

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

GEORGIA, ET AL.,)
) Petitioners,)
) v.) No. 18-1150
PUBLIC.RESOURCE.ORG, INC.,)
) Respondent.)

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GEORGIA, ET AL.,)

Petitioners,)

v.) No. 18-1150

PUBLIC.RESOURCE.ORG, INC.,)

Respondent.)

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Washington, D.C.

Monday, December 2, 2019

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:09 a.m.

APPEARANCES:

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supporting the Petitioners.

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on behalf of the Respondent.

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P R O C E E D I N G S

(11:09 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 18-1150, Georgia versus Public.Resource.Org, Inc.

Mr. Johnson.

ORAL ARGUMENT OF JOSHUA S. JOHNSON

ON BEHALF OF THE PETITIONERS

MR. JOHNSON: Mr. Chief Justice, and may it please the Court:

The Eleventh Circuit held that annotations to Georgia's official code are categorically ineligible for copyright protection. That holding conflicts with a straightforward application of the Copyright Act's text and this Court's precedents.

Starting with the statute, Sections 101 and 103 of the Act expressly provide that annotations are copyrightable derivative works. Nothing in the Act supports stripping Georgia's annotations of copyright protection merely because they were prepared by a contractor on behalf of a state agency.

Therefore, the crux of the party's dispute is whether this Court's 19th-century

1 precedents support a decision different from the
2 one that would be reached by applying standard
3 interpretive principles to the Copyright Act's
4 plain text. They do not.

5 In fact, those decisions strongly
6 favor Georgia. Together, they hold that while
7 judicial opinions are not copyrightable,
8 annotations added to opinions by a court's
9 official reporter are copyrightable works of
10 authorship.

11 Similarly, while statutory text is not
12 copyrightable, annotated research references are
13 eligible for copyright protection, even if they
14 appear in an official code book like the OCGA.

15 As a diverse coalition of states has
16 explained, affirming the decision below would
17 scuttle numerous states' regimes for publishing
18 annotated official codes. Absent direction from
19 Congress, this Court should not extend a
20 judge-made doctrine to override the systems
21 established by numerous states' democratically
22 elected governments.

23 I invite questions. But as a diverse
24 -- so PRO's case rests heavily on an expansive
25 interpretation of just a few sentences of this

1 Court's 1888 Banks decision. But the Banks case
2 really just explained its rationale in a single
3 sentence, and that sentence says that the whole
4 work done by the judges constitutes the
5 authentic exposition and interpretation of the
6 law, which is binding on every citizen and is
7 thus free for publication to all.

8 So we read that sentence as
9 establishing the principle that a work is not
10 copyrightable if it is of a type that can serve
11 as a vehicle for establishing binding law.

12 CHIEF JUSTICE ROBERTS: What do you
13 understand the significance to be of the fact
14 that these annotations, the references are
15 official?

16 MR. JOHNSON: I --

17 CHIEF JUSTICE ROBERTS: Does that --
18 does that give them more weight when they're
19 cited to the court?

20 MR. JOHNSON: No. And I -- I think
21 that the thing that's official is the code. So
22 it's the Official Code of Georgia.

23 CHIEF JUSTICE ROBERTS: Whether the --
24 the -- whatever the additional material is
25 included in --

1 MR. JOHNSON: It does appear in the
2 same publication. That's correct. And I don't
3 think that that makes a difference for purposes
4 of copyright under this Court's precedent.

5 And I -- I think that that's clear
6 from Wheaton and Callaghan. So, in both of
7 those cases, the Court said that a
8 court-appointed official reporter could hold
9 copyright in annotations that appeared in the
10 reporter volumes. So this case is really just
11 the legislative analogue of Callaghan.

12 In Callaghan, the Court held that the
13 official reporter could hold copyright in things
14 like headnotes at the top of a decision. And if
15 you look at the judicial decision summaries in
16 the OCGA, they are materially indistinguishable
17 from those headnotes --

18 JUSTICE KAVANAUGH: This case --

19 JUSTICE SOTOMAYOR: Except -- go
20 ahead.

21 JUSTICE GINSBURG: But why isn't --
22 why isn't the legislature like the judge? The
23 -- the judge puts his imprimatur on the
24 annotations not copyrightable of the syllabus.
25 And, here, it's the state legislature. Why do

1 you treat the judge and the state legislature
2 differently?

3 MR. JOHNSON: Well, I think it's
4 different because the general assembly is not
5 enacting individual legis -- annotations through
6 bicameralism and presentment. So the
7 annotations are first prepared by a commercial
8 publisher, so by a contractor, and they do that
9 subject to the supervision of the Code Revision
10 Commission.

11 JUSTICE GINSBURG: But they do it
12 as -- as a -- what do they call it, authors for
13 hire. So the one that would hold the copyright
14 would be the state.

15 MR. JOHNSON: The state does hold the
16 copyright, that is correct, very much like how
17 an official reporter held the copyright in
18 Wheaton and Callaghan. So, here, the Code
19 Revision Commission, acting on behalf of the
20 state, obtains a copyright for the state.

21 But I think the crucial point under
22 Banks is that the annotations are not
23 individually reviewed by legislators. They do
24 not go through the process of bicameralism and
25 presentment. So --

1 JUSTICE GORSUCH: Well, but, counsel,
2 aren't they approved? I thought they were at
3 least approved as a whole by the legislature.

4 MR. JOHNSON: So I think the Eleventh
5 Circuit's decision is perhaps a little confusing
6 on this issue, but I don't think that there's
7 any disagreement about the underlying facts.
8 The answer is, as the Eleventh Circuit said in
9 its opinion, the annotations are not
10 individually enacted.

11 JUSTICE GORSUCH: I -- I understand
12 that. I -- I posited that in my question to
13 you.

14 MR. JOHNSON: Right, right.

15 JUSTICE GORSUCH: Aren't they approved
16 as a whole by the legislature?

17 MR. JOHNSON: So what the legislature
18 does every year is passes a reviser act, and the
19 reviser act reenacts the code, including OCGA
20 1-1-1, which calls for the statutory text to be
21 merged with the annotations.

22 JUSTICE GORSUCH: Okay. All right.
23 So, if that's the case, and you include the word
24 "official" on it, presumably, you're doing that
25 to create some value for the reporter.

1 Why would we allow the official law
2 enacted by a legislature, approved -- equivalent
3 of being approved by a judge in annotations, as
4 Justice Ginsburg indicated, why would we allow
5 the official law to be hidden behind a pay wall?

6 MR. JOHNSON: So I don't think that
7 adopting our position would cause the official
8 law to be hidden behind a pay wall. First, the
9 law is available on Lexis's website. And also,
10 PRO is free to cut --

11 JUSTICE GORSUCH: But not the official
12 annotations that the legislature has, in some
13 fashion or another, given its official approval
14 to.

15 MR. JOHNSON: The annotations are not
16 the law. So the law is not behind a pay wall.
17 Also, the annotations are available --

18 JUSTICE GORSUCH: You're not arguing
19 that it's purely -- I thought you had disavowed
20 the argument that it's only things that bind for
21 which copyright's unavailable.

22 MR. JOHNSON: So our position is that
23 if a work is of a type that, as a class, can
24 serve as a vehicle for establishing binding law
25 like judicial opinions --

1 JUSTICE GORSUCH: And -- and aren't
2 annotations in that category? Aren't they
3 frequently used by state courts as indications
4 of the legislature's intentions?

5 MR. JOHNSON: No, not the type of
6 annotations that we're talking about here.
7 We're talking about traditional annotations that
8 are research references or finding aids.
9 They're things like, to give an example from JA
10 699, one of the annotations that we're claiming
11 copyright in, says for a survey article on trial
12 practice and procedure, see a particular law
13 review.

14 JUSTICE GORSUCH: So you're disavowing
15 that they're ever used by state courts as
16 indications of legislative intent? That never
17 happens?

