.’”³¹ The enabling legislation and the contract treated the Code as a “work made for hire” under the Copyright Act³² and vested ownership of the copyright with the state.³³ “The Commission itself developed the uniform numbering system and rules of style used in the new . . . Code,” and when the editorial process was completed, a manuscript—the Code of Georgia 1981 Legislative Edition—was presented to and enacted by the General Assembly.³⁴ Annotations, indexes, and other notes and materials then were added to the manuscript to produce Georgia’s first official Code since 1933—the O.C.G.A.³⁵

Lawyers serving in the General Assembly at this time were strongly in favor of having an annotated code with “explanations to the statutory provisions [that] interpret judicial opinions, attorney general guidance documents, and law review and journal articles that relate to the statute.”³⁶ They felt that annotations helped

(15) To register the copyright claim in all materials in the Code and any supplements thereto, to protect, enforce, and preserve all claims in such materials, to bring and defend actions in any court in connection therewith, and to negotiate and grant licenses or rights, on behalf of the state, to use such material upon such terms and conditions as the commission shall determine to be in the best interest of the state

³⁰ *Harrison Co.*, 548 F. Supp. at 112.

³¹ *Id.*

³² See 17 U.S.C. § 101 (2012) (defining “work made for hire”).

³³ *Harrison Co.*, 548 F. Supp. at 112; see also 17 U.S.C. § 201(b) (2012) (providing that the employer for whom the work was prepared is considered the author for purposes of the Copyright Act and is deemed owner of the copyright).

³⁴ Code Revision Comm’n v. Public.Resource.Org, Inc., 244 F. Supp. 3d 1352, 1353 (N.D. Ga. 2017).

³⁵ *Id.*

³⁶ Holland, *supra* note 28, at 111.

lawyers understand how to apply the law.³⁷ In fact, this intent is reflected in the enabling legislation itself because it provides broad discretion to include any material deemed “to be useful to users of the Code.”³⁸ Michie’s version of the new Code as annotated consequently had the imprimatur of the state, and attorneys who cited unofficial versions of the Code “d[id] so at their peril” because the Michie version controlled.³⁹

In 2006 the Commission requested proposals from interested publishers and subsequently entered into a new agreement with Matthew Bender & Co., a division of LexisNexis.⁴⁰ As in the prior agreement with Michie, the official Code is required to include “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.”⁴¹

LexisNexis is also required to summarize “all published opinions of the Georgia Supreme Court and the Court of Appeals of Georgia, and all published opinions of the United States Supreme Court and other federal courts that arose in Georgia and construed Georgia’s general statutes.”⁴² Finally, the agreement requires LexisNexis “to provide appropriate copyright notice on both the free public website and the online O.C.G.A. available as part of [its] for-profit online services and to notify visitors that any reproduction of the O.C.G.A. other than the statutory text and numbering [was] prohibited.”⁴³ In essence, “[t]he Commission asserts a copyright in all portions of the

³⁷ See *id.* (quoting an attorney’s belief that “[y]ou really need an annotated Code to practice law”); Liptak, *supra* note 15 (“Only a very bad lawyer would fail to consult [the annotations] in determining the meaning of a statute.”). In addition, the lawyer-legislators did not want practitioners to have to buy two versions of the Code—the official version and an unofficial annotated version. See Holland, *supra* note 28, at 111.

³⁸ O.C.G.A. § 28-9-3(9) (2019).

³⁹ *Georgia v. Harrison Co.*, 548 F. Supp. 110, 117 (N.D. Ga. 1982); see also Johnson, *supra* note 17, at 602–03 (discussing *Georgia v. Harrison Co.* and noting that the court “held that states were, like everyone else, unentitled to copyright over law”).

⁴⁰ *Public.Resource.Org*, 244 F. Supp. 3d at 1353.

⁴¹ *Id.* The court noted that all of these materials were prepared by LexisNexis under the terms of the agreement. *Id.*

⁴² *Id.* (internal quotation omitted).

⁴³ *Id.* at 1354; see also *Code Revision Comm’n v. Public.Resource.Org, Inc.* 906 F.3d 1229, 1234 (11th Cir. 2018).

[Code] except for the statutory text, which it recognizes cannot be copyrighted.”⁴⁴

III. THE LITIGATION—*CODE REVISION COMMISSION V. PUBLIC.RESOURCE.ORG*

This copyright infringement litigation was instigated after defendant PRO purchased, scanned, and uploaded to its website an entire print edition of the O.C.G.A. and its supplements, making it freely accessible to the public.⁴⁵ “It also placed digital copies of the [O.C.G.A.] onto USB drives and [distributed] them to various Georgia legislators” and other organizations.⁴⁶ The Code Revision Commission demanded that PRO stop publishing the O.C.G.A. because this infringed Georgia’s copyright.⁴⁷ PRO, however, refused, arguing that the O.C.G.A. could not be copyrighted.⁴⁸

The Code Revision Commission sued PRO for copyright infringement, seeking “injunctive relief and removal of infringing materials from the Internet.”⁴⁹ The United States District Court for the Northern District of Georgia “acknowledge[d] that this [was] an unusual case because most official codes are not annotated and most annotated codes are not official.”⁵⁰ Even so, it concluded that the annotations in the O.C.G.A. lacked the force of law, were not in the public domain, and were protected by the state’s copyright.⁵¹

The Eleventh Circuit reversed. It acknowledged that the Code itself specifically states that the annotations and commentaries are

⁴⁴ *Public.Resource.Org*, 906 F.3d at 1234. (“The publication agreement also provides that [a]ll the contents of the Code . . . shall be copyrighted in the name of the State of Georgia . . . [and] [t]he copyrights shall cover all copyrightable parts of the Code.” (alterations and omissions in original)); see also Johnson, *supra* note 17, at 602 (“Georgia has argued that it is not restricting the distribution of the plain statutory text, which it maintains people are free to copy.”).

⁴⁵ *Public.Resource.Org*, 906 F.3d at 1235; see also Frohock, *supra* note 25, at 1274–76 (summarizing the litigation in the U.S. District Court for the Northern District of Georgia).

⁴⁶ *Public.Resource.Org*, 906 F.3d at 1235.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Code Revision Comm’n v. Public.Resource.Org, Inc.*, 244 F. Supp. 3d 1352, 1354 (N.D. Ga. 2017).

⁵⁰ *Id.* at 1356.

