No. 18-1150

IN THE

Supreme Court of the United States

STATE OF GEORGIA, *et al.*,

Petitioners,

v.

PUBLIC.RESOURCE.ORG, INC.,

Respondent.

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

BRIEF OF THE CASELAW ACCESS PROJECT AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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October 16, 2019

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INTEREST OF AMICUS CURIAE

Amicus curiae is a team of legal researchers, software developers, and law librarians based in the Harvard Law Library.[1] Motivated by the core belief that access to the law should be universal, the Library began a project called the Caselaw Access Project ("CAP") in 2013. Its mission is deceptively simple: make all official American caselaw accessible to everyone online. For free.

Over the centuries, the Harvard Law Library has purchased books containing nearly all of the official published decisions of the federal, state, territorial, and tribal courts of the United States, including all fifty states, American Samoa, Puerto Rico, the Northern Mariana Islands, the U.S. Virgin Islands, and Guam. This collection contains over 6.5 million decisions. It spans the entire history of the United States and includes some materials from prior to the American Revolution. In launching the Caselaw Access Project, the Library aimed to share all of these materials with the Public online.

But to make this book-bound official law accessible online, CAP first had to convert it to digital form. This process was extraordinarily difficult. First, CAP retrieved, dis-bound, and scanned roughly 40,000 volumes comprising about 40 million pages of official

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[1] Pursuant to Supreme Court Rule 37, both parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than the amicus or its counsel made a monetary contribution to the preparation or submission of this brief.

caselaw. Next, CAP ran all of the scanned images through a process called optical character recognition (OCR), which converted the images into machine-readable text. Lastly, CAP built an application programming interface (API) and various software tools to enable anyone to access the law for free. That effort motivates CAP's interest in this case. CAP is uniquely positioned to speak to the logistical and financial effects of uncertain copyright status on government materials.

Just as the Official Code of Georgia ("Georgia Code") contains annotations, many states publish official reports of legal decisions along with potentially copyrighted headnotes and other annotations. To share official U.S. caselaw with the public, CAP faced a difficult choice: either copy and share the entire muddled mixture, or attempt to remove some of the insertions in order to reproduce a "clean" version of the law. CAP chose the latter path, and in doing so undertook significant, painstaking efforts to remove annotations from the pages. These efforts imposed large financial and logistical burdens on the project, which continue to impede and complicate CAP's public interest mission. These same burdens will frustrate any effort to share the law, unless the Court draws a clear line: copyright protection does not extend to annotations that are made part of official state codes.

SUMMARY OF THE ARGUMENT

It is an oft-repeated cliché that every citizen should be able to learn what the law is. But there are many practical barriers to such access. Due to the high cost of physical law books and subscription-based online legal services, many in the public can only rely on the limited collections of local libraries or on labyrinthine, unofficial government websites. These burdens make free, comprehensive, and well-organized legal databases like the Caselaw Access Project especially important.

The Caselaw Access Project offers universal access to American caselaw, but its usefulness to the Public has suffered from an amalgamation of unclear copyright rulings. While the Eleventh Circuit's decision in the instant case held that the Official Code of Georgia Annotated was not protected by copyright, other courts have held that various aspects of annotated official texts are copyrightable. It is often unclear exactly which material in a published court decision is protected by copyright—and this uncertainty forces actors such as CAP to take overly broad and expensive pre-emptive measures to ensure compliance. The cost of this over-compliance has detrimental effects on the efficacy and capability of projects like CAP, undermining their public interest missions.

CAP's experience can serve as a warning of the consequences of a test that preserves the copyrightability of annotations to government works like the Georgia Code. Fact-intensive tests lead to unpredictable outcomes, requiring CAP to redact over-broadly. By replacing case-by-case, fact-specific tests

with a clear rule, this Court will encourage innovative projects like the Caselaw Access Project and increase public access to the law. To best serve the Public, this Court should hold that the annotations within official state codes are uncopyrightable.

ARGUMENT

I. CAP's Experience Shows the Detrimental Effect of Allowing Copyright of Annotations Embedded Within Official Statements of Law.

A. Official Reports of Court Decisions, Like Official Annotated Codes, Are Subject to an Uncertain and Inconsistent Amalgamation of Copyright Expectations.

