

No. 18-1150

IN THE
Supreme Court of the United States

GEORGIA, ET AL., *Petitioners*,

v.

PUBLIC.RESOURCE.ORG, INC., *Respondent*.

On Writ of Certiorari to the United States Court of
Appeals for the Eleventh Circuit

**BRIEF OF *AMICI CURIAE*
PRINT DISABILITY ADVOCATES
IN SUPPORT OF RESPONDENT**

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INTEREST OF AMICI CURIAE¹

Amici American Association of the Deaf-Blind, American Council of the Blind, Burton Blatt Institute, Disability Rights Advocates, National Federation of the Blind, World Institute on Disability, and Sina Bahram are national organizations and an individual dedicated to advocating for people with print disabilities. “A ‘print disability’ is any disability that prevents a person from effectively reading printed material. Blindness is one example, but print disabilities also include those that prevent a person from physically holding a book or turning pages.” *Authors Guild, Inc., v. HathiTrust*, 755 F.3d 87, 91 (2d Cir. 2014).²

Amici work with chapters and affiliates in all fifty states, the District of Columbia and Puerto Rico. Amici seek to advance equal access to employment, education, and full participation in American life for people with disabilities.

SUMMARY OF ARGUMENT

The court of appeals reached the correct result by protecting the right of all Americans—including those with print disabilities—to access the law.

¹ All parties have given written consent to the filing of all amicus briefs. No counsel for a party authored this brief in whole or in part, and no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

² References to “people with print disabilities” throughout this brief are consistent with the definition of “eligible person[s]” under the recently amended Chafee Amendment to the Copyright Act. *See* 17 U.S.C. § 121(d)(3).

Unencumbered access to knowledge about the rights and obligations created by the state is an indispensable foundation of a free society, particularly for people with disabilities who rely on knowledge and understanding of the law to assert and defend their civil rights.

Georgia's efforts to limit access to the law have particularly acute impacts on people with print disabilities who need or want access to Georgia law. Georgia seeks to stop the efforts of Public.Resource.Org ("PRO") to make the Official Code of Georgia Annotated ("OCGA") more widely accessible—including to people with print disabilities—leaving in place only Georgia's proprietary versions of the OCGA that are inaccessible to people who rely on screen-reader software.³

Georgia's attempt to stop PRO's efforts to make the OCGA more accessible is especially concerning because Georgia has failed to provide its own accessible version of the OCGA in violation of Title II of the Americans with Disabilities Act ("ADA"). 42 U.S.C. § 12131 et seq. Title II requires Georgia to make all its informational services—including its online provision of the OCGA—accessible to people with disabilities. Georgia fails to meet its ADA obligations and then effectively seeks to compound its

³ Screen-access or screen-reader software transmits textual information on a computer screen, such as the text on a website, into an audio output or refreshable Braille display pad. Some screen-access software also allows those with partial sight who can read large print to magnify text on a screen to a size that allows them to read it visually.

failure to provide an accessible version of the OCGA by using copyright law as an impediment for third parties to do the same.

Amici agree with PRO that the OCGA represents the authoritative word of the state of Georgia and is not copyrightable. A rule that essential legal materials such as the OCGA are not copyrightable would provide organizations seeking to make those materials accessible to people with print disabilities assurance that their work does not risk liability under copyright law.

Even if the Court disagrees with PRO's broad position that the OCGA is never protected by copyright, the Court should recognize that efforts such as PRO's are not copyright infringement to the extent that they make works accessible to people with print disabilities. The United States has a long history of implementing legislation prioritizing the rights of people with disabilities to access information over the proprietary interests of copyright holders. The rights of people with disabilities to participate fully in civic discourse and to have equal access to law and legal proceedings, including through access to copyrightable works, has been repeatedly confirmed through both affirmative obligations placed on third parties to provide copyrighted works in accessible formats—including under the ADA—and through exceptions to the exclusive rights of copyright holders for making works accessible to people with disabilities.

Against that backdrop, the Court should at a minimum hold that PRO's work toward providing the

OCGA in a format accessible to people with print disabilities is a noninfringing fair use. In light of Georgia's failure to meet its obligations under the ADA, this Court should view Georgia's efforts to curtail PRO's efforts to provide an accessible version of the OCGA as a hypocritical attempt to erect additional barriers to accessibility in contravention of federal law and policy.

ARGUMENT

I. Equal access to the law is an essential civil right for people with print disabilities.

Access to law and legal information is an indispensable element of full participation in society. The UN General Assembly recognizes "the publication and widespread availability" of law as necessary for people to understand "their civil, political, economic, social, and cultural rights."⁴ Without access, people are denied knowledge not just of their duties and responsibilities to society, but also of the rights and benefits that society has pledged to them.