18 MR. JOHNSON: They are --

19 JUSTICE GORSUCH: That's the
20 representation you're making to this Court?

21 MR. JOHNSON: The annotations would
22 never be used as an indication of legislative
23 intent like you would cite legislative history
24 material.

25 JUSTICE ALITO: There are --

1 JUSTICE KAGAN: Why does Georgia --

2 JUSTICE ALITO: No, go ahead. Does
3 that apply to all of the annotations in the
4 official code? Does it apply to annotations
5 made by the Georgia Bar?

6 MR. JOHNSON: So they -- it applies to
7 all the annotations we're claiming copyright in.
8 The Georgia Bar, I think of those as comments,
9 not necessarily annotations.

10 They're provided by the Georgia Bar
11 Committee to the Code Revision Commission. The
12 bar committees ask that they be included in the
13 code. And, often, the people who write them are
14 involved in actually drafting the statutes.

15 Georgia courts do cite those comments,
16 but we are not claiming copyright in those
17 annotations. PRO is free to copy them. And, in
18 fact, they appear in West's unannotated --

19 JUSTICE ALITO: What is the --

20 MR. JOHNSON: -- or unofficial
21 annotated code.

22 JUSTICE ALITO: -- what is the -- what
23 is the theory that distinguishes those
24 annotations from the other annotations?

25 MR. JOHNSON: I -- well, I think that,

1 first of all, the author is different. So it's
2 the state bar. The state bar, if it wanted to
3 make a copyright claim, would have to be the one
4 that's making the copyright claim.

5 I don't think that -- I think probably
6 those would not be copyrightable if the state
7 bar was trying to make a copyright claim.

8 JUSTICE ALITO: Okay, why?

9 MR. JOHNSON: I -- I -- now I think
10 there could be maybe a debate or dispute about
11 this, but I think that they probably would not
12 be copyrightable because they are offered for
13 the purpose of providing a gloss on the text,
14 the drafter's intent for the statutory text in
15 some cases. And courts in Georgia have treated
16 them as such.

17 JUSTICE ALITO: Why would the Georgia
18 Bar have particular insight into the intent of
19 the legislature in enacting a provision of law?

20 MR. JOHNSON: Well, often -- my
21 understanding from reading the introductory text
22 to these comments is that they're often drafted
23 by people who were involved in drafting the
24 legislation. So, even though a bar committee
25 member isn't in the legislature, they're often

1 involved in assisting with the drafting of the
2 legislation.

3 Now perhaps --

4 JUSTICE ALITO: But a lot of people
5 could be involved in -- in -- in the drafting of
6 legislation. It could have been proposed by
7 some interest group, it could have been
8 something that was worked on by a law professor.

9 So what distinguishes -- those could
10 -- those would be copyrightable, shouldn't --
11 wouldn't they be if they -- somebody like that
12 wrote an article? So what distinguishes them
13 from the comments of the Georgia Bar?

14 MR. JOHNSON: So I think it's perhaps
15 different because the Georgia Bar has
16 specifically asked for these comments to be
17 included in the OCGA and Georgia courts have
18 treated them as having some authoritative
19 weight.

20 So I think that that's what makes it
21 different. But I want to stress that the
22 comments are not at issue in this case. So I'm
23 just trying to give my best views about whether
24 those are --

25 JUSTICE SOTOMAYOR: I -- I'm sorry --

1 MR. JOHNSON: -- copyrightable or not.

2 JUSTICE SOTOMAYOR: -- I didn't
3 actually in reading this brief understand that.
4 And I'm not sure the court below did because
5 they relied on the comments as one of the
6 reasons for why this was attributable to the
7 state, for the very reasons you're giving, that
8 the state asked for them, that the state
9 commission who prepares them is involved
10 generally in the drafting of the law.

11 And so I don't think they separated
12 out that the only thing you were seeking
13 copyright protection for is the research
14 comments and the -- what -- tell me exactly
15 which part of the annotations you're seeking.

16 MR. JOHNSON: It's the materials
17 listed at JA 496 to 497. And I -- I can march
18 through those --

19 JUSTICE SOTOMAYOR: No, no.

20 MR. JOHNSON: -- if it would be
21 helpful. But --

22 JUSTICE SOTOMAYOR: That's all right.
23 But I do have a question. If I read Wheaton,
24 Wheaton says anything prepared by the judge
25 can't be copyrighted. That includes headnotes,

1 which are comparable, I think, to summaries that
2 might be included in these annotations because
3 it's prepared by the judge.

4 It remands to see if Wheaton was not
5 an independent contractor and -- was an
6 independent contractor and actually sought the
7 copyright.

8 Banks says, if -- if you are a
9 separate entity, you can do this, but this is a
10 work-for-hire.

11 And I go back to what Justice Gorsuch
12 was asking you. The state is the one who's
13 requiring this to be done. It reviews it. It
14 approves it. It is setting it out there as a
15 merged document with the actual laws.

16 It may have -- merger doesn't mean
17 it's actual law, but neither are headnotes
18 actual law. Dicta is not actual law. And no
19 one's arguing -- you're not arguing under Banks
20 or any of the other cases that the state
21 couldn't put a copyright in headnotes it
22 prepares or in the dicta in its judicial
23 opinions.

24 So why isn't authorship really the
25 most important factor?

1 MR. JOHNSON: I think we --

2 JUSTICE SOTOMAYOR: And if it's going
3 to explain the law, either by reference to
4 comments or by reference to cases that reflect
5 its intent, isn't that an explanation, an
6 official explanation of the law?

7 MR. JOHNSON: So I think we win if
8 authorship is the standard. And I think that
9 that's basically the United States' test. And
10 the United States agrees that we win under that
11 standard.

12 And on the question of what are the --

13 JUSTICE SOTOMAYOR: No, it doesn't,
14 because it sort of limits it. It thinks that
15 it's not official in some sort of unofficial
16 way. Even though it's approved by the
17 legislature, it's -- it's merged by its very
18 terms. It's a contract-for-hire, which means
19 you treat it like an employee.

20 If a law clerk prepares my headnotes
21 or my summaries, I don't think I can get a
22 copy -- he or she can get a copyright in it. I
23 don't think I can get a copyright in it even as
24 a work-for-hire.

25 MR. JOHNSON: Well, I -- I think that

1 the answer can't be that the fact that this is
2 an official document makes a difference for
3 copyright purposes under Wheaton and Callaghan.
4 Again, those were official reporters.

5 And if the officialness of the
6 document renders it uncopyrightable, then
7 almost -- I mean, all state government documents
8 in some way are official. They come from the
9 state government. But the one thing that we
10 know is that Congress made the policy
11 determination to allow state governments to have
12 copyright.

13 And it's important to emphasize that
14 Congress did this with a 1959 study and 1961
15 report in front of it saying that annotations by
16 state government employees are copyrightable
17 under current law.

18 JUSTICE KAGAN: Mr. Johnson, why does
19 Georgia have an official annotated code? Why
20 not just an official code?

21 MR. JOHNSON: I think it's for the
22 benefit of readers so that those finding aids
23 are present. And I think the reason why they
24 made it official is because they wanted to have
25 an annotated version subject to a price cap so

1 that it would be available to people at a
2 relatively low price.

3 JUSTICE BREYER: Probably
4 governmental -- look, I mean, I thought this
5 isn't that difficult. If a judge does something
6 in his judicial capacity, it is not
7 copyrightable. If a legislator does something
8 or a group of legislators in their legislative
9 capacity, it is not copyrightable.

10 I mean, who cares who the author is?
11 There are public policy reasons that have
12 existed forever in the law that you make those
13 two things not copyrightable.