The Court last addressed the copyrightability of the law in 1888, in *Banks v. Manchester*, 128 U.S. 244 (1888) and *Callaghan v. Myers*, 128 U.S. 617 (1888). In *Banks*, the Court reiterated its previous holding in *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834), that "no reporter has or can have any copyright in the written opinions delivered by this court." *Banks*, 128 U.S. at 254. In *Callaghan*, the Court held that a reporter who prepared volumes of court decisions could obtain copyright in "the parts of the book of which he is the author, although he has no exclusive right in the judicial opinions published…." *Callaghan*, 128 U.S. at 650.

The lower courts have adopted inconsistent standards when applying these precedents to works that do not fall neatly into the categories described in

Banks and *Callaghan*, leading to inconsistent results. For example, the Second Circuit weighs, as part of its standard, whether an economic incentive was necessary to create the work and whether the public required notice of the work to know the law. *See County of Suffolk v. First Am. Real Estate Sols.*, 261 F.3d 179, 194 (2d Cir. 2001). In contrast, in the opinion below, the Eleventh Circuit focused on the circumstances of authorship of statutory annotations, and the question of whether "[t]hey are so enmeshed with [state] law as to be inextricable." *Code Revision Comm'n for Gen. Assembly of Georgia v. PublicResource.Org, Inc.*, 906 F.3d 1229, 1242-43 (11th Cir. 2018). Courts in the past have even reached different conclusions about whether page numbers in official reports of court decisions may be copyrighted. *Compare Matthew Bender & Co., Inc. v. West Pub. Co.*, 158 F.3d 693, 699 (2d Cir. 1998) (holding that volume and page numbers of publisher's printed compilations of judicial opinions were not protected by copyright), *with West Pub. Co. v. Mead Data Cent., Inc.*, 799 F.2d 1219, 1227 (8th Cir. 1986) (explaining that page numbers generated by the publisher through comprehensive arrangement of cases are within the scope of copyright protection).

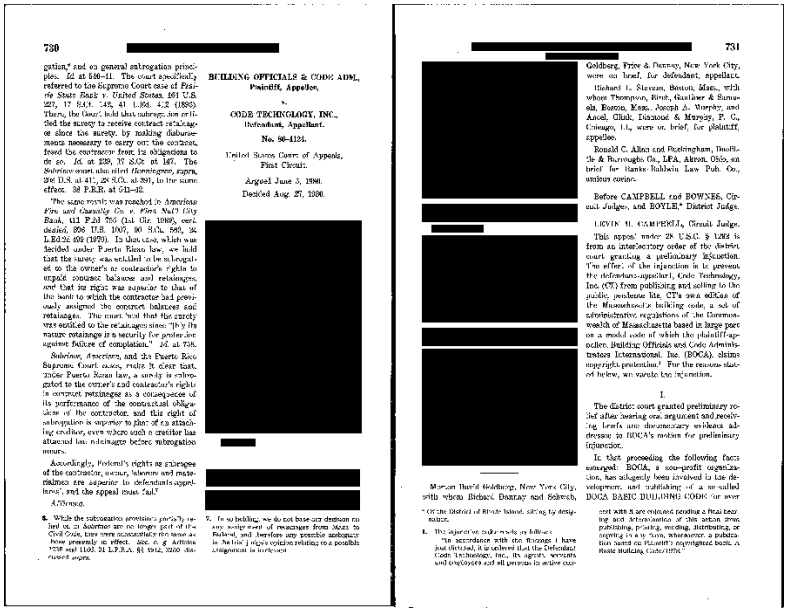
These inconsistent and fact-intensive standards produce uncertainty about the copyright status of official reports of court decisions and, in particular, material embedded within the official statement of those decisions.

B. CAP Dealt with This Uncertainty by Taking Significant and Expensive Steps to Redact Materials Embedded Within Official Decisions.

Official statements of American law appear in countless venues. To cover precedential caselaw alone, CAP currently includes 647 legal reporter series across 62 American jurisdictions. As illustrated above, there are significant differences in the law of various circuits. The variety of standards and lack of certainty in the law regarding the copyrightability of material included in cases forced CAP to make value judgments concerning how much information could be shared to effectuate the goal of providing free, universal, public access to official law online.

Because of the limited labor and financial resources available, CAP was unable to investigate the drafting process of each reporter or to study the economic incentives behind official reports produced for various jurisdictions at various times. Ultimately, for every volume of official caselaw that might still be within a copyright term — some 30 million pages — CAP redacted all front and back matter for the volume, all headnotes or other annotations injected into each decision, all headnote references or "key" numbers within each decision, and various other on-page elements.

