

No. 18-1150

In the Supreme Court of the United States

STATE OF GEORGIA, ET AL., PETITIONERS,

v.

PUBLIC.RESOURCE.ORG, INC.

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

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF

Unsatisfied with the Eleventh Circuit’s novel, three-factor test for identifying uncopyrightable works under the government edicts doctrine, PRO proposes an even broader standard that it has never before raised in this litigation and no court has ever adopted. PRO now contends that “a legal work adopted by or published under the authority of the State” is uncopyrightable. PRO Br. 45. That amorphous rule is not supported by the Copyright Act’s text, this Court’s precedents, or any coherent theoretical or policy rationale. It would also upend the well-established systems of numerous states that, like Georgia, rely on copyright incentives to induce private publishers to prepare and publish annotated official codes. And given PRO’s conspicuous failure to define key terms in its broadly worded test, it could jeopardize copyrights in myriad other law-related works, from government-subsidized works containing some legal discussion to government-approved civics textbooks and legal treatises whose statements of the law are adopted by courts. Cf. *Schnapper v. Foley*, 667 F.2d 102, 106, 108-112 (D.C. Cir. 1981) (government-commissioned films about judicial decisions copyrightable).

By contrast, Georgia’s position follows straightforwardly from the Act’s text, which does not exempt state-authored works from the general rule that “annotations” are copyrightable, 17 U.S.C. §§ 101, 103, and precedent, which recognizes the copyrightability of annotations in official reporters, while avoiding the disruptive consequences of PRO’s position. This Court should reverse.

I. THE COURT SHOULD REJECT PRO'S UN- PRECEDENTED COPYRIGHTABILITY STANDARD

A. PRO's Test Conflicts With Statutory Text And History

1. As the sole textual basis for its newly minted standard, PRO invokes the term “author.” PRO Br. 19-22, 37. PRO, however, never suggests that the ordinary meaning of “author,” either today or at the Nation’s founding, excludes “legal work[s] adopted by or published under the authority of the State.” See *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57-58 (1884) (citing dictionary in defining “author”); see also *Bilski v. Kappos*, 561 U.S. 593, 603 (2010); cf. *Respublica v. Oswald*, 1 Dall. 319, 331 n.* (Pa. 1788) (“authors of the constitution”).

PRO instead relies heavily on the originality requirement this Court has found to be embedded in the concept of authorship. PRO Br. 20-22; see also *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346-347, 351 (1991). Based on *Feist*'s partial quotation of a law-review article focused on issues not presented here, PRO contends that the “originality requirement means * * * that an ‘author’ can only claim [copyright in] acts of ‘original—*personal*—authorship.” PRO Br. 21 (emphasis added by PRO) (quoting *Feist*, 499 U.S. at 352). PRO suggests that through this single use of “personal,” *Feist* establishes that a work must reflect the creator’s “personal creativity” or “personality” to qualify as an original work of authorship. *Id.* at 20-22. And PRO contends *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834), and its progeny reflect that supposed “personality” requirement. According to PRO,

this Court's government-edicts precedents indicate that reporters' annotations may be copyrightable if they are sufficiently "personal" to the reporter, PRO Br. 25-26, but other official legal works lack the requisite "personality" for copyright protection, *id.* at 21-22.

PRO's arguments are thus founded on the premise that because "authorship" entails originality, a work must reflect the creator's individual "personality" to be copyrightable. PRO Br. 21-22. That, however, is not how this Court has defined originality under the Copyright Act. As *Feist* explains, "[o]riginal * * * means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity." 499 U.S. at 345. The OCGA's annotations amply satisfy that definition. For example, it is undisputed that Lexis independently creates its judicial-decision summaries, and as the district court found, those annotations require "creativity" because "there are a multitude of ways to * * * summariz[e] a judicial decision." Pet. App. 65a, 69a. Neither *Feist* nor this Court's government-edicts precedents adopt a nebulous "personality" requirement that would preclude copyrighting a wide array of works that otherwise satisfy the originality requirements of independent creation and minimal creativity.

2. PRO's discussion of the Copyright Act's history (Br. 37-40) does not help PRO. It cites (*id.* at 38) a 1906 proposal to exclude from copyright protection "any publication of * * * any State government." *Copyright Hearings, December 7 to 11, 1906: Arguments Before the Comms. on Patents of the S. and H., Conjointly, on the Bills S. 6330 and H.R. 19853*, 59th Cong. 135 (1906). PRO, however, admits

Congress rejected that proposal in enacting the 1909 Copyright Act. Far from “reflect[ing] a *skepticism* in Congress toward copyrights in state publications of any kind,” PRO Br. 38, that rejection indicates that Congress intended for state-government works to be generally copyrightable. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-443 (1987).