14 The executive is harder to separate
15 out, but you could do it. Now that, I think, is
16 basically the SG's position. If it's not in
17 their official capacity, if it's simply a
18 summary or it's a comment upon something done in
19 an official capacity, it is copyrightable, even
20 though it be done by a sworn public servant, all
21 right? There we are.

22 I think that's roughly the SG's
23 position. When I read that, seemed pretty
24 sensible to me and consistent with the
25 precedents. You have a somewhat different

1 position.

2 So I guess my question is, is their
3 position, at least as I understand it,
4 acceptable to you?

5 MR. JOHNSON: The SG's position is
6 acceptable to us and we win under that standard.
7 Perhaps it would be helpful for me to explain
8 quickly why we do win under that standard.

9 So the Lexis and the Code Revision
10 Commission are not acting in a law-making
11 capacity when making these annotations.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Mr. Yang.

15 ORAL ARGUMENT OF ANTHONY A. YANG
16 FOR THE UNITED STATES, AS AMICUS CURIAE,
17 SUPPORTING THE PETITIONERS

18 MR. YANG: Mr. Chief Justice, and may
19 it please the Court:

20 This Court in *Banks* determined that
21 there was consensus that no copyright exists in
22 a work by "judicial officers in the discharge of
23 their judicial duties."

24 *Banks* then held that a judge who in
25 his judicial capacity prepares an opinion or

1 decisions and other materials is not regarded as
2 the author within the meaning of the copyright
3 statute.

4 Those principles from the judicial
5 context also apply in the law-making context.
6 So, if a lawmaker acts in his capacity as a
7 lawmaker and creates a work in the discharge of
8 his law-making duties that is within the process
9 for creating law, no copyright exists.

10 Now, in this case, this case is going
11 to be controlled, however, by Callaghan.
12 Callaghan upheld a copyright in annotations to
13 judicial decisions by an official court
14 reporter, a salaried public officer of the
15 court, who was appointed and removable by the
16 court. Such annotations are written after the
17 fact as an attempt to accurately describe or
18 provide context for the underlying source that
19 --

20 JUSTICE KAGAN: Mr. Yang -- I'm sorry.
21 Finish your sentence.

22 MR. YANG: Well, I was just going to
23 say that the -- the annotations here are
24 research aids. They are created after the fact.
25 They provide a comprehensive, not a selective

1 selection of materials related to the statutes.

2 There's no approval for the substance.

3 And, in fact, the context is easier
4 than Callaghan because it's made by a --

5 JUSTICE KAGAN: Don't finish it that
6 far.

7 (Laughter.)

8 MR. YANG: Okay. All right. I'm
9 happy to stop.

10 JUSTICE KAGAN: I'm -- I'm glad I
11 asked you to finish it because if -- I mean, you
12 stressed that the Commission doesn't do anything
13 with respect to these annotations.

14 Suppose the Commission did do
15 something with respect to these annotations.
16 They didn't write them themselves, but they
17 supervised the process carefully. They were --
18 they -- they imposed some kind of editorial
19 standards. What then?

20 MR. YANG: I don't know that that
21 would make a difference to the bottom line. Our
22 understanding of the test that draws from Banks
23 is that when a lawmaker acts in his capacity as
24 a lawmaker in the discharge of law-making
25 duties --

1 JUSTICE KAGAN: Are you saying that
2 the Commission just doesn't count as a lawmaker?
3 Is that --

4 MR. YANG: Well, and they're not
5 discharging lawmaking duties, yes, because the
6 Commission is composed of 15 individuals, five
7 of which are not even in the law -- legislative
8 process. In Harrison, the Supreme Court of
9 Georgia recognized that those non-legislative
10 people could actually make the difference in any
11 kind of decision. So it's --

12 JUSTICE KAGAN: So -- so -- but the
13 legislature sets up this Commission and puts a
14 bunch of its members on this Commission.

15 MR. YANG: Yep.

16 JUSTICE KAGAN: And let's say, in my
17 hypothetical world, this Commission actually
18 takes its job seriously and imposes some
19 editorial standards for what will and will not
20 go into the annotation. Still --

21 MR. YANG: Same result and -- but it's
22 also in the context of the rest of this case,
23 Section 1-1-1. The statutory portion of the --
24 the -- what's produced by Lexis in the -- and
25 the Commission is enacted as statute. But

1 Section 1-1-7 explains that the notes, the
2 annotations and the other things, are for
3 convenient reference and do not constitute the
4 law.

5 Every year they enact this. And
6 there's a good example.

7 JUSTICE KAGAN: Well, the people look
8 at the annotations pretty carefully as guides to
9 what that law is all about.

10 MR. YANG: Well, if they looked at the
11 annotations --

12 JUSTICE KAGAN: And if the Commission
13 is basically involved in -- in what should be in
14 and what shouldn't be in to explain to people
15 what the law means, why would that be
16 copyrightable?

17 MR. YANG: I don't think they're
18 actually explaining what the law means. They're
19 describing what other -- this is better than
20 Callaghan because, in Callaghan, the reporter
21 was at least superintended by the court, right?
22 Could have been removed by the court, was hired
23 by the court, appointed by the court.

24 Here, they're describing what third
25 parties do, what courts do. To the extent

1 there's any relationship, it's only with the
2 legislature, and even there it's attenuated.

3 JUSTICE KAGAN: So you think even if
4 the Commission actually wrote the annotations,
5 it would still --

6 MR. YANG: That's right, because --
7 and look what the annotations are. Under this
8 contract, they are intended to be comprehensive.
9 They don't say this is a good opinion, this is
10 right, this is wrong. They just want to cover
11 the waterfront, right or wrong, accurately
12 describe the judicial sources that are out
13 there, the attorney general's opinions, law
14 reviews, other types of secondary ALRs, these
15 types of things. It -- it's finding --

16 JUSTICE GORSUCH: Would it make a
17 difference if -- if, instead of the Commission,
18 it were done by the legislature itself?

19 MR. YANG: You know, I think that
20 would be a little more complicated.

21 JUSTICE GORSUCH: But all they do is
22 -- is describe what judges do.

23 MR. YANG: After the --

24 JUSTICE GORSUCH: That's it.

25 MR. YANG: Oh, no, I think that would

1 be the same.

2 JUSTICE GORSUCH: Okay.

3 MR. YANG: I -- I think you would --

4 JUSTICE GORSUCH: Let's say it was
5 adopted by the legislature too, and let's say we
6 put the word "official" on it for whatever good
7 that does market -- market power-wise. Then
8 what?

9 MR. YANG: Well, if it's done as it is
10 done here, which I think, if you look, for
11 instance, in the Respondent's brief at pages 2a
12 and 3a, the -- the -- it's prepared -- it says
13 the official code, I mean, is prepared by the
14 Commission, legislative counsel, and Lexis. And
15 then the next page over, it says the statutory
16 portion is a true and correct copy. It's
17 certified.

18 What's official, what's certified as
19 correct, is the text of the statute.

20 JUSTICE GORSUCH: All right.

21 JUSTICE KAVANAUGH: Isn't a different
22 --

23 JUSTICE GORSUCH: Nice evasion, but if
24 we could just answer the question --

25 (Laughter.)

1 MR. YANG: No, no, I -- but I don't
2 think --

3 JUSTICE GORSUCH: -- I'd be grateful.
4 Let's say the legislature itself does the
5 reviewing of all of the judicial opinions and
6 then it collects the ones and then it enacts it
7 and calls it official or not official. You
8 choose. I don't care.

9 Is that copyrightable?

10 MR. YANG: Yes, if they are doing it
11 in the same way, which is that they're --

12 JUSTICE GORSUCH: Because it's not --

13 MR. YANG: -- they're covering the
14 waterfront.

15 JUSTICE GORSUCH: -- in the same
16 capacity, right? I mean, that's what it comes
17 down to. It's not in its legislative capacity.
18 It's in some other abstract capacity in which a
19 legislature can act.

