
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*

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS**

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QUESTION PRESENTED

Whether the State of Georgia is entitled to copyright in annotations contained within the Official Code of Georgia Annotated, which were prepared pursuant to a work-made-for-hire agreement between a state commission and a private publisher, and which lack the force of law.

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INTEREST OF THE UNITED STATES

This case concerns the copyrightability of annotations that accompany the text of Georgia’s statutory law in the State’s annotated code. The Copyright Office is responsible for, among other things, determining whether a work is copyrightable before registering a copyright for the work, 17 U.S.C. 410(a), and advising Congress, agencies, the courts, and the public on copyright matters, 17 U.S.C. 701. The United States Patent and Trademark Office advises the President on intellectual-property matters. 35 U.S.C. 2(b)(8) and (c)(5). The United States therefore has a substantial interest in the Court’s disposition of this case.

STATEMENT

1. a. This case implicates one aspect of the statutory concept of “author” in federal copyright law. The first

Congress enacted the Copyright Act of 1790 to provide copyright protection to “the author or authors” of certain works. Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124. Today, the Copyright Act of 1976, 17 U.S.C. 101 *et seq.*, similarly extends copyright protection to “original works of authorship” that are “fixed in any tangible medium of expression.” 17 U.S.C. 102(a). Such “fix[ation]” occurs when, “by or under the authority of the author,” a sufficiently permanent embodiment of the work is produced in a copy or phonorecord. 17 U.S.C. 101 (defining “fixed”).

To satisfy the Act’s requirement of “original[ity],” 17 U.S.C. 102(a), a work must be “independently created by the author (as opposed to copied from other works)” and “possess[] at least some minimal degree of creativity.” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991). A “work based upon one or more preexisting works”—including a work that consists of “annotations” or other modifications to prior works—can qualify as an “original work of authorship,” 17 U.S.C. 101 (defining “derivative work”), for which a copyright may be obtained. 17 U.S.C. 103(b). A copyright for such a “derivative work” will “extend[] only to the material contributed by the author of the work, as distinguished from the preexisting material employed” therein. *Ibid.*; see *Feist Publ’ns*, 499 U.S. at 348 (“[C]opyright protection may extend only to those components of a work that are original to the author.”). Such copyright protection for a derivative work “does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.” 17 U.S.C. 103(b). Cf. 17 U.S.C. 201(e).

A copyright “vests initially in the author or authors of the work.” 17 U.S.C. 201(a). A copyright owner—

previously denominated a copyright “proprietor,” see, *e.g.*, 17 U.S.C. 6-7 (1926)—may transfer ownership of his rights in whole or in part. 17 U.S.C. 201(d). Those rights include exclusive rights specified by statute, including the rights to reproduce the work, distribute copies, and produce derivative works. 17 U.S.C. 106. Such exclusive rights, however, are subject to exceptions, 17 U.S.C. 107-112, 117, 119, 121-122, including one allowing “fair use” of copyrighted works. 17 U.S.C. 107.

b. When “a work [is] prepared by an employee within the scope of his or her employment,” the work constitutes a “work made for hire,” 17 U.S.C. 101, for which the employer is “considered the author” for copyright purposes, 17 U.S.C. 201(b). Unless the parties expressly provide otherwise in a written agreement, the employer initially “owns all of the rights comprised in the copyright.” *Ibid.*

“[A] work prepared by an officer or employee of the United States Government as part of that person’s official duties” is considered a “work of the United States Government.” 17 U.S.C. 101; see H.R. Rep. No. 1476, 94th Cong., 2d Sess. 58 (1976) (*1976 House Report*) (stating that the work-made-for-hire and work-of-the-United-States “concepts are intended to be construed in the same way”). Although copyright protection is available for “works prepared [by other persons] under U.S. Government contract or grant,” *id.* at 59, and the federal government can “receiv[e] and hold[] copyrights transferred to it,” “[c]opyright protection under [the Act] is not available for any work of the United States Government.” 17 U.S.C. 105; but cf. 15 U.S.C. 290e(a) (exception). That disclaimer of any copyright in works produced directly by the federal government is a modern codification of a policy adopted in 1895. See Act of

Jan. 12, 1895, ch. 23, § 52, 28 Stat. 608 (“[N]o * * * Government publication shall be copyrighted.”); 17 U.S.C. 7 (1926) (“No copyright shall subsist * * * in any publication of the United States Government.”); 17 U.S.C. 8 (Supp. I 1947) (same). No similar provision applies to works of state governments.

c. This case concerns a copyright doctrine grounded in three of this Court’s decisions, which applied the statutory concept of authorship in the context of annotated law reports that reproduced federal and state judicial decisions. Such compilations of preexisting works (*i.e.*, judicial opinions) are a form of “derivative work,” 17 U.S.C. 101, that may be entitled to copyright protection for original materials (*e.g.*, annotations) contributed by the law report’s “author,” 17 U.S.C. 103(b). Determining the copyrightability of annotated law reports therefore requires a court to assess separately the copyright status of (a) the preexisting judicial opinions and (b) any original annotations added to accompany those opinions.

In *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834), the Court considered an argument by Wheaton, the Court’s first official reporter of decisions, that he owned a copyright for the entirety of *Wheaton’s Reports* as the “author of the reports.” *Id.* at 615 (argument for appellants). Wheaton contended that he had written the “[statements of the] cases and abstracts” and that, although the Court’s judges had initially possessed a “copy[right] in the opinions” they had written, he had “acquired the right to the opinions by judges’ gift.” *Id.* at 614-615 (argument). The Court remanded the case for a jury trial on the question whether Wheaton had complied with the procedural requirements that Congress had established for copyright protection. *Id.* at 667-668. In the concluding sentence of its opinion, the

Court stated: “It may be proper to remark that the court are unanimously of opinion, that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right.” *Id.* at 668.