⁵¹ *Id.* at 1356–57. The court also rejected PRO’s fair use defense. *Id.* at 1357–61. PRO was enjoined from all unauthorized use of the O.C.G.A. and ordered to remove all versions of it from PRO’s website. *Id.*

not part of the law and were provided for purposes of convenience.⁵² The Eleventh Circuit further acknowledged that “[l]aws passed during each session of the Georgia General Assembly that reenact the [Code] . . . similarly provide that the annotations . . . ‘are not enacted as statutes.’”⁵³

The Eleventh Circuit, however, found the “merger” language in O.C.G.A. § 1-1-1 to be crucial,⁵⁴ concluding that the annotations were law-like and “that the People [were] the ultimate authors of the annotations.”⁵⁵ In so concluding, the court carefully avoided holding that the annotations have the force of law. Rather, the court placed them in “a zone of indeterminacy at the frontier between edicts that carry the force of law and those that do not.”⁵⁶ The annotations are part and parcel of the law, “so enmeshed with Georgia’s law as to be inextricable.”⁵⁷ As such, the annotations were “inherently public domain material” and could not be protected by copyright.⁵⁸

In reaching this conclusion, the court focused on three independent but overlapping factors: (1) “the identity of the public officials who created the work”; (2) “the authoritativeness of the work”; and (3) “the process by which the work was created.”⁵⁹

⁵² *Public.Resource.Org*, 906 F.3d at 1233 (“Despite the fact that they are part of the official Code, Georgia law says that the annotations themselves do not have the force of law in the way that the statutory portions of the Code do.”); *see also* O.C.G.A. § 1-1-7 (2019) (providing that the annotations “do not constitute part of the law,” do not “limit or expand the construction of any Code section,” and are provided solely “for the purpose of convenient reference”).

⁵³ *Public.Resource.Org*, 906 F.3d at 1233–34.

⁵⁴ O.C.G.A. § 1-1-1 (2019) provides that “[t]he statutory portion of . . . [the codification of Georgia laws] *shall be merged with* annotations, captions, catchlines, history lines, editorial notes, cross-references, indices, title and chapter analyses, and other materials . . . and may be cited as the ‘Official Code of Georgia Annotated.’” (emphasis added). At the same time, O.C.G.A. § 1-1-7 (2019) states 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.”

⁵⁵ *Public.Resource.Org*, 906 F.3d at 1233.

⁵⁶ *Id.* at 1242.

⁵⁷ *Id.* at 1243.

⁵⁸ *Id.* at 1233. Given its decision regarding copyrightability, the court had “no occasion to address the parties’ other arguments regarding originality and fair use.” *Id.* The U.S. Supreme Court granted certiorari on June 24, 2019. *See Georgia v. Public.Resource.Org, Inc.*, 139 S. Ct. 2746 (June 24, 2019) (No. 18-1150).

⁵⁹ *Public.Resource.Org*, 906 F.3d at 1232, 1243–54; *see also* Street & Hansen, *supra* note 1, at 223–26 (discussing the *Public.Resource.Org* litigation); Frohock, *supra* note 25, at 1281–83 (discussing the Eleventh Circuit decision).

A. CONSTRUCTIVE AUTHORSHIP AND THE IDENTITY OF THE PUBLIC OFFICIALS WHO CREATED THE WORK—WHETHER THE ULTIMATE AUTHOR OF THE ANNOTATIONS AND ANALYSES IS THE PUBLIC AT LARGE

Notwithstanding the important roles played by the Code Revision Commission, the Office of Legislative Counsel, and the Georgia General Assembly in the creation of the O.C.G.A., the Eleventh Circuit was wrong to treat the public at large as the authors of the annotations, analyses, and commentary that are included with the Code's statutory portion. Rather, third parties—namely, employees of LexisNexis and formerly Michie, acting in the course of their employment—prepared the annotations, analyses, and commentary for Georgia.⁶⁰ Accordingly, under the Supreme Court's interpretation of §§ 101 and 201 of the Copyright Act, LexisNexis would be the copyright owner but for its agreement with Georgia.⁶¹ No court has ever held nonbinding annotations and commentary to be unprotectable.⁶² In fact, the Eleventh Circuit itself recognized “that annotations created by a private party generally can be copyrighted because the annotations are an original work created by a private publisher.”⁶³

In finding constructive authorship, the Eleventh Circuit placed too much weight on the role of the Code Revision Commission and the Georgia legislature in the production of the annotations created by Michie and LexisNexis.⁶⁴ The metaphysical concept of “citizen authorship”—that the “people” are the authors of the law—works when text, even when initially drafted by a private party, is adopted

⁶⁰ See Brief of the States, *supra* note 16, at 1 (explaining that official annotated codes are generally created “by third-party annotators who recoup the costs of preparing those codes by selling the official annotated codes and pocketing the revenues of those sales”).

⁶¹ See *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 752 (1989) (rejecting the “right to control the product” and “actual control” tests and instead applying common law agency principles to determine whether an employee is acting within the course of his employment).

⁶² See, e.g., STAFF OF SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS, COMM. ON THE JUDICIARY, 86TH CONG., REP. ON COPYRIGHT LAW REVISION 28–29, 36 (Comm. Print 1961) (reviewing nineteenth century case law and finding that “material prepared for [s]tate [g]overnments by their employees, notably the headnotes, syllabi, [and] annotations . . . [were] held copyrightable on behalf of the [s]tates”).

⁶³ *Public.Resource.Org*, 906 F.3d at 1232.

⁶⁴ Notably, “[t]he Eleventh Circuit’s analysis of the role the Commission plays and the analysis of the adoption of the annotations diverges from accounts of members of the Commission and those active in the creation of the Commission.” Holland, *supra* note 28, at 128.

as law by the body politic.⁶⁵ But this concept should not be extended to situations in which the enacting legislative body explicitly states that third-party annotations are not part of the statutes.

Recognizing that the Code Revision Commission, like the Office of Legislative Council, is a creation as well as an adjunct of the General Assembly,⁶⁶ does not compel the conclusion that the sovereign is the author of the annotations and commentary. Instead, the employees of LexisNexis are the authors; they aid and assist the Code Revision Commission and the Legislative Counsel.⁶⁷ Under the Copyright Office's internal manual, "[a] work that does not constitute a government edict may be registered" for copyright, even if it was written by a government official or employee "while acting within the course of his or her official duties."⁶⁸ Accordingly, annotations and other similar works—which are not government edicts and are prepared by LexisNexis employees within the scope of their employment pursuant to the agreement with the Code Commission—are protectable works that can be registered with the Copyright Office.

The ultimate authority that the Code Commission and the General Assembly exercise over the work of LexisNexis⁶⁹—such as supervising the preparation of the annotations and commentary, including them in the Official Code, giving them the imprimatur of the sovereign, and specifying other details for the Code—would all weigh heavily in Georgia's favor in the event of a dispute with LexisNexis over copyright ownership.⁷⁰ This is because the

⁶⁵ For example, the First Circuit found that a model building code, initially drafted by a private party, entered into the public domain and became uncopyrightable once incorporated into the official Massachusetts building code. See *Public.Resource.Org*, 906 F.3d at 1241 (citing *Bldg. Officials & Code Adm'rs v. Code Tech., Inc.*, 628 F.2d 730 (1st Cir. 1980)).

⁶⁶ See *id.* at 1245 ("The Commission is . . . the 'alter ego' of the General Assembly" because "its staff, funding, and responsibilities all fall under the legislative umbrella.").

⁶⁷ The Eleventh Circuit and the U.S. Supreme Court both acknowledge that that "it is literally impossible, in view of the complexities of modern legislative processes[,] . . . for [elected legislators] to perform their legislative tasks without the help of aides and assistants . . ." *Id.* (first omission in original) (quoting *Gravel v. United States*, 408 U.S. 606, 616–17 (1972)).