Though all Americans should have free access to the state's legal materials, access is particularly important for people with print disabilities. As this Court has noted:

[I]ndividuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to

⁴ GA Res 53/144, UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Dec. 9, 1998).

a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.

Tennessee v. Lane, 541 U.S. 509, 516 (2004) (quoting H.R. Conf. Rep. No. 101–558, §2(7) (1990), referring to 42 U.S.C. § 12101).

People with disabilities have often relied on access to the courts to achieve fair and equal treatment. *See, e.g.*, Arlene Mayerson, *The History of the Americans with Disabilities Act* (1992).⁵ Because Americans with disabilities and their allies cannot rely solely on governmental or third-party enforcement of their civil rights, they often must self-advocate for access. However, people who cannot access the law face significant, if not insurmountable, barriers to engaging in self-advocacy for equal access in all walks of American life. In sum, access to the law is itself a foundational civil right of people with disabilities.

II. Georgia is violating the right of people with print disabilities to an accessible version of the OCGA.

It is no surprise, then, that Title II of the ADA requires Georgia to make the online versions of the

⁵ <https://dredf.org/about-us/publications/the-history-of-the-ada/>.

OCGA accessible on equal terms to people with print disabilities. Despite this requirement, Georgia has failed to make either the public or paid versions of the OCGA accessible.

A. Title II of the ADA requires Georgia to make the OCGA accessible.

In Title II of the ADA, Congress demanded that people with print disabilities have an equal opportunity to access all “services, programs, and activities” of state and local governments. *See* 42 U.S.C. § 12132.⁶ Thus, Georgia’s informational services—including its online provision of the OCGA—must be accessible on equal terms to people with print disabilities.

Congress delegated authority to the Department of Justice (“DOJ”) to enforce Title II’s mandate. 42 U.S.C. § 12134(a). DOJ’s regulations require public entities to ensure that all communications with people with disabilities “are as effective as communications with others.” 28 C.F.R. § 35.160(a)(1).⁷ DOJ has also

⁶ Congress explicitly included states in its definition of covered “public entit[ies]” under Title II. *See* 42 U.S.C. § 12131(1)(A). Title II likewise covers people with print disabilities under the broad definition of “[q]ualified individual[s] with a disability,” which includes any “individual with a disability who, with or without . . . the removal of . . . communication . . . barriers . . . or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.” 42 U.S.C. § 12131(2).

⁷ Conforming with the World Wide Web Consortium (W3C)’s Web Content Accessibility Guidelines (WCAG) version 2.0 Level

made clear that covered programs, services, and activities include websites and online services provided by public entities.⁸

A and AA is one means of achieving effective communication and equal access to a website. Accordingly, the federal government has incorporated WCAG 2.0 into the updated accessibility standards for its own technology under Section 508 of the Rehabilitation Act. 36 C.F.R. pt. 1194; *see* U.S. Access Board, *About the Update of the Section 508 Standards and Section 255 Guidelines for Information and Communication Technology*, <https://www.access-board.gov/guidelines-and-standards/communications-and-it/about-the-ict-refresh/overview-of-the-final-rule>. Likewise, the U.S. Department of Transportation has established WCAG 2.0 Level A and AA as the standard for accessibility for airline websites and kiosks. 14 C.F.R. pts. 382, 399; 49 C.F.R. pt. 27; *see also* Fact Sheet: Web Site and Kiosk Accessibility, https://www.transportation.gov/sites/dot.gov/files/docs/11-04-13%20Accessible%20Kiosks%20Fact%20Sheet_0_0.pdf. Finally, in more than two dozen consent decrees and settlement agreements to which the United States has been a party, DOJ has required states and localities to adhere to WCAG 2.0 level AA to ensure compliance with the ADA. *See, e.g.*, Settlement Agreement Between the United States of America and Palm Beach County Supervisor of Elections, DJ Nos. 204-18-218 & 166-18-43 (Jan. 19, 2017), https://www.ada.gov/palm_beach_sa.html; *see also* *Cases 2006–Present*, https://www.ada.gov/enforce_current.htm (linking numerous DOJ ADA web settlements requiring covered entities to comply with WCAG 2.0 level AA).