Wheaton’s discussion was not expressly rooted in the statutory term “author.” In *Banks v. Manchester*, 128 U.S. 244 (1888), however, the Court subsequently held, in the context of a copyright claim to the *Ohio State Reports*, that “the judge who, in his judicial capacity, prepares the opinion or decision [and other materials]” is not “regarded as their author or their proprietor, in the sense of [the copyright statute], so as to be able to confer any title by assignment” on another. *Id.* at 253; see *id.* at 251 (all relevant materials were “the work of the judges”). The Court stated that the interpretive question was “one of public policy,” and that “[t]he 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.” *Id.* at 253.

In *Callaghan v. Myers*, 128 U.S. 617 (1888), by contrast, the Court rejected a copyright defendant’s argument that the Illinois Supreme Court’s official reporter—a “sworn public officer” who received a salary from the State, and who was appointed and removable by the Illinois Supreme Court—could “not [be] an author, within the meaning of the act of Congress,” with respect to those portions of the *Illinois Reports* that he had written. *Id.* at 646-647. Citing *Banks*, the Court observed that “there can be no copyright in the opinions of the judges, or in the work done by them in their official capacity as judges.” *Id.* at 647. The Court concluded, however, that there was “no [similar] ground of

public policy” to deny a state official a copyright “cover[ing] the matter which is the result of his intellectual labor.” *Ibid.*

The Court in *Callaghan* endorsed the “general proposition that the reporter of a volume of law reports can obtain a copyright for it as an author, and that such copyright will cover the parts of the book of which he is the author, although he has no exclusive right in the judicial opinions published.” 128 U.S. at 650. The Court observed, in that regard, that the remand in *Wheaton* would have been pointless if Wheaton had no potential copyright in any aspect of the reports he had published. See *id.* at 648-649. The fact that the reporter “as an author” was a state official who “receive[d] a compensation or salary from the government,” the Court concluded, had “no bearing upon the subject.” *Id.* at 650.

Lower courts subsequently applied the foregoing precedents in determining the copyrightability of annotated compilations of state statutory law. Most relevant here, Justice Harlan (joined by then-Judge Taft) concluded that the annotations in *Howell's Annotated Statutes of Michigan* were protected by copyright. *Howell v. Miller*, 91 F. 129, 137-138 (6th Cir. 1898). Recounting this Court’s jurisprudence, the court explained that “the reporter of a volume of law reports can obtain a copyright for it as an author” that encompasses “the parts of the book” that he has written, even though “he has no exclusive right in the judicial opinions published.” *Id.* at 138 (quoting *Callaghan*, 128 U.S. at 650). The court then held “[u]pon like grounds” that “Howell was entitled to have copyrighted his volumes of Annotated Statutes, and that such copyright covers all in his books that may fairly be deemed the result of his labors.” *Ibid.* While recognizing that “no one can obtain

the exclusive right to publish the laws of a state,” the court held that a law compiler’s “copyright would embrace all * * * matters”—including “marginal references, notes, memoranda, table of contents, indexes, and digests of judicial decisions”—that the compiler had prepared. *Id.* at 137-138. Accord *Davidson v. Wheelock*, 27 F. 61, 62 (C.C.D. Minn. 1866).

d. The Copyright Act of 1909, ch. 320, 35 Stat. 1075 (17 U.S.C. 1 *et seq.* (1926)), which Congress codified as amended into positive law in 1947, Act of July 30, 1947, ch. 391, 61 Stat. 652 (17 U.S.C. 1 *et seq.* (Supp. I 1947)), did not define the term “author.” See 17 U.S.C. 26 (Supp. I 1947); 17 U.S.C. 62 (1926) (same). When Congress enacted the Copyright Act of 1976, it again declined to define that term. See 17 U.S.C. 101 (other definitions).¹

2. The Official Code of Georgia Annotated (OCGA) is Georgia’s only official code. Pet. App. 60a. Respondent, a California nonprofit corporation (J.A. 112), purchased and digitally scanned every volume and supplement of the OCGA, and it distributed those copies—including all annotations—online and by other digital

¹ A 1961 Report of the Register of Copyrights, prepared for the purpose of assisting Congress in its revision of the copyright laws, explained that “the text of laws, court decisions, governmental proceedings, and similar official documents” were not copyrightable under existing doctrine. *Copyright Law Revision: Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law*, 87th Cong., 1st Sess. 129-130 (H.R. Judiciary Comm. Print 1961). The Report further explained, however, that “a person publishing an official document with his own additions—such as annotations, headnotes, or commentaries—could secure copyright in them,” and that “[a]lmost every State in the Union has registered copyright claims in some of its informational publications.” *Ibid.*

means. Pet. App. 8a-9a, 57a-58a. Petitioners (collectively, Georgia or the State) do not claim a copyright in the text of Georgia statutory law or numbering reproduced in the annotated code. *Id.* at 8a; Pet. Br. 11, 20. Nor does the State claim a copyright in comments reproduced in the annotated code that purport to describe the purposes of various state Acts, which the State explains were drafted by Georgia State Bar committees. Pet. Br. 41 n.12. The State instead claims a copyright in other annotations that were produced by state contractors, under the supervision of petitioner Georgia Code Revision Commission (Commission) and pursuant to work-made-for-hire agreements that identify the State as the owner of copyright in the resulting work. *Id.* at 11, 20; cf. 17 U.S.C. 201(b).

a. Before 1977, the Code of Georgia of 1933 had been the last official codification of Georgia law. Pet. App. 55a. In 1977, Georgia established the Commission to oversee the creation and annual revision of what would become the OCGA. *Ibid.*; see Ga. Code Ann. (OCGA) § 28-9-3 (2018).