⁶⁸ COPYRIGHT OFFICE COMPENDIUM, *supra* note 4, § 313.6(C)(2).

⁶⁹ It is undeniable that the State of Georgia and the Code Revision Commission, on behalf of the Georgia General Assembly, have the ultimate authority over the work of LexisNexis and the enactment of the statutory portion of the O.C.G.A. See *Code Revision Comm'n v. Public.Resource.Org, Inc.*, 244 F. Supp. 3d 1352, 1353–54 (N.D. Ga. 2017) (outlining the relationship between Georgia and LexisNexis as described in the publication agreement).

⁷⁰ See *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989) ("In determining whether a hired party is an employee under the general common law of agency, we consider

commissioning entity's actual control over the method and means by which a work is accomplished is an important factor in determining copyright ownership under "work made for hire" jurisprudence.⁷¹ Of course, LexisNexis is not claiming copyright ownership as an independent contractor. Instead, like Michie in the early 1980s, it has agreed—by contract and force of the enabling statute—that copyright ownership of the O.C.G.A. lies with Georgia.⁷² And while Georgia's authority and supervision over LexisNexis during the publication of the O.C.G.A. might provide Georgia with a better claim to authorship of the creative materials included therein, that authorship does not flow to the public at large.

Similarly, the enactment of the O.C.G.A. pursuant to the Georgia Constitution, through bicameralism and presentment to the Governor for signature or veto, does not make the public at large constructive authors of the annotated Code. After all, this legislation specifically provides that the creative material included in the Code does not limit or expand the statutory construction of the Code in any way and that "[a]ll historical citations, title and chapter analyses, and notes set out in [the] Code are given for the purpose of convenient reference *and do not constitute part of the law.*"⁷³ The Eleventh Circuit should not have disregarded this statutory language and downplayed authorship by the LexisNexis employees.

B. THE AUTHORITATIVENESS OF THE ANNOTATIONS

By describing the annotations as "law-like," the Eleventh Circuit mischaracterized the authoritativeness of the annotations. The court's discussion of copyright's approach to public edicts is treatise worthy, beginning with the Supreme Court's decision in *Wheaton*

the hiring party's right to control the manner and means by which the product is accomplished.").

⁷¹ See *id.* (identifying a non-exhaustive list of factors to consider in determining whether a person qualifies as an employee or an independent contractor). There are, of course, other factors which must be weighed; thus, the right to control is important but not necessarily dispositive. See, e.g., JOYCE ET AL., *supra* note 1, at 270–71 n.6 (questioning which factors, if any, should be given more weight in the "work made for hire" analysis).

⁷² See *supra* notes 31–44 and accompanying text.

⁷³ O.C.G.A. § 1-1-7 (2019) (emphasis added); see also Brief of the States, *supra* note 16, at 3–10 ("The annotation of a case is not an exercise of popular sovereignty, but a comment on it, and the original work of authorship of the company or body that wrote it.").

v. Peters, in which the Court held that its own written opinions were not copyrightable but did not squarely state that law in general was excluded from protection.⁷⁴ The Eleventh Circuit finished its discussion with two circuit court decisions involving copyrightable model building codes that were written by private entities and later enacted as statutes.⁷⁵ Sandwiched between these bookends is an extensive analysis of *Banks v. Manchester*, in which the U.S. Supreme Court extended its holding in *Wheaton* to decisions written by state court judges.⁷⁶ Specifically, the court noted that *Banks* established that statutes and judicial opinions are “attributable to the constructive authorship of the People” and thus are not copyrightable.⁷⁷ The court went on to state that

[t]his does not mean that statutes, judicial opinions, and other texts that carry the clear force of law are the only works that may be subject to the [*Banks*] rule. For one thing, relying, as the district court did, on a bright line distinction between edicts that have the force of law and those that do not . . . simply does not work in some cases. This is one of them. It is clear to us that there exists a zone of indeterminacy at the frontier between edicts that carry the force of law and those that do not. In this small band of cases a government work may not be characterized as law, and yet still be so sufficiently law-like as to implicate the core policy interests undergirding *Banks*.⁷⁸

The court ultimately concluded that the annotations and other analyses in the O.C.G.A. are law-like, notwithstanding the Georgia General Assembly’s clear statements to the contrary in the enabling legislation and thereafter.⁷⁹ This was an unprecedented leap. Prior

⁷⁴ Code Revision Comm’n v. Public.Resource.Org, Inc., 906 F.3d 1229, 1237 (11th Cir. 2018) (citing *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834)).

⁷⁵ See *id.* at 1240–42 (first citing *Bldg. Officials & Code Adm’rs v. Code Tech., Inc.*, 628 F.2d 730 (1st Cir. 1980); then citing *Veeck v. S. Bldg. Code Cong. Int’l, Inc.*, 293 F.3d 791 (5th Cir. 2002)).

⁷⁶ *Id.* at 1237 (citing *Banks v. Manchester*, 128 U.S. 244 (1888)).

⁷⁷ In *Banks*, the U.S. Supreme Court held that the copyright on the opinions of the Ohio Supreme Court was invalid. See *Banks*, 128 U.S. at 252; see also *Public.Resource.Org*, 906 F.3d at 1242.

⁷⁸ *Public.Resource.Org*, 906 F.3d at 1242 (internal citations omitted).

⁷⁹ *Id.* at 1243.

to the Eleventh Circuit's decision, there was no "zone of indeterminacy" about annotations to judicial decisions and statutes. While building codes, standards, classification systems, and other materials referenced in, or incorporated in, statutes and ordinances had caused problems for the courts throughout the years, annotations to statutes and judicial opinions had not.⁸⁰

To support its statement about this zone of indeterminacy, the court cited *Jean v. Nelson*.⁸¹ *Jean* was not a copyright infringement decision, but rather involved a challenge to a policy change by the Immigration & Naturalization Service (INS) regarding the detention of aliens.⁸² The INS, in changing its policy, did not follow notice-and-comment rulemaking procedures, which the immigrant-plaintiffs asserted were required by the Administrative Procedure Act (APA) because the change in policy constituted a "rule."⁸³ The district court agreed and ordered the release of about one thousand Haitians who were held in detention at their point of entry.⁸⁴

On appeal, the Eleventh Circuit agreed that recourse to notice-and-comment rulemaking under § 553(c) of the APA was required because the new policy constituted a "rule" under APA § 551(4) and did not fall under the "general statement of policy" exemption in APA § 553(b)(A).⁸⁵ To determine the scope of the "general statement of policy" exemption, the court asked whether the agency's pronouncement was treated by the agency as a binding norm.⁸⁶ If so, then it was deemed a rule that had to be promulgated through notice-and-comment rulemaking.⁸⁷ The court found that

⁸⁰ See Petitioners' Reply Brief, *supra* note 9, at 5–7 (explaining the recognition from the Copyright Office and the Supreme Court that annotations may be copyrighted); *infra* notes 92–108 and accompanying text.

⁸¹ *Public.Resource.Org*, 906 F.3d at 1242 (citing *Jean v. Nelson*, 711 F.2d 1455, 1480–83 (11th Cir. 1983), *on reh'g*, 727 F.2d 957 (11th Cir. 1984), *aff'd*, 472 U.S. 846 (1985)).