20 MR. YANG: That is our understanding
21 as drawn from Banks.

22 JUSTICE BREYER: Then the answer is
23 no. Then the answer is no to his question,
24 because the -- the whole point, I thought, is
25 that you could very abstractly, the no explains

1 it, I do, says the bride, you can't copyright
2 that. It's being used as a performative. It's
3 not an expression.

4 Now take that idea and bring it down
5 to the legislature and making laws. Where you
6 have some words on pieces of paper and they are
7 performing a function that is a legislative
8 function or a judicial function, no, it's not
9 solely an expression; it's performing a
10 function, and we don't allow it because to let a
11 monopolist get ahold of that is dangerous.

12 MR. YANG: Well, I don't think --

13 JUSTICE BREYER: And that -- that's --
14 that's what I thought that the argument was as I
15 got the entire brief.

16 MR. YANG: I'm not sure there's any
17 disagreement. What I intended to say was that
18 the annotations would be copyrightable; the
19 statute would not.

20 If it is a description of what other
21 parties are doing, there's no particular --

22 JUSTICE SOTOMAYOR: I -- I'm sorry, I
23 don't understand. I'm -- now I'm turned between
24 my two colleagues.

25 MR. YANG: Well, maybe this will

1 clarify.

2 JUSTICE SOTOMAYOR: Let me -- let me
3 clarify -- let me just get to something very
4 simple, okay? Let's assume there are some
5 states that have pro se guidelines. To pro se
6 litigants, this is how you follow the law.
7 Could they copyright those and -- and charge for
8 them and preclude others from copying them and
9 disseminating them?

10 MR. YANG: If, for instance, this is
11 like a -- your -- it's -- let me draw an
12 example. When you do -- when the court adopts
13 rules for -- Federal Rules of Civil Procedure or
14 otherwise, there are often advisory committee
15 notes that explain kind of context. We
16 understand --

17 JUSTICE SOTOMAYOR: Right. Is that
18 copyrightable?

19 MR. YANG: We understand that -- no,
20 we understand that to be in the context of the
21 rule-making proceeding.

22 JUSTICE SOTOMAYOR: All right.

23 MR. YANG: All right. Now --

24 JUSTICE SOTOMAYOR: So why is that
25 different if -- and I think your brief made very

1 clear, committee reports, even on failed
2 legislation, wouldn't be copyrightable.
3 Materials prepared for that process are not
4 copyrightable unless the individual -- the state
5 didn't require them or -- or create them.

6 So why is it that an official guide to
7 an official code where the annotations merge
8 with that code that are prepared by the state,
9 why aren't those copyrightable?

10 MR. YANG: There's a --

11 JUSTICE SOTOMAYOR: Why aren't they
12 like --

13 MR. YANG: There's a few things that
14 are, I think, incorrect in the premise. One, if
15 you look at Callaghan, you had annotations by
16 the official court reporter, superintended by
17 the court, combined in a single volume, still
18 copyrightable. So the fact that they're
19 together, not relevant.

20 Second, when we're talking about
21 annotations here, we're talking about a
22 description of case 1. Case 1 says the statute
23 means X; case 2 means the statute means Y. They
24 reproduce both of them. They're not saying that
25 1 --

1 JUSTICE KAGAN: Suppose that weren't
2 true.

3 JUSTICE ALITO: So is it --

4 MR. YANG: -- isn't the law.

5 JUSTICE KAGAN: Suppose the
6 Commission, when it supervised, part of its
7 supervision, it looked over the annotations and
8 it picked out a few that it thought were
9 egregiously wrong in terms of interpreting the
10 law. Would that make a difference?

11 MR. YANG: You know, I think it would
12 start to be a little harder. It starts to sound
13 a lot like -- more like post-enactment
14 legislative history, if it were done by the
15 legislature.

16 JUSTICE KAGAN: A little bit harder,
17 but that's still copyrightable if the -- if the
18 Commission is saying no, that's an incorrect
19 interpretation of law?

20 MR. YANG: You know, I --

21 JUSTICE KAGAN: We'll take out that
22 annotation?

23 MR. YANG: -- I think because the
24 Commission, is, again, making an observation
25 with respect to what these other parties do,

1 they don't have any particular expertise, it's
2 not the legislature itself doing this, I think
3 --

4 JUSTICE KAGAN: Okay. Now I'm going
5 to go back to Justice Gorsuch. How about the
6 legislature?

7 MR. YANG: Well, if the legislature
8 did that, I think there would be a question
9 whether that is part of the legislative
10 process --

11 JUSTICE KAVANAUGH: Isn't that --

12 MR. YANG: -- for instance, for --

13 JUSTICE KAVANAUGH: -- isn't that
14 Banks? I mean, isn't that the -- potentially
15 Justice Gorsuch's hypothetical, the distinction
16 between Banks and Callaghan or not?

17 MR. YANG: Well, I think Banks --

18 JUSTICE KAVANAUGH: In other words,
19 can't you give up that hypothetical and still
20 win?

21 MR. YANG: I think we could give it
22 up, but let me -- let me take a step back and
23 say we can look -- start looking to the fringes
24 of this case, but when we look at the core of
25 what -- what this is about and the way that this

1 has arisen, the test that we think flows from
2 Banks and Callaghan is one that takes care of
3 the real-world consequences here.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Mr. Citron.

7 ORAL ARGUMENT OF ERIC F. CITRON

8 ON BEHALF OF THE RESPONDENT

9 MR. CITRON: Mr. Chief Justice, and
10 may it please the Court:

11 I think it's useful to remember that
12 the question Georgia presented in this case was
13 whether the government edicts doctrine extends
14 to documents that lack the force of law. The
15 answer to that question is clearly yes. The
16 United States agrees with us that it has to be
17 yes. That's required by the Court's decision in
18 Banks. And it seems necessary unless
19 legislative history, agency guidance documents,
20 unpublished judicial decisions are going to be
21 subject to copyright.

22 Georgia hasn't proposed an alternative
23 test, but we've proposed a test that we've drawn
24 from the language in this Court's decisions,
25 particularly Wheaton as it was understood by

1 Justice Story and Callaghan, which adopted that
2 understanding, and it asks two straightforward
3 questions: Is this a legal work and is it
4 published under the authority of the state?

5 If it is, then it can't be
6 copyrighted, and that makes sense because states
7 don't publish authentic state legal works for
8 the purposes of making money or maximizing
9 profit. They publish them so that people will
10 understand their legal obligations.

11 And so you do not need the copyright
12 incentive to ensure that these works get made.

13 JUSTICE BREYER: Why is it different
14 if the state -- or is it? The state hires an
15 official historian. The historian's job is to
16 write the history of the State of Georgia.
17 After a committee reads it and says yes, then
18 they stamp it official. They have a copyright
19 contract, so they get the -- the state gets the
20 copyright. Is it copyrightable?

21 MR. CITRON: I think that is
22 copyrightable because --

23 JUSTICE BREYER: Because? Why is that
24 copyrightable and yet a comment made by the
25 professor's cousin, who happens to teach in law

1 school, is not copyrightable?

2 MR. CITRON: Uh --

3 JUSTICE BREYER: The comment being on
4 the state of the law, the comment being a
5 summary of the cases, the comment being the --
6 the six things listed on page, whatever it was,
7 page 497, the seven things. How is that
8 different?

9 MR. CITRON: I guess I want to answer
10 both parts of the question, but I'm going to
11 take the second part first. I don't think a law
12 professor speaking in the voice of the state or
13 that something a law professor publishes is
14 published under the authority of the state, so
15 that would be copyrightable under our test.

16 And nor do I think that an official
17 state history is a legal work, and so that
18 wouldn't be captured by our test either. And
19 there is a difference because, when the state
20 speaks -- when you speak in the state's voice
21 with respect to a legal work, you're asserting a
22 kind of authority. That has value that it
23 doesn't have when the state publishes its
24 poetry.