The Commission created the OCGA in conjunction with the Michie Company, which the Commission employed with a contract providing that “the [OCGA] was a ‘work made for hire’” in which “the state would own the copyright.” *Georgia v. Harrison Co.*, 548 F. Supp. 110, 112 (N.D. Ga. 1982), vacated as moot, 559 F. Supp. 37 (N.D. Ga. 1983); see *Harrison Co. v. Code Revision Comm’n*, 260 S.E.2d 30, 32-33 (Ga. 1979); Pet. App. 55a. Their relevant product fell into two categories. First, they prepared a manuscript entitled the *Code of Georgia 1981 Legislative Edition*—a compilation of the text of the State’s preexisting statutory enactments—which in 1981 was presented to, and enacted by, the Georgia

legislature. Pet. App. 55a; J.A. 236-237 (OCGA forward). Second, they prepared annotations, indices, editorial notes, and other materials (collectively, annotations) to accompany the statutory text, which were later added to the manuscript to produce the OCGA. J.A. 237.

The Georgia enacting statute distinguishes between the “statutory portion” of the OCGA and other materials contained therein. It provides that “[t]he statutory portion of the codification of Georgia laws prepared by the Code Revision Commission and the Michie Company pursuant to a contract entered into on June 19, 1978, is enacted and shall have the effect of statutes enacted by the General Assembly of Georgia.” OCGA § 1-1-1 (2019); see Act No. 1, §§ 2-3, 1981 Ga. Stat., Extraordinary Sess. 8-9. The enacting statute further instructs that “[t]he statutory portion of [the] codification shall be merged with annotations * * * and other materials pursuant to the contract,” OCGA § 1-1-1, and that the merged materials then “shall be published by authority of the state” and “shall be known and may be cited as the ‘Official Code of Georgia Annotated.’” *Ibid.* “All historical citations, title and chapter analyses, and notes set out in [the OCGA] are given for the purpose of convenient reference and do not constitute part of the law.” OCGA § 1-1-7 (2019).

b. The Commission prepares for each regular session of the Georgia legislature one or more bills “to reenact and make corrections in the [OCGA].” OCGA § 28-9-5(c) (2018). Those bills may correct spelling, typographical, and grammatical errors; update cross-references; and make similar changes that do not modify “the sense, meaning, or effect” of existing legislation. OCGA § 28-9-5(a) (2018).

The Commission has discharged those duties with assistance provided by the OCGA's private publisher, a component of LexisNexis Group (Lexis), under a work-made-for-hire contract (J.A. 535-595). Pet. App. 55a. Under that contract, Lexis was "responsible for the ongoing publication and maintenance of the [OCGA]," J.A. 535, including the compilation of annotations on judicial decisions and opinions of Georgia's attorney general, other resource references, statutory histories for each code section, and other notes, as well as tables and indices. J.A. 539-547. The Commission supervised the process and retained an "ultimate right of editorial control over all material." J.A. 536; see J.A. 560, 569. The contract states that the work produced by Lexis is a "work made for hire for the purposes of the copyright laws," such that the resulting work is the "sole and exclusive property of the State of Georgia." J.A. 567.

The contract required Lexis to "bear all editorial, publication and distribution costs," J.A. 536, while granting Lexis the exclusive right to distribute and sell the printed volumes and CD-ROM version of the OCGA, and the right to license use of the OCGA on its online database, J.A. 569-573. The contract mandated a low price for the full set of printed volumes—one sixth of the price of the competing Georgia annotated code, Pet. App. 7a—and required Lexis to maintain "an unannotated Code" online for free public use (<http://www.lexisnexis.com/hottopics/gacode/Default.asp>). J.A. 552-553, 564-565, 592.

The Georgia legislature annually enacts reviser acts to update the OCGA by making discrete changes to the OCGA's 53 titles. See, *e.g.*, Act No. 275, §§ 1-53, 2017 Ga. Acts 775-819. Since 1983, those acts have also "reenact[ed]" the text of the "statutory portion of the

[OCGA]” with the changes shown in the prior year’s published OCGA supplement. See, *e.g.*, *id.* § 54(a) and (c), 2017 Ga. Acts 819; Act No. 1, § 1, 1983 Ga. Laws 4. Each such act then states that the OCGA’s “[a]nnotations * * * are not enacted as statutes by the provisions of th[e] Act.” See, *e.g.*, Act No. 275, § 54(b), 2017 Ga. Acts 819; Act No. 625, § 54(b), 2016 Ga. Laws 882; Act No. 580, § 54, 1984 Ga. Laws 129-130; Act No. 1, § 1, 1983 Ga. Laws 4.

3. After the State filed this action against respondent, the district court granted summary judgment to the State. Pet. App. 54a-73a; see *id.* at 74a-75a (injunction). As relevant here, the court held that the OCGA’s annotations were copyrightable because they had not been “enacted into law” and did “not have the force of law.” *Id.* at 63a-64a; see *id.* at 60a-65a.

4. The court of appeals reversed. Pet. App. 1a-53a. The court held that the annotations in the OCGA are not subject to copyright. *Id.* at 11a-53a.

The court of appeals explained that the concept of “‘authorship’ is central to the statutory scheme”; that a copyright’s ownership vests initially in the work’s “‘author’”; and that this Court in *Banks* had construed “the term ‘author’” as used in copyright statutes. Pet. App. 12a, 19a; see *id.* at 13a-17a. The court understood this Court’s interpretation of the term “author” in the copyright laws to “derive from first principles about the nature of law in our democracy” and a “‘metaphorical concept of citizen authorship.’” *Id.* at 12a, 18a-19a, 21a (citation omitted). The court stated that “the People are sovereign” and are “ultimately the source of our law,” so that “lawmakers and judges” are mere “draftsmen of the law, exercising delegated authority,” and “whatever they produce the People are the true authors.” *Id.* at 19a.

The court of appeals identified three “hallmarks of law” as determining whether a work is “sufficiently law-like so as to be properly regarded as a sovereign work.” Pet. App. 3a-4a. Those criteria included whether the work (1) was “written by particular public officials who are entrusted with the exercise of legislative power,” (2) is “authoritative,” and (3) was “created through certain, prescribed processes, the deviation from which would deprive it of legal effect.” *Id.* at 25a-26a. Based on those factors, the court concluded that “the annotations in the OCGA, while not having the force of law,” are sufficiently “law-like” to deem them “constructively authored by the People.” *Id.* at 26a.