PRO discusses (Br. 38-40) the Copyright Office’s 1961 report, but ignores the preceding 1959 study on which that report relied. See Copyright Law Revision: Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, 87th Cong., 1st Sess., X-XI, 129 n.1 (H.R. Judiciary Comm. Print 1961) (Copyright Law Revision Report). PRO does not dispute that the 1959 study, which was written by a Copyright Office staff attorney and published as a Senate committee print, recommended *against* “withdraw[ing] from the States the privilege” of copyrighting certain “material[s] prepared for State Governments by their employees,” including “annotations.” Pet. Br. 28 (quoting 1959 study).

The 1961 report also “strongly favors” Georgia. Cf. PRO Br. 38. The sentence PRO block quotes (*id.* at 38-39) explains that under the judicially created government edicts doctrine, “State laws, municipal ordinances, court decisions, and *similar* official documents” are uncopyrightable, but “State * * * publications * * * containing historical, technical, educational, or other informational material[] may be copyrighted.” Copyright Law Revision Report 129-130 (emphasis added). One would expect non-binding annotations to fall within the category of copyrightable “informational material[s]” rather than the category of official

documents “similar” to binding “laws, municipal ordinances, [and] court decisions.”

But one need not speculate. The sentence PRO highlights refers back to an earlier, fuller discussion of government-edicts case law. That discussion acknowledges what PRO spends most of its brief denying: Nineteenth-century case law “sustained a State government’s copyright in additions” to official legal documents “prepared by its employees,” including “annotations,” and distinguished those copyrightable materials from uncopyrightable “governmental edicts.” Copyright Law Revision Report 129. The 1961 report did not recommend disturbing that settled case law, which the report explained allowed states to “contract[] with private publishers * * * to print and publish [state-government works] at their own expense as a commercial venture”—precisely what Georgia did here. *Id.* at 130.

3. Lacking any basis for its position in the Copyright Act’s plain text or history, PRO argues that by choosing not to disturb *Wheaton* and its progeny, Congress has “le[ft] the issue” of whether to expand the government edicts doctrine “to the courts.” PRO Br. 36 (quoting *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 238 (1987)). But the very decision PRO cites to support its argument demonstrates this Court’s hesitancy to expand on precedents lacking a clear foothold in statutory text. *McMahon* refused to extend an earlier case’s anti-arbitration holding because doing so would have conflicted with “explicit [statutory] provisions.” 482 U.S. at 238 (citation omitted). Similarly, this Court has refused to expand on nineteenth-century judge-made exceptions to patent eligibility by “impos[ing] other limitations that are inconsistent

with the [Patent Act's] text and the statute's purpose and design." *Bilski*, 561 U.S. at 603. Likewise, the Court should reject PRO's effort to dramatically expand the government edicts doctrine beyond the holdings of this Court's nineteenth-century precedents.

B. Precedent Favors Georgia

Ultimately, PRO's arguments rely on a novel interpretation of this Court's precedents, not the Copyright Act's plain text. PRO interprets *Wheaton*, *Banks v. Manchester*, 128 U.S. 244 (1888), and *Callaghan v. Myers*, 128 U.S. 617 (1888), as reading PRO's preferred copyrightability standard into the statutory term "author." As an initial matter, the Court's nineteenth-century assertion that, for "public policy" reasons, judges cannot "be regarded as the[] author[s]" of their opinions for purposes of the Copyright Act differs dramatically from how the Court today approaches issues of statutory interpretation. *Banks*, 128 U.S. at 253. Regardless, PRO's proposed standard lacks any basis in *Wheaton*, *Banks*, and *Callaghan*.

1. PRO tries to distinguish *Wheaton* and *Callaghan*, as well as *Howell v. Miller*, 91 F. 129 (6th Cir. 1898), by arguing that the copyrightable annotations in those cases "represented only the authorship of the private reporter." PRO Br. 22. By contrast, PRO contends, the OCGA's annotations are uncopyrightable because they "embod[y] the authority of the State." *Id.* at 35. Contrary to PRO's arguments, however, the OCGA's annotations are materially indistinguishable from the annotations considered copyrightable in *Wheaton*, *Callaghan*, and *Howell*.

Under PRO's proposed test, *Wheaton*, *Callaghan*, and *Howell* were wrongly decided (or at least wrongly

reasoned) because they accepted the copyrightability of portions of reporter volumes that were “adopted by or published under the authority of” the federal or a state government. PRO Br. 35. Freeman (the *Callaghan* reporter) and Wheaton were appointed by the courts whose opinions they reported and received government compensation. See, e.g., Act of Mar. 3, 1817, ch. 63, 3 Stat. 376; *Callaghan*, 128 U.S. at 646, 650. The Michigan legislature adopted Judge Andrew Howell’s annotated compilation of statutes, providing: “[T]he general laws of the State of Michigan, collected and arranged in two volumes, * * * compiled *and annotated* by Andrew Howell, shall be received and admitted * * * as evidence of the existing laws thereof, *with the like effect as if published under and by the authority of the State.*” 1883 Mich. Pub. Acts 8 (emphasis added). PRO does not dispute that Howell’s work was the only officially recognized Michigan code printed in the 1880s. U.S. Br. 29.