25 JUSTICE KAGAN: I understand, Mr.

1 Citron, that the SG is essentially saying, well,
2 for these annotations, the state is not telling
3 you what it thinks about the law. The state is
4 doing no more and no less than what Westlaw
5 does.

6 So the state's view of the law is just
7 like Westlaw's view of the law. Why should we
8 treat the two differently?

9 MR. CITRON: Well, I -- I don't think
10 they're the same for two reasons. One is these
11 annotations are produced in the name of and the
12 voice of the Code Revision Commission, and the
13 Code Revision Commission is not a non-entity.

14 Code Revision Commissions are
15 responsible for assembling the text of the
16 statutes and the other things that go into the
17 official code. And, look, in the United States
18 context, 27 of the titles of the United States
19 Code are simply the product of a Code Revision
20 Commission. They aren't enacted as texts.

21 So these Code Revision Commissions,
22 they do exercise a legislative function --
23 function. They assemble the text of the
24 statutes.

25 JUSTICE KAVANAUGH: How is that

1 different from the court reporter?

2 MR. CITRON: Because the court
3 reporter doesn't -- isn't responsible for the
4 text of the opinions at all, right? They're not
5 allowed to move around the text and say, well,
6 this would be clearer --

7 JUSTICE KAVANAUGH: They're
8 responsible for the text of what they -- they
9 produce as the summary.

10 MR. CITRON: What they add they are
11 responsible for, but the court is not
12 responsible for it, and that's the big
13 difference. Being the official reporter doesn't
14 prevent you from adding whatever you want to the
15 report.

16 If Henry Wheaton had added things the
17 Court didn't like to the 1815 term report,
18 they're not required to pay him for the 1816
19 term, but they can't pull the 1815 term report
20 off the shelves. It's up to him what goes in
21 that book. That's the complete opposite of what
22 happens with Lexis and the OCGA.

23 Lexis can't add one thing to the OCGA
24 outside the state's authority. The hypothetical
25 facts you pose, those are the actual facts of

1 this case. The undisputed material facts are
2 that all the materials in the OCGA are finalized
3 under the direct supervision of the Code
4 Revision Commission.

5 JUSTICE KAVANAUGH: And what's the --
6 what's the difference between the Commission and
7 the -- and the reporter? I'm sorry.

8 MR. CITRON: The difference between
9 the Commission and the reporter?

10 JUSTICE KAVANAUGH: Yeah, the court
11 reporter.

12 MR. CITRON: The Commission --

13 JUSTICE KAVANAUGH: In other words,
14 how do you deal with Callaghan and Wheaton, I
15 guess, and Howell, if we're going to bring in
16 the Sixth Circuit decision in Howell?

17 MR. CITRON: I think the difference is
18 that the classic judicial reporter, particularly
19 in the 19th century, which is what we should try
20 to keep in mind, spoke in their own voice when
21 they added materials to the Court's opinion.

22 The Code Revision Commission does not
23 speak in its own voice. It's not like Westlaw,
24 something you read on the Internet. It's
25 speaking in the state's voice when it puts the

1 annotations in.

2 The annotations may not be very
3 valuable. They might not be worth a lot in
4 court, just like legislative history in front of
5 many judges is not worth a lot in court. But
6 it's still an authentic state legal document.
7 It still comes through in the voice of the
8 state. And that's the difference.

9 JUSTICE ALITO: Does this amount to
10 anything other than the label that's put on this
11 volume? Suppose they put -- they made it clear
12 in labeling the volume that the law itself is
13 the official -- the code itself is the official
14 law of the State of Georgia, all of the rest is
15 not official.

16 MR. CITRON: Uh --

17 JUSTICE ALITO: Would that take care
18 of the problem?

19 MR. CITRON: I don't think it would
20 take care of the problem in the following sense.
21 If the state is the one that actually puts
22 together the annotations, and it's known that
23 these are the state's annotations, labeling part
24 of it official and part of it unofficial is not
25 going to do the trick.

1 But that does go a long way. I think
2 our main objection is when you confer
3 officiality on these documents and you speak in
4 the state's voice, that's the thing you can't
5 copyright. If they wanted to have the official
6 Code of Georgia with annotations by Lexis, they
7 could certainly have that.

8 JUSTICE SOTOMAYOR: Mr. Citron, in
9 both Wheaton and in Callaghan, both opinion
10 mentioned that the cover pages said that these
11 reports were by the individuals, not by the
12 state.

13 MR. CITRON: Yeah.

14 JUSTICE SOTOMAYOR: And so the state
15 wasn't claiming ownership or title to these
16 annotations, correct?

17 MR. CITRON: That's right.

18 JUSTICE SOTOMAYOR: That's different
19 from here, where neither Lexis nor -- am I
20 wrong? I don't think the annotation tells us
21 who prepared the annotations, or does it? I --
22 I didn't look specifically.

23 MR. CITRON: I mean, the reason the
24 Eleventh Circuit got confused about whether
25 these comments were -- who they were authored by

1 and whether they were distinguishable from the
2 other kinds of annotations in which they claim
3 copyright is there isn't anything on the face of
4 the annotations to tell you who wrote them or
5 who's responsible for them.

6 JUSTICE SOTOMAYOR: All right. Could
7 you please take the government's test? You
8 articulate it, and you tell me why their
9 conclusion is wrong under their test.

10 MR. CITRON: Well --

11 JUSTICE SOTOMAYOR: I know you don't
12 accept their test, so don't fight the
13 hypothetical.

14 MR. CITRON: Okay.

15 JUSTICE SOTOMAYOR: Okay?

16 MR. CITRON: Yes.

17 JUSTICE SOTOMAYOR: Accept the
18 hypothetical.

19 MR. CITRON: Yeah.

20 JUSTICE SOTOMAYOR: And tell me why
21 they're wrong under their -- their test.

22 MR. CITRON: I -- I think the simplest
23 understanding is the following. The Code
24 Revision Commission is in two critical respects
25 like the legislature or exercising a legislative

1 or law-making function.

2 First, it discharges its duties
3 entirely for the behest -- at the behest of and
4 for the benefit of the legislature, and the
5 Georgia Supreme Court has told us that this is
6 an exercise of the legislative authority for
7 purposes of Georgia constitutional law.

8 So trying to draw some line between
9 the Code Revision Commission and the legislature
10 would be, I think, inauthentic. On top of that,
11 Code Revision Commissions are exercising a
12 legislative function. They assemble the text of
13 the statutes.

14 If you were to adopt a rule that the
15 Code Revision Commission does not speak for the
16 state, in states like New York, where the
17 statutory text is put together by a Code
18 Revision Commission, you could copyright the
19 statutory text itself because those statutory
20 texts are just evidence of the law. They're not
21 binding or the force of law vis-à-vis the
22 statutes at large or the like.

23 And but for Section 105, Title 42 of
24 the U.S. Code could be copyrighted too.

25 JUSTICE BREYER: What does the --

1 JUSTICE GINSBURG: Mr. Citron, may I
2 ask you a basic question of -- of what matters
3 here? One thing is that the annotations have
4 the official state imprimatur, and you say that
5 that's what matters.

6 But why instead shouldn't it matter
7 that these annotations are in no sense the law,
8 they're just useful information on how the law
9 has been interpreted and applied by others?

10 MR. CITRON: I think it's what you
11 mean by "in no sense the law," which is, I
12 think, a complicated concept. When it bears the
13 state's imprimatur, it is the law in some sense.
14 It may not be worth very much.

15 The state can say: Look, this is just
16 informational, just the way the IRS when it puts
17 out an FAQ about how to file your tax returns
18 says: Look, this is just informational. A
19 court might take a different view of it.

20 But, when the state is telling you
21 this is a good summary of the statute -- of --
22 of the case, you're going to treat that
23 differently. And it's not for nothing.