⁸² See *Jean*, 711 F.2d at 1462 ("Pursuant to the new policy[,] Haitians were detained in camps or prisons pending a final determination of their right to remain in this country . . .").

⁸³ *Id.* at 1463, 1474.

⁸⁴ *Id.* at 1462.

⁸⁵ *Id.* at 1462, 1478.

⁸⁶ *Id.* at 1481–82.

⁸⁷ *Id.* at 1482–83 ("If an agency, or its official, is bound to apply an airtight rule in a given case[,] it is important to allow specific objections prior to promulgation . . .").

the new INS policy clearly established a binding norm on agency personnel.⁸⁸

Distinctions between legislative rules, interpretative rules, and general statements of policy have vexed courts and commentators for many years because the differences are fuzzy, blurred, baffling, and enshrouded in smog.⁸⁹ If a court determines that an agency's guidance document does not fit within one of the APA's rulemaking exceptions—for example, the “general statement of policy” exemption—the agency is sent back to the drawing board to promulgate the rule appropriately.⁹⁰ In other words, if an agency is treating the “government work” like a law, then it should have been promulgated properly.

This proposition does not, however, support PRO's contention and the Eleventh Circuit's conclusion that the O.C.G.A.'s non-statutory annotations and commentary are not copyrightable because they are law-like. As previously explained, the Georgia General Assembly has made it abundantly clear that these materials are not part of the Code that it enacts.⁹¹ The annotations do not create binding norms because they lack the force of law.

The difficult cases for copyright law's edicts of government doctrine involve privately developed materials, like building and zoning codes, technical standards, and guidelines which have been referenced in, or incorporated in, statutes or ordinances.⁹² It is fair

⁸⁸ *See id.* (“A broad rule of detention with undefined exceptions is susceptible to rigid enforcement with no opportunity to avoid the rule's harsh results. Such a rule cannot be a general statement of policy; in truth it creates a binding norm.” (footnote omitted)).

⁸⁹ *See, e.g.*, WILLIAM FUNK & RICHARD SEAMON, ADMINISTRATIVE LAW: EXAMPLES & EXPLANATIONS 167–68 (3d ed. 2009) (explaining that the distinction between legislative rules and interpretative rules is blurry and baffling and that general statements of policy often look like interpretative rules).

⁹⁰ *See, e.g.*, *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1811 (2019) (invalidating a change in the reimbursement formula under the Medicare Act that was adopted without providing affected parties with notice and an opportunity to comment).

⁹¹ *See supra* notes 52–58 and accompanying text.

⁹² *See, e.g.*, *John G. Danielson, Inc. v. Winchester-Conant Props., Inc.*, 322 F.3d 26, 38 (1st Cir. 2003) (explaining that references to architectural drawings in a local government's re-zoning decision did not “thrust the drawings themselves into the public domain”); *Veeck v. S. Bldg. Code Cong. Int'l, Inc.*, 293 F.3d 791, 793 (5th Cir. 2002) (“[A]s *law*, the model codes enter the public domain and are not subject to the copyright holder's exclusive prerogatives. As model codes, however, the organization's works retain their protected status.”); *Cty. of Suffolk v. First Am. Real Estate Sols.*, 261 F.3d 179, 195 (2d Cir. 2001) (upholding copyright protection for government-created tax maps that clarify residents' duty to pay taxes); *Practice Mgmt. Info. Corp. v. Am. Med. Ass'n*, 121 F.3d 516, 518–20 (9th Cir. 1997) (holding that the adoption by federal regulations of a third party's uniform classification system for medical

to say that these difficult cases fall into a zone of indeterminacy. Notably, though, they do not, involve annotations accompanying statutes or judicial decisions.

John G. Danielson, Inc. v. Winchester-Conant Properties, Inc. is illustrative.⁹³ This case involved copyrighted architectural plans and drawings for a failed condominium project that the plaintiff architect had drafted for the project's developer.⁹⁴ These plans and drawings were used without permission by a second developer for another condominium project at the same location.⁹⁵ The jury returned a \$1.3 million verdict for the plaintiff-architect.⁹⁶ A crucial issue on appeal was the trial court's rejection of the second developer's defense that the plans and drawings, by being included in a restrictive covenant sought by the first developer and approved at a town meeting in connection with a zoning change, thereby entered the public domain and lost copyright protection.⁹⁷

The First Circuit acknowledged the difficulty in determining the public domain status of material that does not fall neatly into the categories of statutes and judicial opinions and that judicial decisions on these cases were inconsistent.⁹⁸ Nevertheless, it declined to consider the broad question of copyright protection for codes and other materials that were written by private parties and were referenced in, or incorporated in, codes or ordinances enacted by a governmental entity.⁹⁹ Instead, it distinguished restrictive covenants from zoning ordinances. Rezoning a property from residential use to mixed use simply sets new parameters for the

procedures did not render that code uncopyrightable); *CCC Info. Servs., Inc. v. Maclean Hunter Mkt. Reports, Inc.*, 44 F.3d 61, 63 (2d Cir. 1994) (finding that the incorporation of used car valuations in insurance laws did not make those valuations uncopyrightable because they represented the editors' predictions "based on a wide variety of informational sources and . . . professional judgment," rather than simply communicating "pre-existing facts that had merely been discovered by the . . . editors"); *Street & Hansen*, *supra* note 1, at 226–33 (discussing several cases involving privately developed content that was incorporated in or referenced by binding law).

⁹³ 322 F.3d 26 (1st Cir. 2003).

⁹⁴ *Id.* at 30.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 38.

⁹⁸ *Id.*

⁹⁹ *Id.* at 39. The court discussed its decision in *Building Officials & Code Administrators v. Code Technology, Inc.*, 628 F.2d 730 (1st Cir. 1980), where the court declined to decide whether a properly promulgated regulation that incorporated a private party's copyrighted material thereby invalidated the copyright on that material. *See John G. Danielson, Inc.*, 322 F.3d at 39.

development of a particular site.¹⁰⁰ In contrast, the approval at a town meeting of a restrictive covenant for a project in a particular zone was an agreement between the town and the developer concerning that site.¹⁰¹ That agreement, which incorporated the architect's copyrighted plans and drawings, was not equivalent to a statute or code.¹⁰² The copyrighted works were not part of any generally applicable laws and were not placed in the public domain solely by virtue of their approval at the town meeting as part of a restrictive covenant.¹⁰³

In short, the First Circuit decided that mere reference to a copyrighted drawing or plan in a planning board decision or in speeches at a town meeting did not place those works in the public domain any more than quoting a protected poem on the floor of the Senate would strip that poem of its copyright.¹⁰⁴ Courts continue to struggle, however, in determining whether and at what point otherwise copyrightable works lose protection when adopted by a government body. In contrast, the copyrightability of annotations and commentary accompanying statutes and judicial decisions has been settled since the end of the nineteenth century.¹⁰⁵

The annotations and analyses are part of the Official Code of Georgia and, as stated in O.C.G.A. § 1-1-1, are merged with the statutory portion of the Code. This does not, however, cast a shadow of authority over the annotations as suggested by the Eleventh Circuit.¹⁰⁶ To the contrary, the General Assembly makes clear repeatedly in the enabling statute and elsewhere that the

¹⁰⁰ *John G. Danielson, Inc.*, 322 F.3d at 39.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 40.

