

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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9 Washington, D.C.
10 Monday, December 2, 2019

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

15
16 APPEARANCES:

17 JOSHUA S. JOHNSON, ESQ., Washington, D.C.;
18 on behalf of the Petitioners.
19 ANTHONY A. YANG, Assistant to the Solicitor
20 General, Department of Justice, Washington, D.C.;
21 for the United States, as amicus curiae,
22 supporting the Petitioners.
23 ERIC F. CITRON, ESQ., Bethesda, Maryland;
24 on behalf of the Respondent.

25

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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 parties' 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 think that
21 the thing that's official is the code. So it's
22 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 think that that's clear from
6 Wheaton and Callaghan. So, in both of those
7 cases, the Court said that a court-appointed
8 official reporter could hold copyright in
9 annotations that appeared in the reporter
10 volumes. So this case is really just the
11 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 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 the -- 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: 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 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 Now Georgia hasn't proposed an
23 alternative test, but we've proposed a test that
24 we've drawn from the language in this Court's
25 decisions, particularly Wheaton as it was

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

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

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

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

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

24 JUSTICE BREYER: Because? Why is that
25 copyrightable and yet a comment made by the

1 professor's cousin, who happens to teach in law
2 school, is not copyrightable?

3 MR. CITRON: Uh --

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

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

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

24 JUSTICE KAVANAUGH: How is that
25 different from the court reporter?

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

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

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

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

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

1 that all the materials in the OCGA are finalized
2 under the direct supervision of the Code
3 Revision Commission.

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

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

9 JUSTICE KAVANAUGH: Yeah, the court
10 reporter.

11 MR. CITRON: The Commission --

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

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

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

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

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

15 MR. CITRON: Uh --

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

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

25 But that does go a long way. I think

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

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

12 MR. CITRON: Yeah.

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

16 MR. CITRON: That's right.

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

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

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

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

9 MR. CITRON: Well --

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

13 MR. CITRON: Okay.

14 JUSTICE SOTOMAYOR: Okay?

15 MR. CITRON: Yes.

16 JUSTICE SOTOMAYOR: Accept the
17 hypothetical.

18 MR. CITRON: Yeah.

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

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

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

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

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

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

24 JUSTICE BREYER: What does the --

25 JUSTICE GINSBURG: Mr. Citron, may I

1 ask you a basic question of -- of what matters
2 here? One thing is that the annotations have
3 the official state imprimatur, and you say that
4 that's what matters.

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

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

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

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

23 JUSTICE GINSBURG: Well, they're not
24 saying it's a good summary or a bad summary.
25 They may take comments from both sides, one

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

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

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

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

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

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

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

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

25 MR. CITRON: I'll give you my best

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

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

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

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

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

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

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

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

17 But the editor's notes --

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

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

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

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

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

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

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

1 change the copyright status?

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

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

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

25 MR. CITRON: No, I -- I -- I will

1 admit to you at the end of the day that the
2 statute at large is going to control over the
3 editor's note. The editor's note doesn't have
4 the force of law as such.

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

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

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

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

24 JUSTICE ALITO: You gave us a --

25 JUSTICE KAVANAUGH: Go ahead.

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

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

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

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

25 JUSTICE KAVANAUGH: What --

1 MR. CITRON: -- to change it.

2 JUSTICE KAVANAUGH: What about Howell?
3 Do you accept Howell as correctly decided, the
4 Sixth Circuit decision by Justice Harlan?

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

8 JUSTICE KAVANAUGH: Explain that.

9 MR. CITRON: Okay.

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

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

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

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

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

25 And that causes Justice Harlan to

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

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

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

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

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

22 MR. CITRON: No, I think the merger
23 does make a difference because that is the
24 legislature deciding that these annotations will
25 be part of the code and then publishing that

1 code under the state's authority.

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

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

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

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

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

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

1 not sure each court would treat that as
2 incorrect. That's a -- that seems to be a
3 plausible --

4 JUSTICE KAVANAUGH: The court would
5 do --

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

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

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

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

23 JUSTICE KAVANAUGH: Can I ask you a
24 question from a different direction? Which is
25 the states' amicus brief --

1 MR. CITRON: Uh-huh.

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

10 MR. CITRON: Yeah, happy to.

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

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

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

25 MR. CITRON: -- by the differences in

1 this case.