The results look like this, with the full scan of the case available in Appendix A:



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gation," and on general subrogation principles. Id. at 546–11. The court specifically referred to the Supreme Court case of *Prairie State Bank v. United States*, 164 U.S. 227, 17 S.Ct. 142, 41 L.Ed. 412 (1896). There, the Court held that subrogation entitled the surety to receive contract retainage or since the surety, by making disbursements necessary to carry out the contract, freed the contractor from its obligations to do so. Id. at 238, 17 S.Ct. at 147. The Supreme court also cited *Henningsen, supra*, 294 U.S. at 417, 55 S.Ct. at 891, to the same effect. 32 P.R.R. at 643–32.

The same result was reached in *American Fire and Casualty Co. v. First Nat'l City Bank*, 411 F.2d 755 (1st Cir. 1969), cert. denied, 396 U.S. 1007, 90 S.Ct. 560, 24 L.Ed.2d 498 (1970). In this case, which was decided under Puerto Rican law, we held that the surety was entitled to be subrogated to the owner's or contractor's rights to unpaid contract balances and retainages, and that its rights was superior to that of the bank to which the contractor had previously assigned the contract balances and retainages. The court held that the surety was entitled to the retainages since "[b]y its nature retainage is a security for protection against failure of completion." Id. at 758.

Sobrino, Americana, and the Puerto Rico Supreme Court cases, make it clear that, under Puerto Rican law, a surety is subrogated to the owner's and contractor's rights in contract retainage as a consequence of its performance of the contractual obligations of the contractor, and this right of subrogation is superior to that of an attaching creditor, even where such a creditor has attached the retainages before subrogation occurs.

Accordingly, Protendi's rights as assignee of the contractor, owner, laborers and materialmen are superior to defendants-appellees', and the appeal must fail.[6]

Affirmed.

6. While the subrogation principles partially relied on in *Sobrino* are no longer part of the Civil Code, they were reconstituted in some form presently in effect. See, e. g. Articles 1158 and 1168, 31 L.P.R.A. §§ 3052, 3100 discussed supra.

7. In so holding, we do not base our decision on any assignment of retainers from them to Federal, and therefore any possible ambiguity in Article 1 might not be relevant to a possible assignment to Protendi.

BUILDING OFFICIALS & CODE ADM., Plaintiff, Appellee,

v.

CODE TECHNOLOGY, INC., Defendant, Appellant.

No. 80-1124.

United States Court of Appeals, First Circuit.

Argued June 3, 1980.

Decided Aug. 27, 1980.

[redacted]

[redacted]

[redacted]

731

[redacted]

Goldberg, Price & Dunray, New York City, were on brief, for defendant, appellant.

Richard L. Stevens, Boston, Mass., with whom Thompson, Rivet, Gualtieri & Simonin, Boston, Mass., Joseph A. Murphy, and Ansel, Glick, Diamond & Murphy, P. C., Chicago, Ill., were on brief, for plaintiff, appellee.

Ronald C. Allen and Buckingham, Doolittle & Burroughs Co., LPA, Akron, Ohio, on brief for Banks Baldwin Law Pub. Co., amicus curiae.

Before CAMPBELL and BOWNES, Circuit Judges, and BOYLE,* District Judge.

LEVIN H. CAMPBELL, Circuit Judge.

This appeal under 28 U.S.C. § 1292 is from an interlocutory order of the district court granting a preliminary injunction. The effect of the injunction is to prevent the defendant-appellant, Code Technology, Inc. (CT) from publishing and selling to the public, pendente lite, CT's own edition of the Massachusetts building code, a set of administrative regulations of the Commonwealth of Massachusetts based in large part on a model code of which the plaintiff-appellee, Building Officials and Code Administrators International, Inc. (BOCA), claims copyright protection.[1] For the reasons stated below, we vacate the injunction.

I.

The district court granted preliminary relief after hearing oral argument and receiving briefs and documentary evidence addressed to BOCA's motion for preliminary injunction.

In that proceeding the following facts emerged: BOCA, a non-profit organization, has allegedly been involved in the development and publishing of a so-called BOCA BASIC BUILDING CODE (or more

Marian Thayer Goldberg, New York City, with whom Richard Dunray and Schwab,

* Of the District of Rhode Island, sitting by designation.