The unique authority of the reporter volumes in *Wheaton*, *Callaghan*, and *Howell* was well known and widely acknowledged. The copy of the second volume of Howell’s annotated code book for which PRO provides only the title page (Br. Add. 6) also contains an “AUTHENTICATION” reprinting the legislation adopting Howell’s compilation. See Reply Br. App. 4a; cf. PRO Br. Add. 3 (certification that “the *statutory portion* of the [OCGA] * * * is a true and correct copy” (emphasis added)). Wheaton noted that his reports were “received as authentic evidence of the [Court’s] proceedings,” including his copyrightable summaries of counsel’s arguments. *Ramsay v. Allegre*, 25 U.S. (12 Wheat.) 611, 643 (1827) (note responding to alleged inaccuracy in reporting counsel’s argument in prior

case); cf. PRO Br. 23-25 (citing Peters’s copyrightable annotations). Indeed, before *Wheaton*, this Court had recognized that only its official reporter, not its clerk, could provide authenticated copies of the Court’s opinions. *Anonymous*, 28 U.S. (3 Pet.) 397 (1830). In *Callaghan*, the trial court recognized Freeman “was an officer of the state, and prepared [his reporter] volumes under the authority of law.” *Myers v. Callaghan*, 5 F. 726, 728 (C.C.N.D. Ill. 1881). Accordingly, in direct contradiction of PRO’s proposed copyrightability standard, *Callaghan* held that a reporter’s work is copyrightable “[e]ven though [he] may be a sworn public officer, *appointed by the authority of the government* * * * [and] paid a fixed salary.” 128 U.S. at 647 (emphasis added).

PRO nonetheless claims Georgia “ignor[es] the[] historical context” of *Wheaton* and its progeny “in three critical respects.” PRO Br. 24. None of PRO’s arguments warrants treating the OCGA’s annotations differently than the copyrightable annotations in *Wheaton*, *Callaghan*, and *Howell*.

First, PRO notes (Br. 24-25) that *Wheaton*’s counsel distinguished between the Court’s official reporter and a clerk “employed by congress to revise and publish the statutes,” acknowledging that the clerk could not claim copyright in statutes. 33 U.S. at 616 (argument). To the extent counsel’s concession regarding an issue not before the Court has any relevance here, the cited concession does not help PRO because Georgia does not claim copyright in the OCGA’s statutory text.¹

¹ PRO also mentions (Br. 25) that Peters’s counsel compared *Wheaton* to “the clerk of the house of representatives, keeping the journals.” *Wheaton*, 33 U.S. at 648-649 (argument). That analogy

Second, PRO argues that Wheaton’s annotations “convey[ed] [only] *his* personal authorship,” not “the authority of * * * this Court.” PRO Br. 25-26. The OCGA, however, similarly makes clear that its annotations have no legal force. OCGA § 1-1-1 distinguishes the OCGA’s “annotations” from its “statutory portion” and provides that only the latter has “the effect of statutes enacted by the General Assembly of Georgia.” OCGA § 1-1-7 similarly provides that the OCGA’s non-statutory components “are given for the purpose of convenient reference and do not constitute part of the law.” And the editor’s notes to OCGA § 1-1-1 cite Georgia’s annual reviser acts, which provide that annotations “are not enacted as statutes.” *E.g.*, S.B. 52, § 54(b) (2019). To “clearly distinguish” (PRO Br. 31-32) the annotations in which Georgia claims copyright from binding statutes, the OCGA’s statutory text is printed differently than the annotations, the bodies of which are printed in smaller type and in two columns. See J.A. 276-277. The OCGA’s “User’s Guide” also explains that *Lexis*—not Georgia’s legislature—“has prepared and included in the [OCGA] a complete set of case annotations.” J.A. 489. Therefore, to put matters in PRO’s terms, the OCGA’s annotations in no way “convey” the General Assembly’s law-making authority.

