

No. 18-1150

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IN THE  
*Supreme Court of the United States*

GEORGIA, ET AL.,

*Petitioners,*

v.

PUBLIC.RESOURCE.ORG, INC.,

*Respondent.*

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

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**BRIEF OF RESPONDENT**

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## **QUESTION PRESENTED**

The Official Code of Georgia Annotated (OCGA) is Georgia's only official code of law and is "published under authority of the State of Georgia." Georgia courts routinely cite annotations and other parts of the OCGA that formally lack the force of law as nonetheless authoritative. Every element of the OCGA is "finalized under the direct supervision" of Georgia's legislative branch, and the OCGA only exists because Georgia law requires that Georgia's statutes be "merged" with other material before being published "by authority of the State" in the form of Georgia's only official code.

The question presented is:

Is the OCGA an edict of government?

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## INTRODUCTION

In a series of nineteenth-century cases, this Court held that judicial writings and other official legal works “published under the authority of” the State are not “the proper subject of private copyright.” *Callaghan v. Myers*, 128 U.S. 617, 649-50 (1888) (quoting *Gray v. Russell*, 10 F. Cas. 1035, 1039 (C.C.D. Mass. 1839) (Story, J.)). That rule of course covers texts with binding legal effect, which once adopted by the State, can be published as “found in any printed book.” *Howell v. Miller*, 91 F. 129, 137 (6th Cir. 1898) (Harlan, J.). Importantly, however, it also includes legal works that lack independent, binding force if they embody the legal authority of state actors rather than the personal authorship of a drafter or private publisher. See *Banks v. Manchester*, 128 U.S. 244, 253 (1888) (excluding *all* judicial work from copyright). This rule is known as the government edicts doctrine.

The Official Code of Georgia Annotated (OCGA) is Georgia’s only official Code and is unambiguously “published Under Authority of the State of Georgia.” Add. 2 (OCGA title page). Indeed, it exists only because Georgia’s legislature affirmatively requires that Georgia’s statutes be “merged” with other materials before being published “by authority of the state” as Georgia’s only Code. OCGA §1-1-1. Every bill enacted in Georgia is thus a bill “[t]o Amend ... the Official Code of Georgia *Annotated*.” JA61 (emphasis added). And the creation of the OCGA and all its parts is supervised by a state commission that operates “within the sphere of legislative authority.” *Harrison Co. v. Code Revision Comm’n*, 260 S.E.2d 30, 34 (Ga. 1979). Georgia courts thus regularly cite the OCGA’s “non-statutory” materials as legal authority. And that is

unsurprising, because the whole document holds itself out as an authentic legal work of the State.

The question presented is whether the OCGA is thus an uncopyrightable “edict of government” or instead an “original work of authorship” under 17 U.S.C. §102. It is the former. While some of the OCGA’s non-statutory content is initially prepared by LexisNexis editors (under the State’s “direct supervision,” JA516), Georgia has intentionally cloaked the whole work in the State’s legal authority. That veil of state approval is convincing enough to confound even Georgia’s own courts—let alone ordinary citizens seeking to distinguish state-sanctioned materials from those that (allegedly) convey only Lexis’s private, authorial choices. *Contra* Ga.Br. 49. Georgia can surely let Lexis both publish its own codification of Georgia’s laws and also copyright whatever original contributions Lexis wants to make to that private publication. But nothing in copyright law, the seminal cases, or common sense suggests that, by inserting Lexis into a process that begins and ends with state legislative authority and personnel, the State can transform an official legal document that holds itself out as “published under the authority of the State” into a copyrightable work.

Georgia contests this proposition by offering an untenable legal rule properly rejected by the Eleventh Circuit and the United States as *amicus* here. On its view, the government edicts doctrine forbids copyrighting *only* legal materials with “binding” or “independent legal force.” Ga.Br. 3. But while that is *sufficient* to foreclose copyright, it cannot be *necessary* under this Court’s precedents, as the United States recognizes. *See* U.S.Br. 24. What matters, instead, is

whose authority the purported edict conveys—the supposed author’s, or the State’s. *See infra* pp.32-33; *compare* U.S.Br. 21 (copyright excludes “whole work” of any state actor operating “as a lawmaker”).

Having rejected Georgia’s rule, the United States nonetheless joins it in arguing that the OCGA fails the operative test for a government edict. Yet this analysis (U.S.Br. 25-29) questions only the local court of appeals’ reasonable interpretation of Georgia’s state-law regime, and this Court’s “customary practice” when granting certiorari is to “follow that interpretation,” *see Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1149-50 (2017)—as we stressed in acquiescing to certiorari. *See* BIO 5 n.1, 14 n.3. In any event, the court of appeals got it right; the OCGA is in fact the official state legal work that it purports to be.

This case may well be “close,” as the Eleventh Circuit suggested, because of the very state-law ambiguities it reasonably resolved. But, importantly, any line-drawing challenge here arises not from some “uncertainty” lurking in this Court’s cases, *contra* Ga.Br. 55, but from Georgia’s own persistence in flirting with the line the cases draw. It would be easy to publish and copyright material like the OCGA’s annotations as private authorship were that all Lexis or Georgia really meant to do. The problem is that they mean to do something more: They want to make the OCGA legally special for Lexis’s commercial benefit, and then turn around and deny that there’s anything special about it—at least as to the only parts one could conceivably copyright.