¹⁰⁴ *Id.*

¹⁰⁵ *See, e.g.*, *Callaghan v. Myers*, 128 U.S. 617, 647 (1888) (holding that government officials have a right to copyright their own works); *Howell v. Miller*, 91 F. 129, 138 (6th Cir. 1898) (recognizing copyright protection for annotations in a code book that Michigan law mandated be treated as if published under authority of the state); *Petitioners' Reply Brief, supra* note 9, at 9–10 (noting the Georgia Supreme Court's determination that the inclusion of annotations in an official Code does not provide such annotations with legal force (citing *Harrison Co. v. Code Revision Comm'n*, 260 S.E.2d 30 (Ga. 1979)). Interestingly, in *Matthew Bender & Co. v. West Publishing Co.*, 158 F.3d 674 (2d Cir. 1998), Hyperlaw did not include West's copyrighted headnotes and syllabi in its publication of West's judicial opinions, as they were undoubtedly protected by West's copyright. *Id.* at 676–77. The court, however, determined that West's copyright did not extend to unoriginal content, including parallel citations, captions, courts, date information, and attorney information. *Id.*

¹⁰⁶ *See Code Revision Comm'n v. Public.Resource.Org, Inc.*, 906 F.3d 1229, 1249–50 (11th Cir. 2018).

annotations and analyses are distinct from the statutory portion and are not law.¹⁰⁷ Accordingly, they are protected by copyright, while the underlying statutory provisions are not.¹⁰⁸ This is consistent with the long-settled distinction in the government edicts doctrine between the public domain status of judicial opinions and statutes and affording copyright protection to annotations.

C. THE LEGISLATIVE PROCESS IN GEORGIA

The Eleventh Circuit explained that the process by which the annotations were enacted by the General Assembly, along with the statutory portion of the O.C.G.A., “is similar to the ordinary process by which laws are enacted”—bicameral passage and presentment to the Governor.¹⁰⁹ It “depict[s] a [Code Revision] Commission that intensely exercises its authority to control the annotations.”¹¹⁰ In essence, the involvement of state employees and the General Assembly, giving the O.C.G.A. its final approval and imprimatur, is more than a seal of approval; it is direct involvement in the creation of the O.C.G.A.¹¹¹

In reality, the Eleventh Circuit legislated to give the “annotations [law-like] authority without a legislator, outside of members in the Commission, having ever read the text.”¹¹² In fact, Terry McKenzie, who worked with the General Assembly at the time of the Code Revision Commission’s creation, “stressed [that] the General Assembly has never voted on a case annotation.”¹¹³ Michie, the first publisher of the official annotated Code, initially prepared an unannotated compilation of Georgia’s statutes under

¹⁰⁷ See *supra* notes 52–58 and accompanying text.

¹⁰⁸ The annotations included in the Georgia Code are analogous to the Advisory Notes accompanying the Federal Rules of Civil Procedure in the sense that lawyers turn to them for guidance in formulating arguments on how code provisions or rules should be interpreted and applied. But neither the annotations nor the Advisory Notes carry the force of law. *Cf. Public.Resource.Org*, 906 F.3d at 1250–51.

¹⁰⁹ *Id.* at 1252–54.

¹¹⁰ Holland, *supra* note 28, at 128. After all, as the Eleventh Circuit notes, the O.C.G.A. contract and guidelines received legislative approval, the commission that supervises LexisNexis in producing the O.C.G.A. is composed mostly of legislators, and the General Assembly votes on whether to approve it as the official codification of the state’s laws. *Public.Resource.Org*, 906 F.3d at 1252–53.

¹¹¹ Jahner, *supra* note 15 (quoting Elizabeth Rader, counsel for PRO, who posits that “[t]he state has the ultimate right to approve or disapprove” the annotations).

¹¹² Holland, *supra* note 28, at 128.

¹¹³ *Id.*; see also Terry McKenzie, *The Making of a New Code*, 18 GA. ST. B.J. 102, 102 (1982) (“These unofficial codes were not enacted by the General Assembly.”).

the Code Commission’s supervision.¹¹⁴ That compilation was then adopted as the official code by the General Assembly.¹¹⁵ At this point, Michie annotated the Code, including “summaries of judicial decisions and Georgia Attorney General opinions interpreting or applying statutory provisions.”¹¹⁶ In the almost forty years since the O.C.G.A.’s enactment, the General Assembly’s approach has not varied—it has never reviewed or voted on individual annotations.¹¹⁷ Pursuant to O.C.G.A. § 1-1-1, the General Assembly has always distinguished between the statutory portions of the Code and the annotations, which do not have the effect of statutes.¹¹⁸ Moreover, O.C.G.A. § 1-1-7 emphasizes that the notes, chapter analyses, and historical citations in the Code “are given for the purpose of convenient reference and *do not constitute part of the law.*”¹¹⁹ In short, the court overstated the Georgia General Assembly’s contribution to and approval of the annotations.¹²⁰

IV. LEGAL SIGNIFICANCE OF THE “MERGER” OF CODIFIED STATUTES WITH ANNOTATIONS AND CHAPTER ANALYSES UNDER O.C.G.A. § 1-1-1

Section 1-1-1 of the Georgia Code provides that “[t]he statutory portion of the codification of Georgia laws prepared by the Code Revision Commission . . . shall have the effect of statutes enacted by the General Assembly” and that it “*shall be merged* with annotations, captions, . . . chapter analyses, and other materials” and “published by authority of the state.”¹²¹ While hindsight is often 20/20, perhaps the Georgia General Assembly should have said something like ‘the statutory portion of such codification *shall be included alongside the annotations,*’ instead of using “merged.”¹²²

¹¹⁴ McKenzie, *supra* note 113, at 103.

¹¹⁵ *Id.* (explaining that after reviewing the unannotated compilation of Georgia’s statutes Michie prepared a manuscript—the Code of Georgia 1981 Legislative Edition—that was enacted by the General Assembly).

¹¹⁶ Georgia’s Petition for Writ of Certiorari, *supra* note 22, at 6; *see also* McKenzie, *supra* note 113, at 103–06.

¹¹⁷ Georgia’s Petition for Writ of Certiorari, *supra* note 22, at 7.

¹¹⁸ *See supra* notes 53–58 and accompanying text.

¹¹⁹ O.C.G.A. § 1-1-7 (2019) (emphasis added).

¹²⁰ *See Jahner, supra* note 15 (quoting Georgia attorney Joshua Johnson).

¹²¹ O.C.G.A. § 1-1-1 (2019) (emphasis added).

¹²² *See, e.g.,* Holland, *supra* note 28, at 129–30 (suggesting that the merging clause of O.C.G.A. § 1-1-1 should be amended to clarify and remove the authority of the annotations).