First, the court of appeals stated that “the creators of the OCGA annotations” were “entrusted by the sovereign with legislative power.” Pet. App. 37a; see *id.* at 26a-38a. The court stated that Lexis prepared the annotations pursuant to “detailed instructions” from, and under the supervision of, the Commission, which had “final editorial” control. *Id.* at 26a-29a. The court viewed the Commission as “one in the same with the legislators for [the court’s] purposes,” stating that the Commission worked as the legislature’s “alter ego” even though its “staff and six of its fifteen members are not Georgia legislators.” *Id.* at 29a-31a.

Second, the court of appeals held that the annotations were “‘authoritative’ sources on the meaning of Georgia statutes,” because they had been “merged” with the statutory text in the OCGA, which was labeled as the State’s “official” code, Pet. App. 38a-41a. See *id.* at 38a-46a. Thus, although state law “disclaims any legal effect in the annotations,” the court concluded that the “character” of the annotations had been “altered” by “intermingl[ing]” them in a “unified” document,” which

“imbue[d] them with an official, legislative quality” and “legal significance.” *Id.* at 40a-41a. The court found its conclusion “reinforced” by decisions of Georgia courts that have treated as “conclusive” certain comments in OCGA annotations. *Id.* at 43a.

Finally, the court of appeals determined that the State’s process for creating the annotations supported its view. Pet. App. 47a-51a. The court recognized that, unlike “Georgia session laws,” the annotations are not separately enacted in the “ordinary legislative process.” *Id.* at 47a-48a. The court stated, however, that the legislature’s annual reviser acts “adopt the annotations” as “an integral part of the official Code,” through a process that includes “bicameralism and presentment.” *Id.* at 48a.

SUMMARY OF THE ARGUMENT

The court of appeals concluded that OCGA’s annotations were sufficiently law-like to be regarded as a sovereign work ineligible for copyright protection. Pet. App. 4a. That is incorrect.

A. *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 668 (1834), *Banks v. Manchester*, 128 U.S. 244, 253-254 (1888), and *Callaghan v. Myers*, 128 U.S. 617, 646-650 (1888), establish that a judge is not the “author” of the judicial opinions or other works written in his capacity as a judge and, for that reason, the judge cannot assert or assign to others an exclusive right in those works. This Court described its interpretation of “author” as based on the “public policy” that a judge’s “authentic exposition and interpretation of the law” should be “free for publication to all.” *Banks*, 128 U.S. at 253. This Court further held, however, that annotations explaining or summarizing judicial opinions can be copyrighted, even when prepared by government officials within the scope of their official responsibilities. No

similar “public policy,” the Court determined, would warrant prohibiting an official court reporter from copyrighting materials that he has written to accompany judicial decisions. *Callaghan*, 128 U.S. at 647.

The same basic framework applies to state statutes and to annotations or similar commentary concerning such statutes. If the “exposition and interpretation of the law” by judges should be “free for publication to all,” *Banks*, 128 U.S. at 253, it follows *a fortiori* that the actual sources of law that judges interpret and apply—including statutory law produced by lawmakers—must be equally available. A lawmaker therefore cannot qualify as an “author” of the text of statutes enacted into law. But just as the rule that judges cannot copyright works created “in the discharge of their judicial duties” “extends to *whatever* work [judges] perform *in their capacity as judges*,” such that the “*whole work done by the judges* * * * is free for publication to all,” *ibid.* (emphases added), the parallel rule for legislators extends beyond just statutory text. A legislator, like a judge, does not qualify as an “author” with respect to the “whole work” that he performs in his capacity as a lawmaker in discharging his lawmaking duties during legislative proceedings.

Materials produced outside that context—including materials prepared by officials other than legislators to explain or summarize state statutes or materials related thereto—do not trigger a similar limitation on the term “author.” Just as an official court reporter is the “author” of annotations he prepares to accompany judicial opinions, so too is a state entity the “author” of statutory annotations that the entity either prepares or has prepared for it as a work made for hire.

B. The court of appeals largely accepted that general analytical framework. It concluded, however, that copyright protection is unavailable for the OCGA's annotations based principally on three aspects of the OCGA's annotations' creation and placement within the State's annotated code. That was error.

First, the court of appeals concluded that the Georgia's legislators were "in a very real way" the creators of the annotations in question, based on its view that Commission was "an arm of the General Assembly" that gave "highly detailed instructions" to the private contractors that prepared the annotations. Pet. App. 26a-27a, 32a. That conclusion is significantly flawed. The Commission acts in its own name and under its own authority; it does not act in the name of the legislature or exercise legislative authority. The Commission members who are also lawmakers thus are not acting in their capacity as lawmakers when discharging the Commission's responsibilities. Moreover, the "detailed instructions" invoked by the court of appeals merely required the State's contractor to provide comprehensive annotations on all relevant opinions. Such instructions provide no sound basis for concluding that legislators were the de facto creators of the annotations.

Second, the court of appeals deemed the annotations to be law-like, in the sense that they were authoritative on the meaning of Georgia law, because Georgia law requires the OCGA's statutory portion to be "merged" with the annotations and because the resulting annotated code is labeled "official." Pet. App. 38a-39a, 41a. But Georgia law makes clear that only the "statutory portion" of the codification was enacted and has the effect of statutes, OCGA § 1-1-1 (2019), whereas the annotations were not and do not. OCGA § 1-1-7 (2019).

The State’s annual reviser statutes follow the same pattern. And although state law discusses merging the statutory portion and annotations, it directs only that they be merged “pursuant to the contract” between the Commission and the Michie Company, OCGA § 1-1-1, meaning that the two components must be physically merged into one document before being printed as the OCGA. The label “official,” in turn, refers to the code itself, not the annotations, which the Georgia Supreme Court has cautioned carry no official weight.