⁸ 28 C.F.R. pt. 35 app. A (explaining 28 C.F.R. § 35.138) (“The Department has consistently interpreted the ADA to cover websites that are operated by public entities and stated that such sites must provide their services in an accessible manner.”); *id.* at *Other Issues* (“Public entities that choose to provide services through web-based applications (*e.g.*, renewing library books or

B. Georgia’s free and paid versions of the OCGA are not accessible.

Both the free and paid online versions of the OCGA provided by Georgia are inaccessible to people with print disabilities. As a result, Georgia’s online provision of the OCGA violates its obligations under Title II of the ADA.

To access the free online version of the OCGA, a user must follow a link on the Georgia Legislature’s website, which takes the user to a LexisNexis-operated website containing the no-cost version of the OCGA. Georgia General Assembly, Homepage (last accessed Oct. 2, 2019);⁹ *see also* J.A. 445-46.

The free OCGA site is effectively incompatible with several screen reader technologies and thus prevents many users with print disabilities from fully and independently navigating the site. Consistent with the record of accessibility problems with the free OCGA site at the lower court, *see* J.A. 447, a review of the site reveals, for example:

- The site contains large and complex areas of content that include insufficient headings or

driver’s licenses) or that communicate with their consumers or provide information through the Internet must ensure that individuals with disabilities have equal access to such services or information, unless doing so would result in an undue financial and administrative burden or a fundamental alteration in the nature of the programs, services, or activities being offered.”); U.S. Dep’t of Justice, Accessibility of State and Local Government Websites to People with Disabilities (2003), <https://www.ada.gov/websites2.htm>.

⁹ <http://www.legis.ga.gov/en-US/default.aspx> .

other anchors to facilitate navigation by screen readers.

- The site's controls for font size are incorrectly coded, causing them to display as additional headings to screen readers.
- The site's controls for the table of contents of statutory sections are mislabeled and difficult for screen reader users to identify and operate.
- Significant portions of the site's content are miscoded as web "forms" that cannot be properly navigated by a screen reader.
- The site contains various mis-ordered elements, miscoded check boxes, and non-functional or vaguely labeled buttons, hampering the ability of screen reader users to search and navigate.
- Each of the problems in this non-exhaustive list poses potentially prohibitive barriers to screen-reader users site navigation, denying them equally effective communication as required under Title II of the ADA. Collectively, the barriers make the equal access for screen-reader users demanded by the ADA impossible.¹⁰

¹⁰ These and other violations identified in an informal examination violate numerous provisions of the WCAG 2.0, including Sections 1.1.1 (Non-text Content), 1.3.1 (Info and Relationships), 1.3.2 (Meaningful Sequence); 2.4.2 (Page Titled), 2.4.3 (Focus Order), 2.4.4 Link Purpose (In Context), 2.4.6 (Headings and Labels), 3.3.2 (Labels or Instructions), 4.1.1 (Parsing), 4.1.2 (Name, Role, Value). *See* <https://www.w3.org/TR/WCAG20/>.

Furthermore, people with disabilities cannot overcome the accessibility problems of the free online version of the OCGA even by paying to access the commercial online version of the OCGA.¹¹ The page navigation and display of the paid online version of the OCGA is nearly identical to the free website and so has many of the same accessibility problems as the free site. *See* LexisNexis, *Lexis Advance—Official Code of Georgia Annotated* (last accessed Oct. 2, 2019).¹² Thus, even people with print disabilities who have the means and willingness to pay cannot independently access any version of the Georgia state code.

III. PRO’s efforts to make the OCGA available in accessible formats do not implicate any legitimate copyright interest of Georgia.

Title II litigation ultimately may be necessary to compel Georgia to make its provision of the OCGA accessible to people with print disabilities. But it is critical in the meantime that third parties such as PRO can lawfully develop accessible versions of the OCGA to remedy Georgia’s accessibility failure. Whatever the copyright status of the OCGA, these

¹¹ Requiring payment from people with disabilities to access a service that others could access for free constitutes unlawful discrimination under the ADA. *See* 42 U.S.C. § 12132 (“no qualified individual with a disability shall, by reason of such disability . . . be subjected to discrimination by any [public] entity” (emphasis added)).

¹² <https://advance.lexis.com> (navigate to “GA – Official Code of Georgia Annotated”).

third-party accessibility efforts are noninfringing fair uses.