That might have better reflected the legislature's intent that the annotations, analyses, and commentary are not law but merely explanations of portions of the Code.¹²³ That alternative language also might have allowed courts and commentators to avoid dealing with the copyright jurisprudence associated with how an unprotectable idea and an author's expression of that idea can sometimes merge.¹²⁴

Nevertheless, the General Assembly used "merger" language in § 1-1-1, and the Eleventh Circuit felt that this language rendered the annotations unprotectable by the state's copyright on the O.C.G.A.¹²⁵ It emphasized that the legislature's decision to "merge" the annotations with the statutes created a unified whole, imbuing the annotations with "an official legislative quality."¹²⁶ This gave the annotations authoritative weight and supported the court's determination that they are "attributable to the constructive authorship of the People."¹²⁷

Although "most official codes are not annotated and most annotated codes are not official,"¹²⁸ the fact that Georgia's official statutory provisions are "merged" with the code's annotations does not transform the annotations into law and make them uncopyrightable. The contention that this merger makes the annotations law or law-like is explicitly contradicted by another section of the Code, which states that the headings, annotations, and descriptions

do not constitute part of the law and shall in no manner limit or expand the construction of any Code section. All 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*.¹²⁹

¹²³ *Id.*

¹²⁴ *See infra* notes 135–36 and accompanying text.

¹²⁵ Code Revision Comm'n v. Public.Resource.Org, Inc., 906 F.3d 1229, 1233 (11th Cir. 2018).

¹²⁶ *Id.* at 1249.

¹²⁷ *Id.* at 1252.

¹²⁸ Code Revision Comm'n v. Public.Resource.Org, Inc., 244 F. Supp. 3d 1352, 1356 (N.D. Ga. 2017).

¹²⁹ O.C.G.A. § 1-1-7 (2019) (emphases added).

The General Assembly thus made clear distinctions between the officially enacted statutory portions of the code and the annotations, analyses, and commentary. As the district court explained, “[t]he entire O.C.G.A. is not enacted into law by the Georgia legislature and does not have the force of law.”¹³⁰

This is also shown by the legislature’s action to tidy up the new comprehensive code through a 1984 “housekeeping act,”¹³¹ which was drafted

[t]o amend the Official Code of Georgia Annotated, so as to correct typographical, stylistic, and other errors and omissions in the Official Code of Georgia Annotated and in Acts of the General Assembly amending the Official Code of Georgia Annotated; to *reenact the statutory portion of the Official Code of Georgia Annotated, as amended*; [and] to provide for necessary or appropriate revisions and modernizations of matters contained in the Official Code of Georgia Annotated.¹³²

It is the statutory portion of the O.C.G.A. that was reenacted with this housekeeping bill, not the other material contained within the O.C.G.A.¹³³ Thus, the Georgia legislature did not inadvertently enact the annotations and other creative additions as law by merging them with the statutory provisions.¹³⁴

PRO argued in the district court that copyright law’s merger doctrine blocked protection for the annotations because there are a very limited number of ways to explain the ideas or concepts they express.¹³⁵ The district court, however, rejected this argument, explaining that

[t]he mere fact that the judicial summaries in the O.C.G.A. are distinctly different from corresponding annotations in West’s Code Annotated belies the

¹³⁰ *Public.Resource.Org*, 244 F. Supp. 3d at 1356.

¹³¹ See *Axson v. State*, 329 S.E.2d 566, 567 (Ga. Ct. App. 1985) (“In 1984, one of the first acts of the General Assembly was an extensive tidying up of the comprehensive new Code which had been adopted previously.”), *overruled by* *Dudley v. State*, 542 S.E.2d 99 (Ga. 2001).

¹³² H.B. 1156, 137th Gen. Assemb., Reg. Sess. (Ga. 1984) (emphasis added).

¹³³ *Id.*

¹³⁴ *Public.Resource.Org*, 244 F. Supp. 3d at 1356.

¹³⁵ Holland, *supra* note 28, at 119.

applicability of the merger doctrine. There is no question that there are a multitude of ways to write a paragraph summarizing a judicial decision, and further, a multitude of ways to compile the different annotations throughout the O.C.G.A. Therefore, the Court finds that the merger doctrine is inapplicable here.¹³⁶

A related issue was litigated in *Georgia v. Harrison Co.*¹³⁷ After the Harrison Company published an unofficial version of the Georgia Code, the state brought suit against the Harrison Company for copyright infringement.¹³⁸ To resolve this dispute, the court had to determine what was included in the “statutory portion”—namely, whether the unprotectable statutes included title, chapter, and article headings.¹³⁹ The court quoted the Code’s provision about the statutory portion being merged with annotations and other specifically listed items, writing “[s]ince no reference is made . . . to the title, chapter, and article headings it may be that the General Assembly assumed that such matters were part of the statutory portion,” and thus were in the public domain unprotected by copyright.¹⁴⁰ The court further stated that even if title, chapter, and article headings were not included in the statutory portion of the Code, they would still not be afforded copyright protection because of the policy of denying protection to descriptive words and short phrases.¹⁴¹ Hence, title and chapter headings were not protected by the state’s copyright on the O.C.G.A. and could be reproduced by the Harrison Company in its unofficial version of the Code.¹⁴² On the

¹³⁶ *Public.Resource.Org*, 244 F. Supp. 3d at 1357. Due to the Eleventh Circuit’s ruling that the annotations were in the public domain and were uncopyrightable, it did not reach the parties’ arguments about originality—including the merger doctrine—and fair use. See *Code Revision Comm’n v. Public.Resource.Org, Inc.*, 906 F.3d 1229, 1233 (11th Cir. 2018); *but see* Frohock, *supra* note 25, at 1283–99 (defending the Eleventh Circuit’s decision and asserting that the same outcome could be reached by recognizing that the law, along with the law-like annotations, is not copyrightable because the law’s idea and its official expression have merged).

¹³⁷ 548 F. Supp. 110 (N.D. Ga. 1982); *see also* Johnson, *supra* note 17, at 602–03.

¹³⁸ *Harrison Co.*, 548 F. Supp. at 113.

¹³⁹ *Id.* at 115.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*; *see also* JOYCE ET AL., *supra* note 1, at 99 n.5.

¹⁴² *Harrison Co.*, 548 F. Supp. at 115–16. The court additionally could have said that these headings were inextricably intertwined with the statutory portion of the Code and thus unprotectable. See *supra* notes 105–108 and accompanying text. Affording copyright

other hand, the implication of these statements is that the items specifically listed in O.C.G.A. § 1-1-1 as merging with the statutory portion are copyrightable. Those listed items include annotations, history lines, editorial notes, and title and chapter analyses.¹⁴³

The contention that the statutory portion of Code merged with the annotations and analyses is also directly at odds with the venerable decision of *Howell v. Miller*,¹⁴⁴ which upheld copyright on the annotations for Michigan's statutes. There, the court stated that

[i]t was suggested in argument that no one can obtain the exclusive right to publish the laws of a state in a book prepared by him. This general proposition cannot be doubted. And it may also be said that any person desiring to publish the statutes of a state may use any copy of such statutes to be found in any printed book, whether such book be the property of the state or the property of an individual. If Miller had cut from Howell's books, delivered to him by the state, the general laws of Michigan as therein printed, and the pages so cut out had been used when his compilation was printed,—if this had been done, and nothing more,—there would have been no ground of complaint. But it is said that he did more than this, and that he appropriated such parts of Howell's books as were the result of the latter's labor and industry.¹⁴⁵

protection to these headings also would have resurrected the discredited "sweat of the brow" doctrine because it would have essentially protected factual matters that can only be expressed in a limited number of ways. *See, e.g., Matthew Bender & Co. v. West Publ'g Co.*, 158 F.3d 693, 699 (2d Cir. 1998) (explaining the U.S. Supreme Court's rejection of the "sweat of the brow" doctrine, which would provide copyright protection "to the facts and other non-original elements of compilations on the basis of the labor invested in obtaining and organizing the information"); *JOYCE ET AL.*, *supra* note 1, at 251–52.