Finally, the court of appeals was wrong in concluding that the process by which the OCGA annotations were created is “similar to the ordinary process by which laws are enacted.” Pet. App. 49a. The annotations were created by contractors and their employees, not legislators or their staffs. Nor does the Commission’s supervision of the annotation-drafting process render it analogous to the lawmaking process. The OCGA’s annotations are just as they appear—annotations—created outside the legislature and provided solely “for the purpose of convenient reference,” OCGA § 1-1-7. Nothing materially distinguishes those materials from annotations that a private party has created. And like a private party, the State may obtain a copyright in its work.

ARGUMENT

THE STATE OF GEORGIA IS ENTITLED TO COPYRIGHT IN OCGA ANNOTATIONS THAT WERE PREPARED FOR THE STATE UNDER WORK-MADE-FOR-HIRE AGREEMENTS

The OCGA is a derivative work that combines the preexisting text of Georgia statutory law with annotations that describe other matters relevant to those researching such law. Those annotations were prepared by contractors under work-made-for-hire agreements supervised by the Commission. See, *e.g.*, J.A. 567. The

purpose of those agreements was to designate the State as the “author” of those annotations and thus as the owner of any associated copyright protecting them. 17 U.S.C. 103(b), 201(b).

The question presented here is whether the State is entitled to copyright in those annotations. This Court’s decisions in *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834), *Banks v. Manchester*, 128 U.S. 244 (1888), and *Callaghan v. Myers*, 128 U.S. 617 (1888), provide the starting point for resolving that issue. Those decisions establish that, for purposes of federal copyright law, judges are not “authors” of their judicial opinions and therefore can neither obtain for themselves, nor transfer to others, any copyright in those opinions. Those decisions also make clear, however, that an official court reporter can obtain a copyright in accompanying materials (*i.e.*, other than the opinions and other judicially written materials themselves) that he has personally created. See pp. 4-6, *supra*. Under the same basic analytic framework, materials that are created by non-legislators to summarize or explain materials concerning statutory law are eligible for copyright protection, even though the underlying statutes themselves are not.

The court of appeals recognized that “annotations created by a private party generally can be copyrighted because the annotations are an original work created by a private publisher.” Pet. App. 2a. Based on the circumstances under which the particular annotations at issue here were created and merged with the State’s official Code, however, the court concluded that those annotations are “sufficiently law-like so as to be properly regarded as a sovereign work,” and therefore are ineligible for copyright protection. *Id.* at 4a; see *id.* at 26a. That conclusion was erroneous.

A. Materials Drafted By Legislators In Their Lawmaking Capacities Are Not Entitled To Copyright Protection, But Materials Drafted By Others To Explain Or Summarize The Law Are Potentially Copyrightable

In a series of decisions dating to 1834, this Court held that, for purposes of federal copyright law, a judge is not the “author” of his judicial opinions and other judicial writings and therefore can neither assert nor assign to others any exclusive rights in those materials. The Court further held, however, that annotations explaining or summarizing judicial decisions are potentially copyrightable, even when they are prepared by government employees. That same basic analytic framework applies to state statutes and to annotations or similar commentary concerning such statutes.

1. This Court’s decisions in *Wheaton*, *Banks*, and *Callaghan* clarify the Copyright Act term “author” as that term applies to judicial opinions and to materials that summarize or explain those opinions

This Court’s decisions in *Wheaton*, *Banks*, and *Callaghan* establish two legal propositions that provide a starting point for analysis of the question presented here.

First, the Court has made clear that a judge can neither assert on his own behalf, nor transfer to another, any copyright in his judicial opinions. The Court in *Wheaton* unanimously held that “no reporter has or can have any copyright in the written opinions delivered by this court,” and that “the judges thereof cannot confer on any reporter any such right.” *Wheaton*, 33 U.S. (8 Pet.) at 668. That holding was not expressly rooted in the statutory term “author.” In *Banks*, however, the Court drew that connection, holding that “the judge who, in his judicial capacity, prepares the opinion or decision [and other written materials]” is not “their *author* or their

proprietor, *in the sense of [the copyright statute]*, so as to be able to confer any title by assignment” on another. *Banks*, 128 U.S. at 253 (emphases added).

The Court in *Banks* described that interpretive question as “one of public policy” and emphasized that, since *Wheaton*, the judicial consensus had been that “no copyright could under the statutes passed by Congress, be secured” in works prepared “by judicial officers in the discharge of their judicial duties.” *Banks*, 128 U.S. at 253. Instead, “[t]he 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.” *Ibid.*²

Second, this Court has made clear that, although “there can be no copyright in the opinions of the judges, or in the work done by them in their official capacity as judges,” there is “no [similar] ground of public policy” to deny an official court reporter a copyright in “the matter which is the result of his intellectual labor.” *Callaghan*, 128 U.S. at 647. The *Callaghan* Court thus

² This Court has “defined ‘author,’ in a constitutional sense, to mean ‘he to whom anything owes its origin; originator; maker.’” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991) (quoting *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884)). Congress, however, has intentionally “avoid[ed] exhausting [its] constitutional power” to legislate in the field of copyright, *1976 House Report* 51, and its use of the term “author” in copyright statutes does not extend to the full scope of the constitutional term. Thus, rather than decide the scope of Congress’s constitutional authority to secure to “Authors” the exclusive right to their “Writings,” U.S. Const. Art. I, § 8, Cl. 8, the Court in *Banks* and *Callaghan* determined only whether particular persons qualified as “author[s], within the meaning of the act[s] of Congress.” *Callaghan*, 128 U.S. at 646-647; see *Banks*, 128 U.S. at 253 (similar).

agreed with decisions teaching that a “reporter of a volume of law reports can obtain a copyright for it as an author” for those “parts of the book” he has written, even though the reporter was a state official who had “receive[d] a compensation or salary from the government.” *Id.* at 650. The Court emphasized that the “universal practical construction has been that such [copy]-right exists, unless it is affirmatively forbidden or taken away,” and that “the right has been exercised by numerous reporters, officially appointed, made sworn public officers, and paid a salary under the governments both of States and of the United States.” *Id.* at 647.