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

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

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

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

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

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

22 MR. CITRON: I do dispute that in two
23 respects. One is the actual useful versions of
24 these codes are already plenty expensive.
25 There's a lot of discussion of the cost for a

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

5 But, even accepting that the price is
6 lower, I think that favors us, because what's
7 going on there is an exchange of -- you're going
8 to accept a price cap in exchange for the right
9 to publish this officially, not for publishing
10 the annotations, because Westlaw makes the
11 annotations and is allowed to charge six times
12 as much.

13 Lexis isn't going to agree to do the
14 annotation work in exchange for a price cap.
15 What it wants for the price cap is the right to
16 publish it officially. I hope -- I hope that
17 makes sense.

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

22 JUSTICE ALITO: What's your best --
23 what is your best evidence that the state
24 actually edits what Lexis does or supervises the
25 substance of what Lexis does?

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

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

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

18 JUSTICE BREYER: The -- I just thought
19 of a possible -- this should shed a lot of light
20 in a number of areas. One of those areas is
21 only applicable to some judges. Some judges do
22 look at legislative history. So, for those who
23 do look at legislative history, a committee
24 report has significance. All right?

25 Now take the same words and imagine

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

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

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

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

18 JUSTICE BREYER: You are?

19 MR. CITRON: -- with you thinking that
20 way. And I think that that's one of the main
21 points I've been trying to make here. There is
22 a difference between being worth very little but
23 nonetheless being official, authentic state
24 legal resource, and being worth nothing because
25 you're not an authentic state legal resource.

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

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

14 And that, again, is the difference
15 between these cases and Howell and Wheaton.
16 Howell and Wheaton were allowed to add whatever
17 they wanted.

18 JUSTICE SOTOMAYOR: Presumably, a
19 certified copy of the committee report would not
20 be post hoc.

21 MR. CITRON: Whether -- I think the
22 point I was trying to make is post hoc or not
23 might affect how much weight you want to give
24 it, but the fact that it's a certified committee
25 report is the thing that really makes the

1 difference.

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

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

11 MR. CITRON: I -- I'll just give you
12 --

13 JUSTICE SOTOMAYOR: -- this is what --

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

23 Turns out that there's a rule that
24 says, no, you have to file a response or else it
25 might be deemed forfeited. And the court is

1 deciding whether his failure to file a response
2 is excusable neglect. And the court says:
3 Well, if you look at the annotations to this
4 statute, it discloses the existence of Rule 6.3,
5 which is not inconsistent with the statute.

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

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

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

22 MR. CITRON: I don't know if it would
23 be a mistake or not.

24 JUSTICE KAVANAUGH: Under -- under
25 state law, it would be a mistake.

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

5 JUSTICE KAVANAUGH: But, under state
6 law --

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

8 JUSTICE KAVANAUGH: -- isn't that --
9 that's wrong.

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

19 CHIEF JUSTICE ROBERTS: Well, but it
20 would also be pertinent to the question of
21 excusable neglect to look at what, you know, all
22 the treatises said. I mean, if I'm writing an
23 opinion about whether the lawyer should have
24 known that, I would say every -- all the
25 treatises about Georgia law, you know, highlight

1 the fact that you've got to file a response.

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

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Three minutes, Mr. Johnson.

16 REBUTTAL ARGUMENT OF JOSHUA S. JOHNSON

17 ON BEHALF OF THE PETITIONERS

18 MR. JOHNSON: I want to start briefly
19 by talking about the different portions of the
20 OCGA, things like editors' notes.

21 We talked in our brief about why the
22 editors' notes should be copyrightable, why the
23 Dominiak case that my friend on the other side
24 just was describing doesn't undermine our
25 copyright claim.

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

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

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

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

22 But I think it's also important to
23 look at the history of the Copyright Act. So
24 the Copyright Office in the 1959 study and 1961
25 report interpreted the 19th century precedents

1 we're talking about here as holding that states
2 could hold copyright in annotations by state
3 government employees, and then Congress passed
4 the modern Copyright Act without in any way
5 overriding that understanding or expanding the
6 government edicts doctrine.

7 Under that understanding, we win here.

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

15 So affirming the decision below would
16 blow up those regimes.

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

24 So I think that statutory text and
25 precedent compel a decision for Georgia here.

1 Any innovations on the government edicts
2 doctrine should come from Congress, not the
3 courts. The Court should reverse.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel. The case is submitted.

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

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