24 JUSTICE GINSBURG: Well, they're not
25 saying it's a good summary or a bad summary.

1 They may take comments from both sides, one
2 interpreting it one way, one interpreting
3 another way. They're -- they're useful aids to
4 research, but you say that that doesn't matter,
5 that -- that these -- these are information,
6 just information about how the law has been
7 interpreted and applied without making any
8 judgment whether those are correct or incorrect?

9 MR. CITRON: Well, the best I can say
10 about it is this. You know, my colleague said,
11 you know, I think the comments, which are often
12 used by courts as an authentic source of law,
13 probably shouldn't be copyrighted because they
14 are offered as a intended gloss on the code.

15 In their complaint, this is what they
16 say the judicial annotations are there for:
17 "They must be carefully crafted by Lexis in
18 order to illustrate and interpret the code
19 sections of the OCGA." That's what they're
20 there for. The state puts them there to
21 illustrate and help interpret the code for its
22 users.

23 They aren't the law. You can't cite
24 them in the sense of saying, I know the statute
25 says this, but look at this annotation here.

1 Just the way the notes that are at the end of
2 the Federal Rules of Civil Procedure aren't
3 going to overrule the text of the rule, but they
4 do count for something because they come in the
5 state's voice.

6 JUSTICE BREYER: That's -- that's, I
7 think, the question. I mean, I agree, you've
8 clarified, everybody to me. I mean, the
9 question is: What function does this particular
10 set of words play in the law?

11 And if we look at the precedent, back
12 where Justice Ginsburg was, it's hard for me to
13 see that it plays much more of a precedent than
14 Wheaton -- I mean much more of a role than
15 Wheaton's annotations, and I can think of cases
16 where a lot of people would say in respect to
17 Westlaw, in respect to Lexis, and probably here,
18 ah, yes, that's what they say, but go read the
19 case, my friend, and it isn't as good a summary
20 as you think. All right?

21 So what you'd have to show is that the
22 official Westlaw actually plays a larger role in
23 the law, in a law-making function, than does
24 Westlaw. I doubt that there's something here
25 that shows that, but maybe there is.

1 MR. CITRON: I'll give you my best
2 shot, okay? There are no cases in Georgia that
3 have ever cited West's unofficial annotated code
4 of Georgia because it's not official and it's
5 not something you would bring to court and say:
6 Well, look, an editor of Westlaw tells us that
7 this is -- that this case is relevant or that
8 this statute became effective on this date.

9 There are lots of cases that cite the
10 annotations to the OCGA, as such, in Georgia for
11 lots of different kinds of propositions.

12 JUSTICE KAGAN: But I think one
13 question that is -- I think Justice Ginsburg
14 asked it, is -- is -- is some of your examples,
15 they are government documents with a point of
16 view, and -- and when you think about one of
17 these annotation books, it doesn't look like it
18 has a point of view. It looks like there are
19 annotations of cases on both sides of an issue.

20 And -- and as long as we don't have
21 any sense that the state is editing in order to
22 create a point of view, you know, why doesn't
23 that make a difference?

24 MR. CITRON: So that's true of the
25 judicial annotations because the judicial

1 annotations are themselves summaries of the
2 cases. I would say they have a point of view
3 about the cases. They will tell you what they
4 think is important about those cases.

5 But they don't purport to comment this
6 -- this was a well-decided case, the reasoning
7 here is poor. I will say the State wants to
8 focus on the judicial annotations because it's
9 hard to imagine using them this way. You should
10 really focus on the editor's notes, which are
11 also an annotation over which they are asserting
12 copyright in this case.

13 I want to bracket, they claim
14 copyright over everything. In this case, they
15 decided not to assert against some of the works,
16 including basically everything in the code.
17 They claim it.

18 But the editor's notes --

19 JUSTICE KAGAN: So what do you mean by
20 "the editor's notes"?

21 MR. CITRON: The editor's notes are
22 notes that appear in the OCGA that describe
23 things like when this code provision becomes
24 effective, whether it was the product of a veto,
25 override, or how it was enacted, and it can be

1 extremely important to deciding a case.

2 So one of the cases that we point to
3 where this -- an editor's note was cited is
4 cited for the proposition that the -- the state
5 changed the rule for when a breathalyzer test
6 was admissible, and it did so retroactively to
7 all cases that were pending on -- at the time
8 that it was signed.

9 The state cites -- the court cites the
10 editor's note for that proposition, and that's
11 the reason this person is acquitted in that
12 case.

13 CHIEF JUSTICE ROBERTS: Is there --
14 is -- is there any other source for that
15 proposition?

16 MR. CITRON: Sure, you could go back
17 to the statute at large, just like you could for
18 all the non-positive law titles of the U.S.
19 Code.

20 CHIEF JUSTICE ROBERTS: So, if there
21 were an award given out by the Law Review
22 Commission every year for the best treatise in a
23 particular area, in other words, we think this
24 is, you know, the best treatise, and as a
25 result, it's cited more frequently and more

1 authoritatively than other treatises is, that
2 change the copyright status?

3 MR. CITRON: I don't think so because
4 I don't think that that treatise is still
5 speaking with the authority of the state. You
6 know, they can say this is a good treatise, in
7 general, you should look at it, but none of the
8 propositions there have been adopted. And the
9 treatise author certainly doesn't write with
10 authority. Writing Miller --

11 CHIEF JUSTICE ROBERTS: But, I mean,
12 the fact that the courts are going to cite that
13 treatise and, you know, with some -- probably
14 more frequency than -- than others, so the fact
15 that you have this editor's note that tells you
16 it's retroactive, that's not what makes it
17 retroactive. The fact is there's something else
18 that the -- that editor is looking at, and that
19 is the official source that makes it
20 retroactive.

21 The fact that they cite the particular
22 notes for ease of reference or -- or because
23 that editor has developed a reputation as being
24 particularly good, seems to me doesn't transform
25 the nature of those notes.

1 MR. CITRON: No, I -- I -- I will
2 admit to you at the end of the day that the
3 statute at large is going to control over the
4 editor's note. The editor's note doesn't have
5 the force of law as such.

6 But that can't be the rule. It would
7 be wildly over -- under-inclusive to exclude all
8 the things that aren't the -- the best authority
9 at the end of the day.

10 Like I said, all the non-positive law
11 titles of the U.S. Code are like that. They are
12 only prima facie evidence of the law and you
13 have to point back to the statute at large, if
14 there's a dispute, to say what the law is.

15 But, if that's the rule, like I said,
16 the actual statutory text in the official codes
17 of most of the states can now be copyrighted
18 because that's what Code Revision Commissions
19 do. They put out these non-positive law titles
20 that are prima facie evidence of the law. They
21 still have a legal effect. They just aren't the
22 controlling authority.

23 JUSTICE KAVANAUGH: There's a lot
24 of --

25 JUSTICE ALITO: You gave us a --

1 JUSTICE KAVANAUGH: Go ahead.

2 JUSTICE ALITO: You gave us a two-part
3 test. The first part is whether it's a legal
4 work. What does that mean?

5 MR. CITRON: It's just a work -- a
6 legal work is going to do one of two things.
7 It's going to purport to state what the law is
8 or interpret it, or it's going to be a part of
9 the process of making it. And it's not intended
10 to be, you know, a complicated doctrine. I
11 think it's pretty easy to look at a work and
12 determine whether it's a legal work or not.

13 JUSTICE KAVANAUGH: There's a lot of
14 debate about what the precedents mean here.
15 Should we interpret them in the direction of the
16 text of the Copyright Act, which clearly says
17 states can get copyright protection for
18 annotations?