1. The injunction order reads in full as follows:

"In accordance with the findings I have just dictated, it is ordered that the Defendant Code Technology, Inc., its agents, servants and employees and all persons in active con-

cert with it are enjoined pending a final hearing and determination of this action from publishing, printing, vending, distributing, or copying in any form, whatsoever, a publication based on Plaintiff's copyrighted book, A Basic Building Code/1978."

Figure 1, Redacted Image Corresponding to *Building Officials & Code Administration v. Code Technology, Inc.*, 628 F.2d 730 (1st Cir. 1980).

Because of the legal and technical complexity of redacting text embedded within millions of court decisions, CAP had no choice but to apply this redaction approach universally, even for materials from jurisdictions where the courts produce their own annotations. Thus, for states like Delaware, Georgia, Illinois, Maryland, Massachusetts, New York and others, CAP had to substantially over-redact the official reports. *See* LexisNexis, *States with Court Provided Headnotes, Official Headnotes, and Syllabi* (2019).[2]

[2] *Archived at* https://perma.cc/4A3E-EFGE.

To execute this redaction approach for a project of this scale, CAP relied on a vendor to redact these materials from every page, using algorithmic as well as human review to ensure accuracy. The targeted materials were removed from all text versions of the decisions that would be accessible publicly. Black redaction boxes were used to conceal the targeted materials on all images.

CAP's final redaction process required high accuracy and was achieved only after several years of research and design. CAP was obliged to evaluate multiple vendors and various methods because not all potential vendors could deliver on the redaction requirements. Those vendors who could deliver offered bids that were significantly more expensive due to the cost of ensuring accurate redaction. Even after the vendor was selected and the multi-year process of digitizing and redacting commenced, members of the CAP team still worked tirelessly to monitor progress and accuracy.

Redaction-related expenses impacted CAP's budget in other areas, necessitating compromises on its final quality. CAP eventually agreed to a funding arrangement with Ravel, Inc. (acquired by LexisNexis in 2017). Under this arrangement, bulk downloads are available only to academic scholars who agree not to republish the data, while ordinary people can view or download only a limited number per day—a poor result when one considers that CAP's materials belong to the People.

In addition, the budget constraints imposed by redaction mean that CAP cannot sustain its digitization work perpetually; CAP's access efforts halted with decisions reported as of mid-2018. As a

result, the current official caselaw of our courts cannot be made publicly available online on an ongoing basis. Furthermore, over time some works will ascend unequivocally into the public domain, and CAP will have to try to undertake the cost, effort and technical complexity of un-redaction, or else official reports that no longer have any copyright restriction will remain inaccessible.

In sum, CAP had to undertake an arduous and expensive redaction process of material merged with court decisions within the official reports because of the material's uncertain copyright status. This process didn't only make the task of copying and sharing official law more difficult; because of its financial impact, it has constrained public access to the law. Other projects that seek to copy and share the law in order to increase public knowledge will face similar obstacles, but those projects may not be able to afford an effective redaction process. Instead, they will simply not exist.

II. This Court Should Draw a Clear Line—Annotations Embedded Within Official State Codes Are Uncopyrightable.

A. Case-by-Case, Fact-Specific Tests Lead to Unpredictable Outcomes, and Thus Overbroad Redaction.

Fact-specific balancing tests may be necessary for those areas of law where bright-line rules are impossible to draw. The doctrine of fair use, for example, relies on a test that balances the rights of copyright holders against otherwise-infringing uses. In the words of Congress, the fair use test is not

"definitive or determinative" because "the doctrine is an equitable rule of reason, [where] no generally applicable definition is possible." *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1399 (9th Cir. 1997).

But fact-specific tests invite subjectivity and make it more difficult for citizens to determine their legal rights. *See*, *e.g.*, *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 475 (1984) (Blackmun, J., dissenting) (quoting *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939)) (declaring that "fair use has been called, with some justification, "the most troublesome [doctrine] in the whole law of copyright"); *see also County of Sacramento v. Lewis*, 523 U.S. 833, 861 (1998) (Scalia, J., concurring) (denouncing the "shocks the conscience" balancing test as "the Celophane of subjectivity.")

In the case of "merged" published official legal texts, public access, and therefore public interest, is best served by a bright-line rule. Without it, organizations that provide access to "merged" official materials have two options. First, they can try to divine a future judge's determination of the copyrightability of each of the material's constituent elements, and then publish those elements that they have decided are not copyrightable. Such a system is prohibitive, requiring fact-intensive research into the administrative processes of countless jurisdictions, venues, and publishing arrangements.