¹⁴³ O.C.G.A. § 1-1-1 (2019); *see also* O.C.G.A. § 1-1-7 (2019) ("All 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.")

¹⁴⁴ 91 F. 129 (6th Cir. 1898).

¹⁴⁵ *Id.* at 137–38. The court stated that Howell's copyright "include[d] marginal references, notes, memoranda, table of contents, indexes, and digests of judicial decisions prepared by him from original sources of information" as well as the "headnotes . . . [that were] clearly the result of his labors." *Id.* at 138. The court had no "difficulty in holding that his copyright would embrace all such matters, for they constitute no part of that which is public property, and are plainly produced by the compiler." *Id.*

This is exactly what PRO did. It could have digitally cut and pasted just the statutory portion of the O.C.G.A. Instead, it did much more by scanning and reproducing the copyrighted annotations and analyses as well.

Moreover, parsing the Code's copyrightable elements from the unprotected core legal text is relatively straightforward. Distinguishing protected annotations and commentary from the unprotected statute is not like applying Learned Hand's abstractions test,¹⁴⁶ or the subtractive approach,¹⁴⁷ to determine what is and is not copyrightable in a literary work.¹⁴⁸ This is largely because the unprotected statutory text is not inextricably intertwined or merged with the annotations and commentary.¹⁴⁹ Copyright offers protection for the annotations against unauthorized copying, and many decisions have "evinced a visceral dislike" of copycats and "rip-off artists" who misappropriate the works of others.¹⁵⁰

In short, the Georgia General Assembly's use of the term "merger" in the enabling legislation for the Georgia Code Annotated did not have the effect of constructively incorporating the annotations and commentary into the Code's statutory portion so that they lost copyright protection. This is not an instance where idea and expression merge because there are a variety of ways for authors to annotate and provide commentary on the Code's many statutory provisions, and because the distinctions made by courts in the late nineteenth century between unprotectable statutes and

¹⁴⁶ See *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (asking "whether the part taken is 'substantial,' and therefore not a 'fair use' of the copyrighted work"); *JOYCE ET AL.*, *supra* note 1, at 676 (distinguishing between the "abstractions" test and the "pattern" test, which extends protection to "the 'pattern' of the work").

¹⁴⁷ *JOYCE ET AL.*, *supra* note 1, at 676–78 (explaining one approach to identifying infringement that focuses on how much of a work the potential infringer did *not* copy).

¹⁴⁸ *Id.* at 670 ("The inquiry into improper appropriation . . . remains one of the most contentious (and, not coincidentally, least precisely delineated) exercises in all of copyright law.").

¹⁴⁹ See *supra* notes 142–143 and accompanying text; see also *Bambauer*, *supra* note 18, at 1075–76 (explaining that merger operates only "when there are but a few ways to express an idea" but noting that "there are generally many ways to summarize or describe a statute"); but see *Frohock*, *supra* note 25, at 1298 (agreeing with the Eleventh Circuit's conclusion that the annotations had effectively merged with the statute and were thus taken outside of copyright protection although acknowledging that the law "presents an unconventional instance of merger" because "there are many ways to express the [law], which only one author can offer").

¹⁵⁰ Paul Heald, *Federal Intellectual Property Law and the Economics of Preemption*, 76 IOWA L. REV. 959, 982 (1991).

judicial decisions and copyrightable annotations remain viable and relatively easy to apply.

V. SUPREMACY CLAUSE CONCERNS

The Eleventh Circuit's disregard of the clear statements in the O.C.G.A. by the Georgia General Assembly that the annotations and analyses do not constitute part of the law raises federalism and separation of powers concerns.¹⁵¹ After all, the court effectively amended sections of the Georgia Code by constructively striking its clear statements that the materials added to the unprotected statutory portion of the Code by LexisNexis are not part of the law. That is a double whammy; a *federal court* effectively *amended* provisions in a *state's* statutes. On the other hand, perhaps this judicial intervention can be justified under the Supremacy Clause of the U.S. Constitution.¹⁵² The argument might be that the pertinent provisions in the Georgia Code, stating that the annotations are not part of the law and providing that Georgia holds the copyright on the O.C.G.A., are preempted under the Supremacy Clause. By claiming copyright protection for the annotations and analyses, Georgia is arguably frustrating the objectives of the Copyright Act specifically and copyright policy generally.¹⁵³ Even though it is difficult to derive a preemption argument from the Eleventh Circuit's opinion in *Public.Resource.Org*, here is how it might look.

The preemption doctrine, derived from the Supremacy Clause, nullifies a state statute or common law rule that frustrates accomplishing the objectives of an act of Congress.¹⁵⁴ Preemption occurs when "either . . . the nature of the regulated subject matter

¹⁵¹ See, e.g., O.C.G.A. § 1-1-7 (2019).

¹⁵² See U.S. CONST. art. VI, cl. 2 ("This Constitution, and the laws of the United States . . . shall be the supreme law of the land; and the judges, in every State, shall be bound thereby, any thing [sic] in the Constitution or laws of any State to the contrary notwithstanding.").

¹⁵³ See generally David E. Shipley, *Refusing to Rock the Boat: The Sears/Compro Preemption Doctrine Applied to Bonito Boats v. Thunder Craft*, 25 WAKE FOREST L. REV. 385, 386–91 (1990) (discussing when federal preemption applies to state intellectual property laws); see also Bambauer, *supra* note 18, at 1076–77 (suggesting that preemption "could erase some noxious aspects" of state enforcement of the copyrights in their annotated codes).

¹⁵⁴ See *Hines v. Davidowitz*, 312 U.S. 52, 66–67 (1941) (analyzing whether a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress").

permits no other conclusion, or . . . Congress has unmistakably so ordained.”¹⁵⁵ Because Congress has enacted a comprehensive copyright statute,¹⁵⁶ pursuant to a clear grant in the Constitution,¹⁵⁷ it is not surprising that state laws regulating certain kinds of intellectual property have been preempted because they conflict with it.¹⁵⁸

The U.S. Supreme Court has found state copyright laws preempted when they “interfere with the federal policy . . . of allowing free access to copy whatever the . . . copyright laws leave in the public domain”¹⁵⁹ and explained that “a [s]tate may not, when the article is . . . uncopyrighted, prohibit the copying of the article itself or award damages for such copying.”¹⁶⁰ The Court also has acknowledged that preemption might occur “if a [s]tate attempted to protect that which Congress intended to be free from restraint.”¹⁶¹ Moreover, its “historic copyright jurisprudence [has] emphasize[d] the public purposes embodied in the Copyright Clause instead of focusing on the proprietary interests of authors [and] copyright owners.”¹⁶²

PRO, in relying on these statements, could argue that Georgia’s copyright claim in the O.C.G.A.—which is based on its contract with LexisNexis, and the statutes that created the Code Revision Commission and authorized the revision of the Code in coordination with a publisher—contravenes federal copyright policy and the Copyright Act by extending protection to materials that are in the public domain.¹⁶³ Of course, this argument depends upon

¹⁵⁵ *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963).