A. PRO is working to provide the OCGA in an accessible format to serve the rights of people with print disabilities.

PRO has demonstrated a strong commitment to providing accessible versions of government resources. *See, e.g.*, Legal Information Institute, *Worth a Thousand Words: We're Upping Our Game on CFR Images*, Cornell University Law School (2019).¹³ PRO has worked on accessible versions of the Code of Federal Regulations and improved the accessibility of other government resources that are particularly important for people with print disabilities. *Id.*; *see also, e.g.*, Public.Resource.Org & Co-signatories, Comment on Proposed Rule: Information & Communication Technology Standards & Guidelines (May 28, 2015) (arguing for enhanced accessibility of government standards).¹⁴ In 2017, Congress recognized PRO for its efforts to improve the accessibility of records of congressional hearings for people with disabilities. 167 Cong. Rec. 39 E285 (daily ed. Mar. 7, 2017) (statement of Rep. Issa).

Part of PRO's effort to improve access to the OCGA is to make it fully accessible to people with print disabilities. *See* J.A. 119 at ¶ 26, 224-25 at ¶ 46;

¹³ <https://blog.law.cornell.edu/tech/2019/04/04/worth-a-thousand-words-were-upping-our-game-on-cfr-images/>.

¹⁴ <https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&s=Public.Resource.Org&dct=PS&D=ATBCB-2015-0002>.

Br. of Resp't. 13; Internet Archive, *OCGA* (2018).¹⁵ Although PRO's efforts are still underway, PRO's provision of plain-text versions of each title of the OCGA has already improved the ability of people with print disabilities to navigate and search the resource using a screen reader. *See id.* PRO's ultimate goal is to provide fully accessible versions of the OCGA as it has done in similar projects to make government sources accessible. *Cf., e.g.*, Introduction, ANSI/HFES 200: Human Factors Engineering of Software User Interfaces Pt. 2: Accessibility.¹⁶ PRO's efforts to provide the law in an accessible form indicate that, if copyright law does not stand in the way, it will continue to take meaningful steps toward providing a practical stopgap to addressing Georgia's failure to meet its obligations under Title II of the ADA, and others like PRO will be able to do the same.

B. Making the OCGA available in an accessible format is an uncontroversially noninfringing fair use.

Amici agree with PRO that the OCGA and its annotations constitute non-copyrightable government edicts. A rule that essential legal materials are not copyrightable would provide organizations seeking to make those materials accessible assurance that their charitable work does not risk liability under copyright law.

Even if this Court concludes that the OCGA's annotations are copyrightable, however, we urge the

¹⁵ <https://archive.org/details/gov.ga.ocga.2018>.

¹⁶

<https://law.resource.org/pub/us/cfr/ibr/006/hfes.200.2.html>.

Court to recognize that efforts such as PRO's are still not copyright infringement to the extent that they make works accessible to people with print disabilities.

Congress and the Court have made clear that providing works in accessible formats for people with print disabilities is an uncontroversial noninfringing fair use. "Making a copy of a copyrighted work for the convenience of a blind person is expressly identified by the House Committee Report [on the Copyright Act of 1976] as an example of fair use, with no suggestion that anything more than a purpose to entertain or to inform need motivate the copying." *Sony v. Universal City Studios*, 464 U.S. 417, 455 n.40 (1984). As the Second Circuit explained in *Authors Guild, Inc. v. HathiTrust*:

Our conclusion [that efforts to make works accessible to people with print disabilities are fair use] is reinforced by the legislative history on which [Justice Stevens] relied [in writing for the Court in *Sony*]. The House Committee Report that accompanied codification of the fair use doctrine in the Copyright Act of 1976 expressly stated that making copies accessible "for the use of blind persons" posed a "special instance illustrating the application of the fair use doctrine" We believe this guidance supports a finding of fair use in the unique circumstances presented by print disabled readers.

755 F.3d 87, 102 (2d Cir. 2014) (citing H.R. REP. NO. 94–1476, at 73 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5686).

The fairness of efforts to make works accessible to people with print disabilities is underscored by application of the familiar four-factor fair use test set out in 17 U.S.C. § 107, which includes:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

Under the first factor, making works accessible to people with disabilities entails a special purpose and character that weigh in favor of fairness. *HathiTrust*, 755 F.3d at 102. That is so in part because such efforts are consistent with the aims of federal disability law:

Since the passage of the 1976 Copyright Act, Congress has reaffirmed its commitment to ameliorating the hardships faced by the blind and the print disabled. In the Americans with Disabilities Act, Congress declared that our “Nation’s proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent

living, and economic self-sufficiency for such individuals.” 42 U.S.C. § 12101(7).

HathiTrust, 755 F.3d at 102 (describing one of “several reasons” that “providing access to the print-disabled is still a valid purpose under Factor One”).