Finally, PRO’s contention that “nineteenth-century judicial reporters like Wheaton were entirely unsupervised” is wrong. PRO Br. 26. Wheaton not only relied

appears in the context of an argument that Wheaton merely “record[ed] * * * the [Court’s] proceedings and decisions” without adding anything “original.” *Ibid.* The Court rejected that argument by implicitly recognizing that Wheaton’s annotations were copyrightable. Pet. Br. 33.

on the Justices to provide him their written opinions or notes regarding their oral opinions; Justice Story, Wheaton's roommate, collaborated with Wheaton on annotations and appendices for his reports. See Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 Mich. L. Rev. 1291, 1321-1322, 1332-1337 (1985). Congress also specified how quickly the reporter must publish decisions to qualify for his salary, see 3 Stat. 376, and in the last year of Wheaton's tenure set a price cap for reporter volumes, Act of Feb. 22, 1827, ch. 18, 4 Stat. 205. Acknowledging the supervisory authority of Congress and the Court, Wheaton's counsel emphasized that the official reporter "would lose his salary" or "his place" if he took such actions as withholding publication of reports or charging "an unreasonable price." *Wheaton*, 33 U.S. at 615-616 (argument). Similarly, in *Callaghan*, the Illinois Supreme Court could remove its official reporter for "misconduct in office, neglect of duty, incompetency, or other cause shown." *Callaghan*, 128 U.S. at 646 (quoting Rev. Stat. Ill., ch. 29, § 21 (1845)).

In sum, the key "historical" attributes PRO claims made nineteenth-century reporters' annotations copyrightable (Br. 35) apply equally to the OCGA's annotations. "[T]he role and limited authority of [the OCGA's annotators is] well known" and articulated in the OCGA's statutory text. *Ibid.* It is "easy for readers to distinguish" non-binding annotations from binding statutes. *Ibid.* And to the extent that this consideration might have any relevance to copyrightability, readers can easily compare the "style" and "trustworthiness" of the OCGA's annotations both over time and versus West's unofficial annotated Georgia code. *Ibid.*

2. PRO rests its arguments primarily on *Banks*. See PRO Br. 27-31. But PRO’s application of its proposed standard to withhold copyright from works like the OCGA’s annotations that lack the force of law conflicts with *Banks*’s rationale for denying copyright to judicial opinions and related judge-written works: “The whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all.” 128 U.S. at 253. The OCGA’s annotations never bind anyone, nor are they “the authentic exposition and interpretation of the law.” *Ibid.* Primary legal authorities like judicial decisions—not annotations *describing* those authorities—control.

Although PRO claims Georgia “misdescrib[es]” *Banks*, PRO Br. 28, PRO acknowledges that *Banks* reflects an understanding that “the whole work done by the judges constitutes . . . the law,” *id.* at 30 (quoting *Banks*, 128 U.S. at 253). Georgia’s position that the government edicts doctrine applies only to works (such as judicial opinions) that can serve as vehicles for establishing “binding” law thus conforms with *Banks*, and accepts that decision on its own terms. 128 U.S. at 253.

By contrast, PRO’s position relies on discounting as “poetical” (Br. 30) the one sentence in *Banks* that comes closest to providing a meaningful rationale for its decision. That tacit acknowledgment of the opacity of *Banks*’s reasoning strongly militates in favor of reading *Banks* as holding only that judicial opinions and other, similar works (such as statutes) that can serve as vehicles for establishing binding law are uncopyrightable.

PRO's acknowledgment that *Banks* "explain[ed] that the whole work done by the judges constitutes . . . the law," PRO Br. 30 (citation omitted), also cuts the legs out from any argument based on the contention that *Banks* held uncopyrightable portions of Ohio Supreme Court reports, such as their judge-written "statements of the case," that independently lack legal force. See *id.* at 27-28. *Banks* simply did not grapple with the issue that portions of the works before it might not set forth the law, and instead grounded its decision on the understanding that the "whole work" it was considering "constitutes the authentic exposition and interpretation of the law, * * * binding every citizen." 128 U.S. at 253.

Regardless, the copied components of the two case reports at issue in *Banks* consisted only of "the head note or syllabus, the statement of the case, the names of the counsel for the respective parties and the decision or opinion of the court." 128 U.S. at 251. Recitations of counsels' names were uncopyrightable because "facts are not copyrightable," a principle not at issue here. *Feist*, 499 U.S. at 344. Although PRO suggests a distinction between the terms "syllabus" and "head note," *Banks* used them interchangeably. As printed in both the *Ohio State Reports* and the allegedly infringing *American Law Journal* issues, the two cases at issue in *Banks* do not have separate syllabi and head notes. See *Railway Co. v. McCoy*, 42 Ohio St. 251 (1884); *Bierce v. Bierce*, 41 Ohio St. 241 (1884); see also 1 Am. L.J. (Columbus) 383-387, 397-398 (1884). *Banks* thus used "syllabus" and "head note" synonymously to refer to the passages preceding an opinion that were approved by all judges concurring in the judgment and provided an authoritative

recitation of the decision’s legal holdings. See Pet. Br. 36 n.10. Finally, the statements of the case provided facts and procedural history that would assist with understanding the context for (and thus potentially the scope of) those holdings. See *ibid.* For example, it would be difficult to understand the *Bierce* opinion at issue in *Banks* without the statement of the case’s reproduction of the will interpreted there. Because the judges’ opinions, syllabi, and statements of the case were interconnected and all played significant roles in the judges’ articulation and explanation of the court’s legal holdings, it is hardly surprising that *Banks* effectively treated them as a single, unified work in assessing copyrightability.