¹⁵⁶ See 17 U.S.C. §§ 101 *et seq.* (2012).

¹⁵⁷ U.S. CONST. art I, § 8, cl. 8 (giving Congress power “[t]o promote the progress of science and useful arts, by securing, for limited times, to authors and investors, the exclusive right to their respective writings and discoveries”).

¹⁵⁸ See, e.g., *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 168 (1989) (holding that a Florida patent-related statute was preempted because it conflicted with federal goals of competitive markets). *But see Goldstein v. California*, 412 U.S. 546, 546 (1973) (holding that the U.S. Constitution “does not expressly or by inference vest *all* power to grant copyright protection exclusively in the [f]ederal [g]overnment” (emphasis added)).

¹⁵⁹ *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 237 (1964).

¹⁶⁰ *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 232–33 (1964).

¹⁶¹ See *Goldstein*, 412 U.S. at 559.

¹⁶² David E. Shipley, *Congressional Authority Over Intellectual Property Policy After Eldred v. Ashcroft: Deference, Empty Limitations, and Risks to the Public Domain*, 70 ALB. L. REV. 1255, 1257 (2007).

¹⁶³ *Cf. Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 33–34 (2003) (explaining that Dastar had an unfettered right to copy and use an original television series because the copyright on that series had expired and was thus in the public domain).

acceptance of the Eleventh Circuit's conclusion that "no valid copyright interest can be asserted in any part of the [O.C.G.A.]," including the accompanying annotations, because it represents "the sovereign expression of the People by their legislature."¹⁶⁴ In essence, Georgia's enforcement of its claimed copyright in the O.C.G.A.'s annotations is analogous to Florida's unsuccessful attempt by statute to protect boat hull designs, unprotected by patent or copyright, against reproduction through a direct molding process.¹⁶⁵ Similarly, the Supreme Court was unwilling to allow Twentieth Century Fox to assert an unfair competition claim under § 43(a) of the Lanham Act against Dastar Corporation for using Fox's television series about World War II that had fallen into the public domain because doing so would conflict with copyright law.¹⁶⁶ The Court said that to allow a cause of action under § 43(a) "would create a species of mutant copyright law that limits the public's 'federal right to copy and use' expired copyrights."¹⁶⁷ In short, everyone has a right to copy and use materials in the public domain, so Georgia's copyright infringement claim is preempted because the O.C.G.A. is in the public domain.

The problem with this preemption argument—and the central thesis of this Article—is that the Eleventh Circuit's conclusion and underlying rationale is seriously flawed. The distinction between the public domain status of statutes and judicial opinions, and the copyrightability of annotations and headnotes, has received long-standing recognition by courts and the Copyright Office.¹⁶⁸ In addition, Congress has not acted to change this dichotomy since it was first recognized.¹⁶⁹ Georgia's copyright in the annotations and other materials added to the statutory portion of the Code by LexisNexis does not conflict with the Copyright Act or copyright policy. Rather, it provides an incentive to create the annotations and

¹⁶⁴ Code Revision Comm'n v. Public.Resource.Org, Inc., 906 F.3d 1229, 1232 (11th Cir. 2018).

¹⁶⁵ See Shipley, *supra* note 153, at 385, 400–09.

¹⁶⁶ See generally David E. Shipley, *What Do Flexible Road Signs, Children's Clothes and the Allied Campaign in Europe During WWII Have in Common? The Public Domain the Supreme Court's Intellectual Property Jurisprudence*, 13 U. BALT. INTELL. PROP. L.J. 57, 81–89 (2005).

¹⁶⁷ *Dastar Corp.*, 539 U.S. at 34 (quoting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 165 (1989)).

¹⁶⁸ See *supra* notes 4, 6, 131–34 and accompanying text.

¹⁶⁹ See *supra* note 131–34 and accompanying text.

analyses.¹⁷⁰ Since these value-added materials created by LexisNexis for Georgia are entitled to copyright protection and support copyright policy, Georgia’s copyright infringement claim is not preempted.

VI. CONCLUSION

The public edicts doctrine’s distinction between the public domain status of judicial opinions and statutes, and the copyrightability of annotations and analyses of those opinions and statutes, has been recognized since the late nineteenth century by the U.S. Supreme Court in *Callaghan v. Myers*¹⁷¹ and the Sixth Circuit in *Howell v. Miller*.¹⁷² This distinction is still recognized by the Copyright Office.¹⁷³ The public edicts doctrine has been somewhat difficult to apply where the material at issue—such as privately drafted ordinances, regulations, standards, and articles like maps or tests referenced in, or incorporated in, legislation—“does not fall neatly into the categories of statutes or judicial opinions.”¹⁷⁴ Georgia’s copyright infringement claim against PRO, however, is not one of those difficult cases. It involves the established distinction between the unprotected statutory portion of the Georgia Code and the annotations and analyses created by LexisNexis. Nevertheless, the Eleventh Circuit, while acknowledging that they did not have the force of law, said that the annotations and analyses in the O.C.G.A. were law-like, attempted to distinguish past judicial decisions, and applied a novel three-step analysis to invalidate Georgia’s copyright in the annotations.¹⁷⁵ For the reasons explained in this Article, the U.S. Supreme Court should reverse the Eleventh Circuit’s erroneous invalidation of

¹⁷⁰ Georgia’s Petition for Writ of Certiorari, *supra* note 22, at 23 (highlighting that LexisNexis will not want to maintain its contract with Georgia absent copyright protection or direct compensation through taxpayer funds); Brief of the States, *supra* note 16, at 10–11 (“States use copyright protections to facilitate the affordable production of official annotated codes.”); *see also* Bambauer, *supra* note 18, at 1076–77 (acknowledging problems with the preemption argument, including that it runs counter to the Copyright Act and relevant precedent from the U.S. Supreme Court).

¹⁷¹ 128 U.S. 617 (1888).

¹⁷² 91 F. 129 (6th Cir. 1898).

¹⁷³ COPYRIGHT OFFICE COMPENDIUM, *supra* note 4, § 313.6(C)(2).

¹⁷⁴ *John G. Danielson, Inc. v. Winchester-Conant Props., Inc.* 322 F.3d 26, 38 (1st Cir. 2003).

¹⁷⁵ *See generally* Code Revision Comm’n v. Public.Resource.Org, Inc., 606 F.3d 1229 (11th Cir. 2018).

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Georgia's copyright in the annotations and reinstate the district court's decision in favor of the Code Revision Commission and Georgia.