19 MR. CITRON: I mean, states can get
20 copyright protection for annotations only
21 insofar as they meet the authorship requirement
22 of the Act. The authorship requirement was
23 given a gloss in Banks. Banks says it got that
24 gloss in Wheaton under the Marshall court and
25 Congress has not seen fit --

1 JUSTICE KAVANAUGH: What --

2 MR. CITRON: -- to change it.

3 JUSTICE KAVANAUGH: What about Howell?

4 Do you accept Howell as correctly decided, the
5 Sixth Circuit decision by Justice Harlan?

6 MR. CITRON: Yeah, we -- we accept
7 Howell as correctly decided and we think it's a
8 good case for us.

9 JUSTICE KAVANAUGH: Explain that.

10 MR. CITRON: Okay.

11 JUSTICE KAVANAUGH: Because it doesn't
12 seem that way to me, but go ahead.

13 MR. CITRON: I'll give it my best
14 shot.

15 So it's really important to focus on
16 the order of operations in Howell and how it's
17 different from what happens here.

18 So, in Howell, Howell compiles, acting
19 on his own, a compilation of the Michigan
20 statutes together with his own annotations.

21 After he does that, Michigan passes a
22 statute authenticating just the -- the statutory
23 portion of his work, and it says, you can treat
24 that statutory portion as though it were
25 published under the authority of the state.

1 And that causes Justice Harlan to
2 write an opinion that says, even though Howell
3 did that work on his own, you can cut and paste
4 that text directly out of his book in order to
5 republish a compilation of the laws because no
6 one can own the laws.

7 The other stuff, which Howell had
8 produced first on his own and the state had
9 never authenticated, remained Howell's property.
10 The exact opposite happens with the OCGA.

11 Lexis produces the annotation for and
12 at the commission of a state commission. The
13 state commission exercises supervisory authority
14 over what those annotations say. The
15 legislature then requires that those annotations
16 be merged into the official state document, and
17 then the whole document is published under the
18 authority of the State of Georgia.

19 If that's what happened in Howell, I
20 don't think you could copyright the annotations.

21 JUSTICE KAVANAUGH: The merger can't
22 make the difference, though, right?

23 MR. CITRON: No, I -- I think the
24 merger does make a difference because that is
25 the legislature deciding that these annotations

1 will be part of the code and then publishing
2 that code under the state's authority.

3 It could do the opposite. It could
4 say we are only -- if it had the authentication
5 that's in the addendum saying the statutory text
6 is authentic, you can treat it as good for cite
7 checking, that's fine. That's not making the
8 whole volume official.

9 The problem is publishing the whole
10 volume under the authority of the state,
11 including the annotations, and then saying,
12 well, actually, these annotations aren't
13 special, they're not distinguishable from what
14 Westlaw does or anyone else.

15 JUSTICE KAVANAUGH: But, if you cited
16 the annotations as binding law, that would be
17 wrong.

18 MR. CITRON: Well, two -- two things
19 about that. One is I --

20 JUSTICE KAVANAUGH: Or even -- or even
21 instructive. It would be wrong.

22 MR. CITRON: I don't think that's
23 right. If you cited the judicial annotation in
24 court, you said I found this in the OCGA, but --
25 and I haven't checked the case, but -- but this

1 is what the case says according to the OCGA, I'm
2 not sure each court would treat that as
3 incorrect. That's a -- that seems to be a
4 plausible --

5 JUSTICE KAVANAUGH: The court would
6 do --

7 MR. CITRON: -- way to use --

8 JUSTICE KAVANAUGH: Correct me if I'm
9 wrong, the court would do its own independent
10 research to determine the weight to be afforded
11 that authority.

12 MR. CITRON: Right. But it does that
13 with lots of things that we all agree are the
14 law for purposes of this copyright rule. Just
15 like when an agency tells you what that -- what
16 one of its documents means, you're going to
17 construe it, you're going to use your own
18 judicial authority to attempt to determine what
19 it means before accepting the agency's
20 determination, but it still could be a good
21 starting place.

22 It wouldn't be the same if it was just
23 something you read on the Internet.

24 JUSTICE KAVANAUGH: Can I ask you a
25 question from a different direction? Which is

1 the states' amicus brief --

2 MR. CITRON: Uh-huh.

3 JUSTICE KAVANAUGH: -- which is a
4 cross-section of states, makes a very strong
5 argument that this is going to create problems
6 in terms of incentives for creating these
7 annotations in the first place, and so the net
8 result of your position, if it wins, so the
9 states claim, is that there will be fewer of
10 these annotations. Can you respond to that?

11 MR. CITRON: Yeah, happy to.

12 If the proposition, which has to be
13 Georgia's view, is that the annotations are just
14 the same as private annotations, there is at
15 least one, and usually two, privately annotated
16 legal codes available for every state in the
17 union. And that includes states that don't
18 copyright anything, and it includes states that
19 make an annotated code available on the Internet
20 for free themselves.

21 So the incentive to create these
22 private works is not going to be affected at all
23 --

24 JUSTICE KAVANAUGH: So the states are
25 just --

1 MR. CITRON: -- by the differences in
2 this case.

3 JUSTICE KAVANAUGH: -- wrong about
4 that? I mean, isn't there a cost/price issue
5 that's involved? Or why are the states saying
6 that if they're -- they have nothing to fear?

7 MR. CITRON: I -- I don't think the
8 states have anything to fear. What they want is
9 the official versions to exist. The official
10 versions bear the states' imprimatur. They get
11 to supervise what goes in them. That's the
12 source of the problem with the copyrighting of
13 it.

14 But the unofficial -- and the
15 annotations themselves will exist without regard
16 to whether or not this kind of --

17 JUSTICE KAGAN: Well, I thought that
18 --

19 MR. CITRON: -- copyright issue is --

20 JUSTICE KAGAN: -- Mr. Johnson told me
21 that they would be more expensive. Do you
22 dispute that?

23 MR. CITRON: I do dispute that in two
24 respects. One is the actual useful versions of
25 these codes are already plenty expensive.

1 There's a lot of discussion of the cost for a
2 printed volume, but online access, which is what
3 really most practitioners need to use, most
4 people want to use, it's much more expensive
5 than the \$400.

6 But, even accepting that the price is
7 lower, I think that favors us, because what's
8 going on there is an exchange of -- you're going
9 to accept a price cap in exchange for the right
10 to publish this officially, not for publishing
11 the annotations --

12 JUSTICE BREYER: Yeah --

13 MR. CITRON: -- because Westlaw makes
14 the annotations and is allowed to charge six
15 times as much.

16 Lexis isn't going to agree to do the
17 annotation work in exchange for a price cap. It
18 -- what it wants for the price cap is the right
19 to publish it officially. I hope -- I hope that
20 makes sense.

21 There's a good description of this in
22 a brief from some former publishing officials
23 that explain, you know, if -- if this is what's
24 going on, Lexis is essentially being hoodwinked.

25 JUSTICE ALITO: What's your best --

1 what is your best evidence that the state
2 actually edits what Lexis does or supervises the
3 substance of what Lexis does?

4 MR. CITRON: Well, so there's a couple
5 of things in the publication manual that set
6 forth how Lexis is supposed to communicate with
7 the state, and it requires sending them memos
8 with bracketing around what the new material is,
9 Xeroxing the pages on which any ALR notes or
10 opinions of the attorney general might be
11 deleted and pointing them out for state
12 approval.

13 The publication manual also highlights
14 situations in which the state is likely to tell
15 them what kind of editor's note to create
16 surrounding complicated amendments or the like.

17 So the Commission is involved, but we
18 don't have -- because the case was decided on
19 summary judgment, we just don't have a record of
20 how often this -- the Commission actually --

21 JUSTICE BREYER: The -- I just thought
22 of a possible -- this should shed a lot of light
23 in a number of areas. One of those areas is
24 only applicable to some judges. Some judges do
25 look at legislative history. So, for those who

1 do look at legislative history, a committee
2 report has significance. All right?