PRO tries to get around the crucial sentence articulating *Banks*’s rationale by arguing that “it meant a judge’s words could be accepted as official evidence in an effort to ascertain the law’s meaning because they were published by state authority.” PRO Br. 30. That understanding of *Banks*, however, compels a decision *for Georgia* because the OCGA’s annotations are *not* “official evidence” of “the law’s meaning.” As the Georgia Supreme Court has made clear, the annotations have no “official weight.” *Harrison Co. v. Code Revision Comm’n*, 260 S.E.2d 30, 35 (Ga. 1979) (“[T]he inclusion of annotations in an ‘official’ Code will not, of course, give the annotations any official weight.”).² Even PRO has admitted that the OCGA’s annotations should not be “accepted” at “face value” as “evidence of the law,” PRO Br. 31, conceding that “[o]nly the laziest

² The Court should reject PRO’s request (Br. 49) that it override this never-repudiated articulation of state law by Georgia’s high court, especially considering its consistency with Georgia statutes (Pet. Br. 40-41).

student or lawyer would rely on a judicial summary [in the OCGA] without reading the actual judicial decision.” Def.’s Mem. Supp. Mot. for Summ. J. 23-24 (May 17, 2016), ECF No. 29-2.

C. PRO Offers No Coherent Theoretical Or Policy Rationale

While PRO attempts to downplay the significance of *Banks’s* stated rationale for the government edicts doctrine, it does not articulate an alternative rationale that would justify its broad understanding of that doctrine. PRO’s certiorari-stage brief suggested that the doctrine is grounded in the “Due Process Clause and the Rule of Law.” Br. in Opp. 31-34. Accordingly, Georgia’s opening brief explained why due process concerns do not support stripping the OCGA’s annotations of copyright protection. Pet. Br. 50-53. Evidently conceding the point, PRO’s merits brief omits any reference to due process or the “Rule of Law.” Yet PRO offers no meaningful alternative theoretical or policy rationale for its new proposed legal standard.

In sum, PRO’s broadly worded standard does not appear to emanate from statutory text, judicial precedent, or even any coherent policy rationale, but instead seems tailored to best facilitate PRO’s fundraising-backed enterprise of publishing law-related works online.³ See J.A. 96, 137. The Court should reject it.

³ Indeed, PRO’s inclusion in its proposed test of an “adopted by” prong—which PRO does not claim is implicated here—appears aimed at resolving *other* litigation. See PRO Br. 13-14, 16 (referencing litigation with standard-setting organizations).

II. PRO'S HALF-HEARTED APPLICATION OF THE ELEVENTH CIRCUIT'S THREE-FACTOR STANDARD DOES NOT ESTABLISH THE ANNOTATIONS' UNCOPYRIGHTABILITY

Without expressly endorsing the three-factor standard central to the decision below, PRO perfunctorily analyzes those factors near the end of its brief. PRO Br. 45-54. PRO's half-hearted application of the Eleventh Circuit's atextual standard is unpersuasive.

1. With respect to "authoritativeness," PRO Br. 45; cf. Pet. App. 38a-46a, PRO's suggestion that the OCGA "convey[s] that the whole document is an authentic embodiment of state law," PRO Br. 45-46, conflicts with the OCGA's plain statutory text, which provides that the OCGA's non-statutory portions "do not constitute part of the law." OCGA § 1-1-7. Lacking statutory support for its argument, PRO switches to Georgia case law. But the cited cases do not undermine Georgia's copyright claims.

PRO attempts to rehabilitate the Eleventh Circuit's reliance on cases citing State Bar committee comments in which Georgia does *not* claim copyright by implausibly contending that "Georgia courts attribute[d] meaning" to those materials only "because they appear in the OCGA." PRO Br. 46-48; see also Pet. App. 43a-44a; Pet. Br. 41 n.12. It is far more likely courts cited those comments because they were authored by experts in the relevant areas of law, many of whom were involved with drafting the statutory provisions. *E.g.*, OCGA, vol. 12, at 14-15 (2017 ed.) (comments by State Bar corporation code revision committee).

For the first time in this litigation, PRO also cites several other Georgia cases it claims “attributed conclusive force” (Br. 46) to annotations in which Georgia claims copyright. See *id.* at 48. But those decisions at most treated certain annotations as helpful secondary sources, much as courts might cite copyrighted treatises, restatements of the law, or law-review articles. *E.g.*, *Shaw Indus., Inc. v. Shaw*, 586 S.E.2d 80, 82 n.2 (Ga. Ct. App. 2003) (citing OCGA editor’s notes and law-review article).