Moreover, making works accessible to people with disabilities weighs in favor of fairness because it is consistent with the aims of federal copyright law: “[T]he Chafee Amendment [to the Copyright Act] illustrates Congress's intent that copyright law make appropriate accommodations for the blind and print disabled. *See* 17 U.S.C. § 121.” *HathiTrust*, 755 F.3d at 102 (citing Chafee, which authorizes the reproduction and distribution of works in accessible formats, as an additional basis for concluding that the first fair-use factor weighs in favor of efforts to make works accessible).¹⁷ Recently, the United States also extended its commitment to “mak[ing] appropriate accommodations in copyright law for the blind and print disabled” as a matter of international policy by signing and implementing the Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities. *See generally* Karen A. Temple, *The Marrakesh*

¹⁷ The Chafee Amendment independently authorizes third-party efforts to make copyrighted works accessible if they are undertaken “exclusively for use” by people with print disabilities. *See* 17 U.S.C. § 121(b)(1)(A) . Depending on the details of PRO’s efforts and whether they are made available exclusively to people with print disabilities or to the general public, they may be noninfringing under the Chafee Amendment as well as under fair use.

Treaty Implementation Act, The Library of Congress (Oct. 10, 2018).¹⁸

PRO’s non-profit efforts to make the OCGA accessible to people with disabilities strongly weigh the first factor in favor of fair use. They advance the aims of both federal disability law—by helping remedy Georgia’s failure to make the OCGA accessible consistent with Title II of the ADA—and copyright law—by making works accessible to people with disabilities, consistent with the objectives of the Chafee Amendment and the Marrakesh Treaty.

Turning to the second fair-use factor, the nature of the work also weighs in favor of fairness. The second factor is rarely dispositive in a fair use inquiry. *See generally Authors Guild v. Google, Inc.*, 804 F.3d 202, 221 (2d Cir. 2015) To the extent it does, however, “[t]he law generally recognizes a greater need to disseminate *factual* works than works of fiction or fantasy.” *Harper & Row Publishers v. Nation Enterprises*, 471 U.S. 539, 563 (1985) (internal citation omitted) (emphasis added).

Of course, whether the OCGA’s annotations are an edict of government is the core question before the Court. But it is indisputable that the annotations, which provide case references and explanations, are factual for purposes of copyright law, which tips the

¹⁸ <https://blogs.loc.gov/copyright/2018/10/the-marrakesh-treaty-implementation-act/>. The implementing legislation in the Marrakesh Treaty Implementation Act, P.L. 115-261, October 9, 2018, expands the scope of the Chafee Amendment in a number of ways, including to apply to international imports and exports of accessible works. *See generally* 17 U.S.C. § 121A.

second factor in favor of fair use. *See* Br. of Pet'r 2 (the annotations consist of "summaries of judicial decisions interpreting or applying particular statutes").

The third fair-use factor—the amount and substantiality of the portion of work used—also weighs in favor of fairness. Even where the entirety of a work is used, the third factor will support fair use when the use is necessary to achieve a purpose that weighs in favor of fairness under the first factor. *See HathiTrust*, 755 F.3d at 98; *Authors Guild v. Google*, 804 F.3d at 221. Here, it is necessary to use the entirety of the specific language of the OCGA and its annotations to make them accessible to people with disabilities; the provision of anything less would perpetuate Georgia's discriminatory treatment of people with disabilities.

The fourth fair-use factor—the effect on the market for the original work—likewise weighs in favor of fairness. Historically, copyright holders have expressed little more than hypothetical interest in serving people with disabilities on equal terms, and therefore equal access to collections of copyrighted works for people with disabilities has rarely materialized absent specific federal government action to compel or enable it. *See generally HathiTrust*, 755 F.3d at 99-100, 102-03. That indifference to the interests of people with print disabilities is particularly salient here. Like many content producers before it, Georgia has failed to provide an accessible version of the OCGA to people

with print disabilities in violation of its duties under the ADA.¹⁹

Moreover, Georgia has decided to outsource a significant portion of the development of the OCGA to a third party, which in turn collects money from end users who purchase subscriptions to or print versions of it. Georgia argues that its copyright claim on the OCGA is necessary to preserve this economic model. Br. of Pet'r 52-53, 55-56. But the model apparently does not include any plan for the development of accessible ADA-compliant versions of the OCGA.

In short: Georgia has selected an economic model that leaves people with print disabilities no choice but to sue Georgia under the ADA or rely on a third party such as PRO to step in and provide the accessible version of the law that Georgia has failed to provide. The Court should reject Georgia's efforts to leverage copyright law to compound its violations of the civil rights of people with print disabilities.

CONCLUSION

The decision of the court of appeals should be affirmed.

¹⁹ See discussion above at Part II(B).

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