2. *The same principles that govern the copyrightability of judicial opinions and associated commentary also apply to works created by legislators in performing their lawmaking duties, and to associated commentary on those works*

In holding that the work of judges “in their capacity as judges” is not copyrightable, this Court has emphasized the “public policy” that a judge’s “authentic exposition and interpretation of the law” should be “free for publication to all.” *Banks*, 128 U.S. at 253. If the “exposition and interpretation of the law” by judges must be freely available as a matter of policy, *ibid.*, it follows *a fortiori* that the actual sources of law that judges interpret and apply—including statutory law produced by legislators—must be equally available.³

The most obvious implication of that principle is that a legislator cannot qualify as a Copyright Act “author”

³ Works created by executive officials in agency rulemaking and adjudication reflect quasi-legislative and judicial forms for executive authority, cf. *City of Arlington v. FCC*, 569 U.S. 290, 304 n.4 (2013), and thus may be treated similarly for copyright purposes.

of statutes enacted into law. But just as the rule that judges cannot copyright works created “in the discharge of their judicial duties” “extends to *whatever* work [judges] perform *in their capacity as judges*,” such that the “*whole work done by the judges * * ** is free for publication to all,” *Banks*, 128 U.S. at 253 (emphases added), the bar to copyright in materials drafted by legislators extends beyond statutory texts. Under the logic of the Court’s decisions, a legislator, like a judge, will not qualify as an “author” with respect to the “whole work” that he performs in his capacity as a *lawmaker* in discharging his duties during legislative proceedings. Original works created by legislators—such as the text of unenacted bills, floor statements concerning legislation, committee reports, and similar materials produced as a legislator discharging his lawmaking duties during legislative proceedings—are covered by that principle.⁴

Those principles, however, do not extend beyond works by legislators who are responsible for creating the law. Even though a reporter of decisions may create a “large amount of matter” (*e.g.*, summaries or headnotes) that is “valuable to the persons using the [judicial] decisions,” this Court has found “no ground of public policy” preventing the assertion of copyright in such materials by a “sworn public officer” paid to summarize and provide background for understanding judicial

⁴ Different questions are presented in circumstances in which a private entity creates a copyrightable work that is subsequently incorporated into legislation and adopted as law. Cf. *Veeck v. Southern Bldg. Code Cong. Int’l, Inc.*, 293 F.3d 791 (5th Cir.) (privately created building code), cert. denied, 537 U.S. 1043 (2002), and 539 U.S. 969 (2003). This case does not implicate those questions.

opinions. *Callaghan*, 128 U.S. at 620-621, 647, 650. Similarly here, there is no public policy against conferring copyright protection on works that are created by persons other than legislators outside the legislative process for lawmaking to explain or summarize materials concerning statutory enactments.⁵

Consistent with that understanding, Justice Harlan (joined by then-Judge Taft) concluded in *Howell v. Miller*, 91 F. 129 (6th Cir. 1898), that copyright analysis of an annotated statutory compilation proceeds “[u]pon like grounds” as copyright analysis of an annotated compilation of judicial opinions. *Id.* at 138. Since no person can copyright judicial opinions that explain and interpret law, it follows that “no one can obtain the exclusive right to publish [the underlying statutory] laws”

⁵ The court of appeals (Pet. App. 18a, 23a n.1, 32a-36a) and petitioner (Br. 17-18, 22-23) both invoke Section 105, which provides that copyright protection does not apply to “any work of the United States Government,” 17 U.S.C. 105, *i.e.*, any “work prepared by an officer or employee of the United States Government as part of that person’s official duties,” 17 U.S.C. 101. Section 105, however, does not speak to the question here. Section 105 is a federal-government provision intended to parallel the work-make-for-hire principle, under which the federal government could be considered the “author” of such works directly prepared by its officers or employees. See 17 U.S.C. 201(b); *1976 House Report* 58 (stating that both “concepts are intended to be construed in the same way”). Section 105 accordingly reflects Congress’s proprietary determination to disclaim any copyright in such works (which would otherwise be owned by the United States) in order to place those materials “in the public domain.” See *id.* at 58-59. By contrast, the interpretation of “author” in the *Wheaton* line of cases rests on a different rationale, namely, that certain judicial and legislative actors are not considered “authors” of certain works. That distinct theory affecting a smaller subset of governmental works would independently apply to the federal government (as well as the States) even if Congress had never enacted Section 105.

themselves. *Id.* at 137. When the text of such written law has been compiled and published, anyone may “cut from [code] books * * * the general laws of [a State] as therein printed” and use “the pages so cut out” to publish a new compilation. *Ibid.*

The court in *Howell* further held, however, based on the same analogy to judicial opinions, that materials prepared by non-legislators to explain or summarize state statutes could receive copyright protection, even when those materials were included within the same volume as the statutes themselves. The *Howell* court observed that, under this Court’s decisions, “the reporter of a volume of law reports can obtain a copyright for it as an author” that encompasses “the parts of the book” that he has written, even though “he has no exclusive right in the judicial opinions published.” 91 F. at 138 (quoting *Callaghan*, 128 U.S. at 650). The court held that *Howell* likewise “was entitled to have copyrighted his volumes of Annotated Statutes, and that such copyright covers all in his books that may fairly be deemed the result of his labors.” *Ibid.* The court held that a law compiler’s “copyright would embrace all * * * matters”—including “marginal references, notes, memoranda, table of contents, indexes, and digests of judicial decisions”—that the compiler had prepared. *Ibid.* Accord *Davidson v. Wheelock*, 27 F. 61, 62 (C.C.D. Minn. 1866).