Just as this Court occasionally cites secondary sources collecting relevant cases, *e.g.*, *Federated Dep’t Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n.2 (1981), Georgia courts sometimes generically reference OCGA annotations as illustrative of such indisputable points as “[w]hether an employee was acting in the scope or course of employment is often determined only after extensive discovery and litigation.” *Rowland v. Dep’t of Admin. Servs.*, 466 S.E.2d 923, 926-927 (Ga. Ct. App. 1996); see also *DeCastro v. State*, 470 S.E.2d 748, 752 (Ga. Ct. App. 1996) (citing statute and “annotations thereto” in observing that prosecution generally cannot “introduc[e] [defendant’s] character into evidence without his having ‘opened the door’”). PRO’s cited cases referencing editor’s notes (Br. 48 n.7) do so for the notes’ summaries of information contained in session laws or other primary legal materials. Cf. J.A. 629 (session laws publicly available online). See generally J.A. 387-398, 490 (discussing editor’s notes). Similarly, *Hogan v. State*, 730 S.E.2d 178, 179 (Ga. Ct. App. 2012), merely cited an annotated cross-reference as further support for a point already clear from codified statutory text and further expressed in a session law. See generally J.A. 369-371, 489 (discussing cross-

references). *Dominiak v. Camden Telephone & Telegraph Co.*, 422 S.E.2d 887, 889 (Ga. Ct. App. 1992), cited annotations not as establishing a legal proposition, but to illustrate the lack of diligence of an attorney claiming unawareness of a court rule. Far from accepting the OCGA’s annotations “at face value” as authoritative “evidence of the law” (PRO Br. 31), *Dallas Bldg. Material, Inc. v. Smith*, 388 S.E.2d 359, 360 (Ga. Ct. App. 1989), dismissed an editor’s note as “incorrect.”

Ultimately, PRO’s trawl of the South Eastern Reporter is simply a distraction. Sporadic citations of annotations do not render them uncopyrightable, any more than this Court’s citation of treatises or restatements renders *those* sources uncopyrightable. Georgia statutes and judicial precedent make clear that the OCGA portions in which Georgia claims copyright have no authoritative, “official weight.” *Harrison*, 260 S.E.2d at 35; see also OCGA §§ 1-1-1, 1-1-7; S.B. 52, § 54(b) (2019). They are thus copyrightable.

2. As for the Eleventh Circuit’s remaining factors—who creates the annotations and by what process, see PRO Br. 50-54; Pet. App. 26a-38a, 47a-51a—PRO is wrong in suggesting (Br. 52-53) that Georgia obscures who authors the OCGA’s annotations. The OCGA makes clear that the annotations are prepared “pursuant to the contract” between the Code Revision Commission (“Commission”) and the OCGA’s private publisher. OCGA § 1-1-1. Accordingly, Lexis prepares the annotations subject to the supervision of, and under a work-for-hire agreement with, the Commission. Under the Copyright Act, the Commission is considered the annotations’ author. See Pet. Br. 25.

The annotations are *not* authored by the Georgia General Assembly, and certainly not in its capacity as a lawmaking body. PRO does not dispute that the OCGA's annotations do not undergo the bicameralism and presentment required to make law. Pet. Br. 40; cf. C.A. Oral Arg. 57:15-57:35 (PRO's counsel concedes Commission is "not a lawmaker").

Nevertheless, adopting a neologism that appears *never* to have graced the pages of any federal reporter, PRO asserts the process for preparing the OCGA is "meaningfully legislative." PRO Br. 50 (bolding omitted). Whatever that phrase may mean, PRO's arguments do not establish the OCGA annotations' uncopyrightability. Although, as PRO notes, new legislation "amends the OCGA," *ibid.*, it is undisputed that enacted bills amend only the OCGA's statutory portions, not the annotations. See Pet. App. 47a.⁴ And PRO's argument based on OCGA § 1-1-1's use of the word "merge[d]" (Br. 50-51) fails for the same reasons as the Eleventh Circuit's. See Pet. Br. 23-24 & n.7, 34.

Contrary to PRO's suggestion, Br. 51-52, the Georgia Supreme Court's conclusion that the Commission's work falls within the general "sphere of legislative authority" for purposes of assessing compliance with the Georgia Constitution's "separation of powers provision," *Harrison*, 260 S.E.2d at 34, has no bearing on the distinct question whether the OCGA's non-binding annotations constitute uncopyrightable government

⁴ Although PRO's brief opaquely asserts that "[t]he [Georgia] legislature adds the allegedly copyrightable material *into* its official document and then publishes the whole under *its* authority," PRO Br. 51, PRO elsewhere grudgingly concedes that "not every line of the OCGA is a 'law' in the sense of having been individually enacted," *id.* at 50.

edicts. Indeed, PRO's (erroneous) view that the Commission and its private contractor can issue purportedly authoritative interpretations of state and federal judicial decisions and the U.S. Constitution conflicts with separation of powers and basic federalism principles. See J.A. 489 (annotations include federal-case summaries); *id.* at 295, 547 (OCGA annotates U.S. Constitution); see also, *e.g.*, *Northside Manor, Inc. v. Vann*, 133 S.E.2d 32, 34 (Ga. 1963) (legislature cannot "construe or alter judgments"). Finally, the fact that the Commission has authority to draft bills, which its legislative members can introduce in the General Assembly, does not undermine the OCGA annotations' copyrightability, given that the annotations, unlike bills, are not subject to the lawmaking process. Cf. PRO Br. 52.