Second, these organizations can deal with "merged" official texts by applying a one-size-fits-all solution; in CAP's case, that meant placing a black box over almost any element that might be copyrighted.

While this route provides the People with access to only a fraction of their own published case law, it isn't a surprise that CAP chose it; it was practically impossible to research the idiosyncratic administrative and publishing arrangements of all the legal jurisdictions whose case law it published. The harm to the public created by the necessity of CAP's approach illustrates why a balancing approach to the Georgia Code is inappropriate here. Rather than forcing non-profit organizations such as Public Resource to internalize the volatility of a balancing test, the Court should adopt a bright-line rule, such as the one proposed in the brief of amici curiae law librarians. *See* Brief for Law Librarians as Amici Curiae Supporting Respondent, Georgia, et al. v. Public.Resource.Org.

B. A Clear Rule that Copyright Does Not Extend to Annotations Embedded Within Official State Codes Will Serve the Public Interest by Encouraging People to Copy, Share and Understand the Law.

Free, easy, and unlimited access to the law, including both statutes and cases, is vital not only for law students, legal educators, or solo practitioners, but also for the general public. In fact, this proposition is so self-evident that Chief Justice Morton of the Massachusetts Supreme Judicial Court summarized it without argument in 1886:

> [Laws] are binding upon all the citizens…. Every citizen is presumed to know the law…[.] [I]t needs no argument to show that justice requires that all should have free access to [legal] opinions, and that it is

> against sound public policy to prevent this, or to suppress and keep from the *earliest knowledge of the public the statutes, or the decisions and opinions of the justices*....

Nash v. Lathrop, 6 N.E. 559, 560 (Mass. 1886) (emphasis added).

When access to the law is hindered, its legitimacy is weakened. It is vital that projects like the Caselaw Access Project continue to provide individuals with free digital access to comprehensive legal databases as an alternative to pricey and bulky prints or packages sold by Government-chosen publishers.

This brings the brief back to an age-old point: uncertainty begets conservativism. When the scope of a law is unclear, then actors must follow a restrictively conservative construction of it. Organizations like CAP, with significant legal and institutional support, may be able to act. But even the Caselaw Access Project, sponsored by the largest private law library in the world, is substantially limited in its ability to share the law by the costs associated with compliance.

The limitations of an uncertain copyright standard are ongoing. To comply with uncertain law, CAP had to restrict access to portions of published official decisions through redaction. In order to pay for those redactions, it must needlessly limit public access to the law. And due to its budgetary restrictions, CAP will not be able to share cases from 2018 onward. Other innovators who operate on shoestring budgets and whose projects stand to benefit the public good may not be able to afford to comply with an uncertain copyright standard. These actors, when weighing the benefits and risks of their endeavors, might decide

that the cost of compliance is simply too great to proceed.

The impact of freely sharing the official precedents of the United States — the law that binds all of us — is profound. In addition to freely offering nearly all American caselaw, CAP inspires a range of innovative uses of its data. CAP provides a single website with short links to publicly cite any case in American history, at https://cite.case.law/. A "trends viewer" allows members of the public to visually explore the topics discussed by caselaw through the centuries, at https://case.law/trends/. Research scholars can perform bulk downloads and create new forms of legal, historical, policy, and computational studies. *E.g.*, JAROMIR SAVELKA ET AL., *Improving Sentence Retrieval from Case Law for Statutory Interpretation in* ICAIL '19 PROCEEDINGS OF THE SEVENTEENTH INTERNATIONAL CONFERENCE ON ARTIFICIAL INTELLIGENCE AND LAW 113, (ACM New York, 2019); Michael Nelson & Steven Morgan, *Do Elected and Appointed Judges Write Opinions Differently?*, (Sept. 17, 2019). [3] And CAP data is being incorporated into other emerging legal research tools, such as Brigham Young University's Corpus of Founding Era American English.[4] These applications expand the impact of caselaw inside and outside the legal profession. Indeed, they "promote the Progress of Science and useful Arts." U.S. Const. art. I, § 8, cl. 8.

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[3] *Archived at* https://perma.cc/ZWG5-F9BD.

[4] *Archived at* https://perma.cc/6MVK-VQYR.

CONCLUSION

The Eleventh Circuit was correct in guaranteeing public access to the official expression of Georgia's law—but this freedom must extend to all annotations that have been merged with official codes. The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A:
Sample Redacted Scan