B. The Court Of Appeals Erred In Holding That The Annotations In The OCGA Are Not Copyrightable

The court of appeals largely accepted the general analytic framework described above, under which judicial or legislative documents that have the force of law are not copyrightable, but annotations or similar explanatory materials typically are. The court recognized, in

particular, that “annotations created by a private party generally can be copyrighted because the annotations are an original work created by a private publisher.” Pet. App. 2a. Based principally on three aspects of the OCGA annotations’ creation and placement, however, the court held that those annotations are “sufficiently law-like so as to be properly regarded as a sovereign work.” *Id.* at 4a.

The court of appeals was correct that the OCGA annotations’ lack of binding legal effect does not, in and of itself, resolve the copyright inquiry. The rule that a judge cannot assert or assign a copyright in a judicial opinion is not limited to precedential decisions having binding legal force (let alone to the portion of a judicial opinion that articulates a binding rule). By the same token, materials like legislative committee reports, floor statements, and unenacted bills, which are created by legislators in the performance of their lawmaking functions, are not entitled to copyright protection even though they lack the force of law. See p. 21, *supra*.⁶

⁶ As petitioner observes (Br. 6-7, 30), a Copyright Office internal manual states that “annotations that summarize or comment upon legal materials” may be copyrighted “unless the annotations themselves have the force of law.” U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices* § 313.6(C)(2) (3d ed. Sept. 29, 2017), <https://www.copyright.gov/comp3/docs/compendium.pdf>. That passage simply states that, if a particular legal annotation somehow had the force of law, it would not be subject to copyright protection. It does not address the copyright status of materials like legislative committee reports or floor statements. And petitioner recognizes (Br. 40) that, although the Court in *Banks* identified the “binding” nature of judicial opinions as a justification for precluding copyright protection, 128 U.S. at 253, the rule announced in *Banks* is not limited to opinions having binding legal effect.

The features of the OCGA annotations that the court of appeals identified, however, provide no sound basis for the court's conclusion that those annotations are ineligible for copyright protection.

1. The court of appeals stated that "Georgia's legislators are in a very real way the creators of the annotations" at issue here. Pet. App. 32a; see *id.* at 26a-38a. The court based that characterization on the Commission's purported status as "an arm of the General Assembly," *id.* at 26a, and on the "highly detailed instructions" given by the Commission to the private party (currently Lexis) that prepares the annotations, *id.* at 27a. That reasoning is seriously flawed.

a. The fact of supervision by officials whose own work product would not be copyrightable has not heretofore precluded copyright protection where the statutory prerequisites are otherwise satisfied. The official court reporter in *Callaghan* was a "sworn public officer" who received a salary from the State of Illinois. 128 U.S. at 647. His office was created by an Illinois statute, *id.* at 645, under which he was appointed and removable by the Illinois Supreme Court, *id.* at 646; yet this Court held that the annotations he prepared were eligible for copyright protection.

b. Although a majority of the Commission's members are members of Georgia's General Assembly, the Commission acts in its own name pursuant to its own statutory authority, not in the name of the legislature. See OCGA § 28-9-3 (2018). Commission members in performing their duties as such therefore are not acting as lawmakers. And the Commission as a body is not authorized to exercise legislative powers.

c. The nature of the contractual directives that the Commission gives to Lexis belies any reasonable inference that Georgia legislators are dictating the content of the annotations included in the OCGA, or that those annotations bear the Commission's imprimatur. As an example of the Commission's "punctiliously specific instructions on how [the annotations] are to be prepared," the court of appeals stated that "the publication contract tells Lexis which court decisions to include" and "specifies the content of these summaries." Pet. App. 27a. But since the contract directs Lexis to include *all* published decisions addressing a particular Code section in the annotations for that section, see J.A. 539, the inclusion of a given judicial decision within the annotations does not suggest legislative approval of the decision's interpretation of the Code. In support of its statement that the contract "specifies the content of" the annotations, the court of appeals quoted contractual language that mandates inclusion of all judicial "constructions concerning constitutionality, purpose, intent, and the meaning of words and phrases." Pet. App. 27a; see J.A. 540. But that sort of generic comprehensiveness mandate provides no sound basis for treating "Georgia's legislators" as the de facto "creators of the annotations." Pet. App. 32a.

2. The court of appeals also found the OCGA annotations to be "law-like" in the sense that they are "authoritative" sources on the meaning of Georgia statutes." Pet. App. 38a; see *id.* at 38a-46a. The court based that characterization on the Georgia-law requirement that the statutory portions of the OCGA must be "merged" with the annotations, *id.* at 39a (quoting OCGA § 1-1-1), and on "the legislature's decision to label the unified whole 'Official,'" *id.* at 41a. That analysis is unsound.

a. The governing Georgia law emphasizes the distinction between the statutory provisions contained in the OCGA, which have binding legal effect, and the corresponding annotations, which do not. Georgia law makes clear that, although “[t]he statutory portion of the codification of Georgia laws” as originally prepared by the Michie Company and the Commission was “enacted and shall have the effect of statutes,” OCGA § 1-1-1 (2019), “[a]ll historical citations, title and chapter analyses, and notes” (*i.e.*, annotations) “do not constitute part of the law.” OCGA § 1-1-7 (2019). And while the Georgia legislature annually passes reviser acts that reenact the “statutory portion” of the OCGA with corrections, those acts provide that the OCGA’s “[a]nnotations * * * are not enacted as statutes.” See, *e.g.*, Act No. 275, § 54(b) and (c), 2017 Ga. Acts 819; see pp. 10-11, *supra*.

b. The requirement that the statutory portions of the OCGA must be “merged” with the annotations likewise does not give the annotations any special legal status. Pet. App. 31a-32a, 40a-41a. The relevant Georgia-law provision instructs that “[t]he statutory portion of [the] codification shall be merged with annotations * * * and other materials *pursuant to the contract*” between the Commission and the Michie Company. OCGA § 1-1-1 (emphasis added). That directive merely reflects that, as provided by the contract, the two components must be physically merged into a single document.