All these arguments by PRO fail for the same basic reason: The OCGA's annotations are prepared "outside of the normal channels of the legislative process," "are not voted on individually" by the General Assembly, and thus lack "the force of law." Pet. App. 26a, 48a. Therefore, the government edicts doctrine does not deprive them of copyright protection.

III. PRO CANNOT REBUT GEORGIA'S STRAIGHTFORWARD APPLICATION OF STATUTORY TEXT AND PRECEDENT

Georgia's arguments for the copyrightability of the OCGA's annotations follow straightforwardly from the Copyright Act's text and this Court's precedents. With respect to text, the Act expressly provides that "annotations" are copyrightable "derivative works," 17 U.S.C. §§ 101, 103, and nothing in the Act supports stripping the OCGA's annotations of protection merely

because they are prepared by a contractor under a work-for-hire agreement with a state agency. See Pet. Br. 21-26. While PRO claims that 17 U.S.C. § 105’s copyright exclusion for *U.S. government* works “says nothing about the government edicts doctrine,” PRO Br. 38, Congress’s failure to adopt a similar exemption for state-government works indicates that Congress intended such works to be copyrightable, and thus did not intend to exclude them from the general rule that annotations are copyrightable. See Pet. Br. 22-23.

As for precedent, *Wheaton*, *Banks*, and *Callaghan* together hold that while judicial opinions are not copyrightable, annotations added to opinions by a court’s official reporter are copyright eligible— notwithstanding the “official” status of the annotations’ author, or the merging of annotations with uncopyrightable opinions in one publication. See Pet. Br. 31-39. Analogously, while statutory text is not copyrightable, statutory annotations—even those contained in an “official” code book like the OCGA—are. See *id.* at 40-43.

Holding, in accordance with this Court’s precedents, that the OCGA’s annotations are copyrightable would not necessarily compel holding that other works, such as legislative-history materials, agency guidance documents, or Attorney General opinions, are also copyrightable. Cf. PRO Br. 41. If states were ever to attempt to enforce copyright claims in such documents—and PRO provides scant reason to believe they will⁵—the copyrightability question should turn

⁵ The only even arguably analogous, real-world example PRO musters is *Georgia v. Harrison Co.*, 548 F. Supp. 110, 111-113 (N.D. Ga. 1982), vacated, 559 F. Supp. 37 (N.D. Ga. 1983). There,

on the legal force state law accords the particular document at issue. See, *e.g.*, Tex. Gov't Code Ann. § 311.023(3) (2019) (authorizing legislative history's consideration in statutory interpretation). In some cases, such fringe hypotheticals, were they ever to arise, might present close questions, and if Congress were dissatisfied with the judiciary's resolution of those cases, it could amend the Copyright Act. This case, by contrast, is an easy one because the OCGA's annotations are materially indistinguishable from the annotations *Callaghan* held copyrightable, and Georgia law makes clear that the OCGA's annotations have no "official weight," *Harrison*, 260 S.E.2d at 35.⁶

Georgia brought suit before the OCGA's effective date to try to prevent publication of an unofficial annotated code incorporating the 1981 manuscript of the OCGA's statutory text. See Pet. Br. 8 (discussing manuscript). The General Assembly had subsequently enacted "over 1,000 changes" to the statutory text reflected in that manuscript, *Harrison*, 548 F. Supp. at 113, so the state had legitimate cause for concern that a publication based on the manuscript would mislead. Georgia's (ultimately unsuccessful) copyright assertion in *Harrison* bears no resemblance to the other, purely theoretical "abuses" PRO hypothesizes. PRO Br. 41.

⁶ To the extent the government edicts doctrine may be grounded in considerations of economic incentives and notice concerns, *e.g.*, *County of Suffolk v. First Am. Real Estate Sols.*, 261 F.3d 179, 193-195 (2d Cir. 2001), government officials likely do not need copyright incentives to prepare materials like legislative-history documents, and copyrighting such documents might present notice problems depending on the legal weight courts accord them. By contrast, Lexis has made clear "it would lose all incentive to remain in [its] [c]ontract" absent copyright protection, J.A. 674, and copyrighting the OCGA's non-binding annotations deprives no one of notice of the law, see Pet. Br. 50-53.