3 Now take the same words and imagine
4 that a senator, long afterwards, came into court
5 and testified that's what we meant. Would we
6 give that senator weight? No. Or suppose that
7 the committee met after it was passed. That's
8 called post-enactment legislative history. Does
9 that have some weight? Usually very little.

10 And that's because that isn't normally
11 their job. That isn't normally part of the
12 lawmaking process. Thinking of that analogy, it
13 seems to me that your case lies somewhere
14 between the official post-enactment legislative
15 history and, over here, the senator walking into
16 the courtroom and just saying, that's what I
17 meant.

18 Now is that fair? Because I don't
19 think you like me thinking that way.

20 MR. CITRON: Oh, I'm comfortable --

21 JUSTICE BREYER: You are?

22 MR. CITRON: -- with you thinking that
23 way. And I think that that's one of the main
24 points I've been trying to make here. There is
25 a difference between being worth very little but

1 nonetheless being official, authentic state
2 legal resource, and being worth nothing because
3 you're not an authentic state legal resource.

4 It's not even the senator walking in
5 and testifying, right? What we need you to
6 compare this in to is somebody from the New York
7 Times walking in and testifying that this is
8 what people had in mind when they enacted this
9 statute.

10 That's not good for anything because
11 it's not a state legal resource. It doesn't
12 speak in the -- in the voice of the state. And
13 you can disagree about how much weight to give
14 something that is nonetheless an authentic state
15 legal resource, but that's the thing that makes
16 the difference.

17 And that -- that, again, is the
18 difference between these cases and Howell and
19 Wheaton. Howell and Wheaton were allowed to add
20 whatever they wanted.

21 JUSTICE SOTOMAYOR: Presumably, a
22 certified copy of the committee report would not
23 be post hoc.

24 MR. CITRON: Whether -- I think the
25 point I was trying to make is post hoc or not

1 might affect how much weight you want to give
2 it, but the fact that it's a certified committee
3 report is the thing that really makes the
4 difference.

5 JUSTICE SOTOMAYOR: Now I -- I
6 understand Justice Ginsburg's question because I
7 do think there's -- the comments troubled me,
8 taking the government and Petitioners' side, the
9 editorial notes trouble me, but most of the
10 references in the notes are just to judicial
11 decisions and/or general research matters.

12 If it were limited just to that, is
13 that -- why can't the state --

14 MR. CITRON: I -- I'll just give you
15 --

16 JUSTICE SOTOMAYOR: -- this is what --

17 MR. CITRON: Yeah. I'll try to give
18 you the best example we could find. In one of
19 the state cases that cites a judicial
20 annotation, what happened was a lawyer from
21 Florida didn't file a response to a motion for
22 summary judgment, because he looked up the
23 statute, and the statute says there's going to
24 be a hearing in 30 days; you can file something
25 up until the hearing.

1 Turns out that there's a rule that
2 says, no, you have to file a response or else it
3 might be deemed forfeited. And the court is
4 deciding whether his failure to file a response
5 is excusable neglect. And the court says:
6 Well, if you look at the annotations to this
7 statute, it discloses the existence of Rule 6.3,
8 which is not inconsistent with the statute.

9 And this is what happens when you have
10 a state legal manual like the OCGA that has
11 official annotations in it. Courts will find
12 ways and regular people will find ways to
13 attribute importance to things that are
14 difficult to use for judicial purposes but
15 sometimes will.

16 And the reason they do that is because
17 this is a legal work that speaks in the voice of
18 the state and not just the bare work of someone
19 who happens to be a legal editor at Westlaw or
20 something like that.

21 JUSTICE KAVANAUGH: But that would be
22 a mistake, right? I mean, isn't that -- it
23 would be a mistake to attribute the significance
24 to it.

25 MR. CITRON: I don't know if it would

1 be a mistake or not.

2 JUSTICE KAVANAUGH: Under -- under
3 state law, it would be a mistake.

4 MR. CITRON: I mean, what -- what they
5 did was attribute significance to the fact that
6 you could find it there in the manual, when they
7 were trying to figure out --

8 JUSTICE KAVANAUGH: But, under state
9 law --

10 MR. CITRON: -- what would be --

11 JUSTICE KAVANAUGH: -- isn't that --
12 that's wrong.

13 MR. CITRON: Well, no, the state law
14 would say that it would be wrong in construing
15 the meaning of that statute, but it isn't
16 necessarily wrong for figuring out what's
17 excusable neglect, right? Whether it's good
18 lawyering or bad lawyering, not to look at the
19 annotations in the OCGA isn't governed by the
20 statute. The statute doesn't say --
21 Section 1-1-1 doesn't say anything about that.

22 CHIEF JUSTICE ROBERTS: Well, but it
23 would also be pertinent to the question of
24 excusable neglect to look at what, you know, all
25 the treatises said. I mean, if I'm writing an

1 opinion about whether the lawyer should have
2 known that, I would say every -- all the
3 treatises about Georgia law, you know, highlight
4 the fact that you've got to file a response.

5 MR. CITRON: I -- I think you and I
6 may have different instincts about that. I
7 think it would be more appropriate for a judge
8 to say, well, look, in the official state legal
9 code, there are annotations that point to the
10 rule that you neglected. And I think that's
11 more persuasive. That's different than saying,
12 well, if you happen to look at the unofficial
13 codification that Westlaw does, there's an
14 indication that that rule exists. That's the
15 difference.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Three minutes, Mr. Johnson.

19 REBUTTAL ARGUMENT OF JOSHUA S. JOHNSON

20 ON BEHALF OF THE PETITIONERS

21 MR. JOHNSON: I want to start briefly
22 by talking about the different portions of the
23 OCGA, things like editors' notes.

24 We talked in our brief about why the
25 editors' notes should be copyrightable, why the

1 Dominiak case that my friend on the other side
2 just was describing doesn't undermine our
3 copyright claim.

4 But I think the crucial point on this
5 is that PRO copied the entirety of the OCGA,
6 including the judicial decision summaries that I
7 think are clearly copyrightable under Wheaton
8 and Callaghan.

9 So PRO has to run the table on all
10 portions of the OCGA to get an affirmance here,
11 and I just don't think that they can.

12 The PRO's main argument seems to be
13 that the fact that the OCGA is official means
14 that it cannot be copyrightable. And I just
15 don't think that that's consistent with history
16 or this Court's precedents.

17 Again, going back to Wheaton and
18 Callaghan, you had official court reporters
19 holding copyright in annotations. And given
20 that those were government officials, I just
21 don't think that it can make a difference here
22 that the state is the one holding the copyright.
23 I think that this case is the legislative
24 analogue of Wheaton and Callaghan.

25 But I think it's also important to

1 look at the history of the Copyright Act. So
2 the Copyright Office in the 1959 study and 1961
3 report interpreted the 19th century precedents
4 we're talking about here as holding that states
5 could hold copyright in annotations by state
6 government employees, and then Congress passed
7 the modern Copyright Act without in any way
8 overriding that understanding or expanding the
9 government edicts doctrine.

10 Under that understanding, we win here.

11 And then the final point that I want
12 to touch on is how affirming the decision below
13 would be very disruptive for states. So about a
14 third of states have the same regime as Georgia.
15 They claim copyright in annotations to an
16 annotated official code by commercial
17 publishers.

18 So affirming the decision below would
19 blow up those regimes.

20 There are at least two additional
21 states that claim copyright in annotations by
22 state government employees and five other states
23 where the commercial publisher holds the
24 copyright in the annotated official code. Those
25 regimes would probably also fall if the court's

1 decision below was affirmed.

2 So I think that statutory text and
3 precedent compel a decision for Georgia here.
4 Any innovations on the government edicts
5 doctrine should come from Congress, not the
6 courts. The Court should reverse.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel. The case is submitted.

9 (Whereupon, at 12:10 p.m., the case
10 was submitted.)

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