The physical proximity of state statutory text and associated annotations does not distinguish the OCGA from any privately compiled annotated code, which all parties agree would be subject to copyright. See Br. in Opp. 3; Pet. Br. 3. Nor does that physical proximity alter the character of the annotations as research aids that merely describe relevant materials. This Court in

Callaghan held that a court reporter was entitled to copyright in the materials he had created, even though those materials were published in the same “volume” as the uncopyrightable judicial opinions. See 128 U.S. at 650 (endorsing the “general proposition that the reporter of a volume of law reports can obtain a copyright for it as an author, and that such copyright will cover the parts of the book of which he is the author, although he has no exclusive right in the judicial opinions published”). There is no sound reason to apply a different approach to annotated legislative codes.

c. The Georgia legislature’s designation of the OCGA as “Official” does not give the OCGA’s *annotations* any special legal status. In the term “Official Code of Georgia Annotated,” the adjective “Official” modifies the noun “Code.” That adjective’s import is that, although other compilers are free to reproduce and disseminate the statutes enacted by the Georgia legislature, only the reproductions of those statutes set forth in the OCGA will be treated as authoritative. But the Georgia Supreme Court has cautioned that the “inclusion of annotations in [the] ‘official’ Code” does not “give the annotations any official weight.” *Harrison Co. v. Code Revision Comm’n*, 260 S.E.2d 30, 35 (1979).⁷

⁷ The court of appeals stated that its conclusion was “reinforced” by state-court opinions that had characterized OCGA annotations as having “conclusive” force. Pet. App. 43a-44a. The court of appeals cited decisions in which Georgia courts had addressed materials prepared by the Georgia bar, not materials created under the auspices of the Commission. See, e.g., *id.* at 44a (citing *Magner v. One Sec. Corp.*, 574 S.E.2d 555, 560-561 (Ga. Ct. App. 2002) (quoting commentary to OCGA § 14-2-1323 as providing definition of statutory term)); OCGA, Tit. 14, at 1 note (2017) (note from the Commission stating that the comments were “prepared under the supervision of the State Bar of Georgia” and that neither the legislature nor

In *Callaghan*, this Court held that annotations contained in “the official edition of the [Illinois] reports,” 128 U.S. at 646, were entitled to copyright protection. Likewise in *Howell*, the court of appeals held that the author could copyright the annotations in the only officially recognized Michigan code printed in the 1880s. *Howell*, 91 F. at 131, 138. Those decisions confirm that otherwise-copyrightable material does not lose copyright protection simply because it is included within an official state document that also contains unprotectable components.

d. It also bears noting that, at least in the main, the annotations at issue here are not standalone summaries or explanations of the corresponding statutory provisions themselves. Rather, the annotations summarize separate documents in which persons outside the Georgia legislature—most notably, state and federal courts, and the Georgia Attorney General—have interpreted Georgia statutes. The value of the annotations as research aids depends on their accuracy in summarizing those documents, without regard to whether the documents themselves correctly interpret the Georgia Code. Cf. p. 26, *supra* (noting that Georgia law requires the OCGA to include annotations for all published judicial decisions construing Georgia statutes). That feature of the annotations further reduces the likelihood that “the citizens of Georgia [will] consider the annotations as

the Commission had “participated in the drafting of,” or had “reviewed[,] the comments”). Georgia does not assert copyright over those materials, see Pet. Br. 41 n.12, and all are also available in West’s annotated unofficial code of Georgia. See, *e.g.*, Ga. Code Ann. §§ 14-2-1323 comment, 14-8-38 comment, 14-9-101 comment (West 2019). Neither the parties nor the court of appeals has cited any decision in which a Georgia court has given authoritative weight to the annotations at issue here.

containing special insight into the meaning of the statutory text.” Pet. App. 42a.

3. Finally, the court of appeals was also wrong in stating that “the process by which the OCGA annotations were created is similar to the ordinary process by which laws are enacted.” Pet. App. 49a; see *id.* at 47a-51a. To be sure, the Georgia legislature was the body that initially established the Commission and determined that annotations would be included within the same document as the State’s Official Code. It is also true that “the General Assembly votes each year to amend the OCGA and reaffirm its status as the official codification of Georgia’s laws.” *Id.* at 48a. But the process by which particular annotations are created and placed in the OCGA bears no resemblance to the process by which Georgia laws are drafted and enacted. The annotations are drafted by Michie and Lexis employees rather than by Georgia legislators or their staffs, and the Georgia legislature has made clear that the annotations “are not enacted as statutes.” See pp. 10-11, 27, *supra*.

In analogizing the creation of OCGA annotations to the enactment of Georgia laws, the court of appeals thus attached undue weight to the Georgia legislature’s undoubted authority to superintend, and conceivably discontinue, the overall process by which the OCGA is created and maintained. The Court’s precedent makes clear that this form of control is insufficient to render copyright protection unavailable. In *Callaghan*, for example, the State of Illinois undoubtedly would have had authority to determine whether “the official edition of the [Illinois] reports,” 128 U.S. at 646, would contain annotations and, if so, what sort of annotations they should be; yet the official reporter was nevertheless entitled to

copyright protection as the “author” of the annotations he drafted. Indeed, the Court reached that conclusion even though the court reporter was a public employee whose office was created by an Illinois statute and who was appointed and removable by the Illinois Supreme Court. *Id.* at 645-646. If those mechanisms for state legislative and judicial control over the court reporter’s work were insufficient to preclude copyright protection, there is no reason for a different conclusion here.

The attributes that the court of appeals identified thus do not meaningfully distinguish the OCGA annotations from the sorts of explanatory materials that have historically received copyright protection. Rather, the OCGA’s annotations are just as they appear—annotations—which are “given for the purpose of convenient reference.” OCGA § 1-1-7. And just as a private law compiler could obtain a copyright in original annotations that it adds to accompany the statutory text, *Howell*, 91 F. at 137-138 (Harlan, Circuit J.), so too can the State of Georgia.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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