IV. POLICY CONSIDERATIONS FAVOR GEORGIA

1. Affirming the decision below would scuttle the well-established regimes of numerous states that, like Georgia, rely on copyright protection to incentivize private publishers to create and maintain annotated official codes. See States Amicus Br. 1, 14-20. That model allows states to provide affordable annotations to the public at negligible taxpayer expense, while private publishers are compensated through exclusive publication rights. As in Georgia's case, Pet. Br. 11-12, it may also result in publication of a free, unannotated code online. Without copyright protection for the annotations they prepare, private publishers "would lose all incentive" to enter into such arrangements. J.A. 674.

Losing commercial publishers' assistance could have serious negative consequences, as Pennsylvania's experience demonstrates. Cf. PRO Br. 55. Nearly 50 years into a codification effort by government personnel, Pennsylvania still lacks a complete, official codification of its statutes, let alone accompanying annotations. See Copyright Alliance Amicus Br. 23-25. Furthermore, while PRO argues that *unofficial* annotated codes "will survive this case unchanged," PRO Br. 55, it ignores the steep, often prohibitive, prices of such works. See Matthew Bender Amicus Br. 8-9; States Amicus Br. 23.

2. Although PRO suggests doubt regarding the scope of Georgia's copyright claims, see PRO Br. 11-12, 54-55, Georgia has been clear since the district court level that it is claiming copyright in only specified OCGA components. See J.A. 496-498. Therefore, a

ruling for Georgia in this case will *not* prevent republishing “the names and captions of OCGA sections” or any similar “material[s] interlineated with statutory text” because they fall outside of Georgia’s copyright claims. *Contra* PRO Br. 12.

If PRO cared to obtain additional clarity for itself and others, cf. PRO Br. 11 (referencing “NBC’s local affiliate”), it could have sought language in the district court’s injunction order expressly recognizing its right to publish a version of the OCGA that redacts the components in which Georgia claims copyright. Instead, after the district court’s summary-judgment decision, PRO jointly moved for entry of a proposed order containing no such language. See J.A. 681-684; see also Pet. App. 74a-75a.

Further, PRO is not a party that made a good-faith effort to respect Georgia’s registered copyrights but misjudged their scope. Defenses like fair use may protect such parties, see 17 U.S.C. § 107, and persons concerned about infringement suits can bring declaratory-judgment actions to clarify their rights, see 28 U.S.C. § 2201. By contrast, PRO republished the *entire* OCGA, including indisputably creative components lacking any legal force, such as judicial-decision summaries. Any concerns about purported difficulties in determining whether particular portions of an annotated state code are copyrightable should be addressed in the case of a party that has at least attempted to distinguish copyrightable from uncopyrightable materials.

3. Finally, PRO gestures at what appears to be a copyright-misuse defense, alleging that Georgia has improperly attempted “to obtain a proprietary interest

in the underlying law.” PRO Br. 55-56; see also, *e.g.*, *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 972-979 (4th Cir. 1990) (discussing defense). PRO, however, has expressly disclaimed that defense. J.A. 146. Regardless, it would fail. Georgia is not attempting to use its copyright to “[m]onopoliz[e] the [l]aw.” PRO Br. 56. Georgia does not claim copyright in the OCGA’s statutory text, so anyone may republish Georgia’s statutes (i.e., the actual law). See Pet. Br. 20. Georgia is using copyright protection precisely as states have for decades, just as Congress envisioned, see pp. 3-5, *supra*, and in accordance with *Wheaton* and *Callaghan*.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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NOVEMBER 2019

APPENDIX

THE
J. B. Pond
GENERAL STATUTES

OF THE
STATE OF MICHIGAN.
IN FORCE.

INCLUDING THE ACTS OF THE EXTRA SESSION OF 1882.

WITH NOTES AND DIGESTS OF THE DECISIONS OF THE SUPREME
COURT RELATING THERETO.

VOL. II.

COMPILED AND ANNOTATED BY
ANDREW HOWELL,

JUDGE OF THE FIRST JUDICIAL CIRCUIT.

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NOTE.

A reference to the acts and sections contained in this Compilation, amended or repealed at the extra session of 1882, and at the regular session of the legislature in 1883, will be found in the Appendix to this volume. And so many of the general laws enacted at the session of 1883, as the progress of the printing would permit, will be found either in the Appendix to volume I, or in their appropriate places in this volume.

AUTHENTICATION.

AN ACT

To authorize the general laws of this State, collected and arranged by Andrew Howell, and entitled "The general laws of the State of Michigan in force," to be received and used in evidence.

SECTION 1. *The People of the State of Michigan enact, That* the general laws of the State of Michigan, collected and arranged in two volumes, entitled "The general statutes of the State of Michigan in force," compiled and annotated by Andrew Howell, shall be received and admitted in all courts and proceedings, and by all officers in this State, as evidence of the existing laws thereof, with the like effect as if published under and by the authority of the State.

Approved March 20 1883.