The government edicts doctrine does not permit that sleight of hand, and there’s no reason it should;

whatever such a scheme promotes, it is not “the Progress of Science and useful Arts.” U.S. Const. art. I, §8, cl. 8. This Court’s cases contemplate compilers of legal materials claiming what is “clearly” or “plainly” their “own” work, and this Court can affirm just by holding the OCGA to that standard. Legal publishers can surely claim the value they create by annotating otherwise official legal works—whether it be in a book like West’s unofficial U.S. Code Annotated or Nimmer on Copyright. What they cannot claim is a monopoly on the additional value conferred on their supposed authorship when it is, like the OCGA, adopted by or “published under the authority of the State.”

## STATEMENT OF THE CASE

### I. Background

**A. The OCGA.** The OCGA was first published in 1982. Pet.App. 5a. Seeking to create a new, official codification of Georgia’s laws, the General Assembly created a Code Revision Commission consisting mostly of its own members and staffed by its Legislative Counsel. *See* Pet.App. 7a, 29a-30a. The Assembly eventually empowered this Commission to contract with a publisher to help in this endeavor, OCGA §28-9-3, and it chose Michie (now, Lexis) to assist. Though it could have created an unannotated code, an annotated code, or both, *id.*, the Commission decided to contract with Michie to create *only* an annotated code. The legislature eventually adopted that code as the Official Code of Georgia Annotated through various bills the Commission drafted and introduced. JA244-46.

The name “Official Code of Georgia Annotated” can contribute to a misimpression that there exists some “Official Code of Georgia” to which Lexis simply

adds “annotations” in its capacity as a normal legal publisher. *See, e.g.*, Ga.Br. 1-2, 8. In fact, Georgia has no “Code” but the OCGA, it is a creation of the State and its legislative personnel, and neither Lexis nor anyone outside Georgia’s legislative branch can add anything to it at all.

1. There is no dispute that the OCGA as a whole represents Georgia’s only official code. Pet.App. 60a. The printed OCGA’s statutory text controls over every other version, JA190, and any reference in any public or private document to Georgia’s laws is understood as a reference to the corresponding OCGA section. *See* OCGA §1-1-8. Any typical bill passed by the General Assembly begins: “An Act ... [t]o amend ... the Official Code of Georgia *Annotated*,” JA143 (emphasis added); indeed, there is no other candidate code to amend. And when those bills refer to amending the OCGA, they are *by law* referring to it as a complete work, including all the material at issue here. *See* OCGA §1-1-1 (A statutory portion is “merged” with annotations and “published by authority of the state ...[,] and *when so published* shall be known and may be cited as the ‘Official Code of Georgia *Annotated*.’”) (emphasis added).

The OCGA is also held out as uniquely authoritative. The title page announces that it is “Published Under Authority of the State of Georgia.” Add. 2. So do multiple Code sections. *See, e.g.*, OCGA §1-1-1, §1-1-8(e). Georgia’s state emblem appears prominently on the cover and title page. *See* Add. 1-2; JA713. And the legislature had to specifically authorize this display of the State’s authority, OCGA §50-3-8, because Georgia otherwise criminalizes such use of the state seal. *Id.*

With the legislature’s blessing, Lexis thus emphasizes the OCGA’s “official” character in advertisements. Resp. C.A. App. 173. And while “[t]he Harrison Company began publishing unofficial versions” of the previous Georgia Code in 1936, *Georgia v. Harrison Co.*, 548 F. Supp. 110, 112 (N.D. Ga. 1982), *vacated*, 559 F. Supp. 37 (N.D. Ga. 1983), the OCGA’s “Foreword” explains that the OCGA—including its “[a]nnotations, indexes, editorial notes, and other materials”—represents “the first official Code to be *published under authority of the State of Georgia* since the Code of 1933.” JA237 (emphasis added).

Georgia’s brief mentions an unannotated legislative manuscript from 1981, perhaps suggesting that this represents the real code. But Georgia never published this document as an “Official Code of Georgia” to which annotations were later added, *contra* Ga.Br. 8, because Georgia never published it at all. Instead, it “enacted” that manuscript by reference while keeping it “on file in the office of the Secretary of State,” *see* Act No. 1, §2, 1981 Ga. Stat., Extraordinary Sess. 8, and did so merely to facilitate the whole OCGA’s initial publication as the official code in 1982. JA237. In fact, when the Harrison Company obtained a copy of that manuscript and tried to incorporate it into its unofficial code, the State sued Harrison for violating its copyright, explicitly arguing that it was not in the public domain because it had “never been published.” *See Harrison*, 548 F. Supp. at 115. The only official document promulgated under the State’s authority and setting forth its laws is thus the OCGA itself. And the OCGA’s own annotations accordingly explain that lawyers citing any other document will do so “at their peril.” OCGA §1-1-1 (Judicial Decisions).

Georgia also repeatedly references an unannotated version of the code that Lexis publishes online. There are many problems with this website, *see infra* p.13, but whatever it represents, it is not an “Official Code” that exists apart from the OCGA. *Contra* Ga.Br. 1. Landing on this website produces a Terms and Conditions page that refers to the contents only as the “Code of Georgia” (without the “Official” part) and prominently explains that the most recent print version is the only authoritative text. JA50. In fact, the incorporated Terms and Conditions actually *disclaim* any warranty that the site is accurate. JA186. That contrasts with the OCGA, which displays an official authentication from the Secretary of State. Add. 3. Likewise, while this website displays Lexis’s branding, it makes no reference to Georgia’s authority or state emblem. This is the reverse of what would be expected if this were the “Official Code of Georgia” and the OCGA merely reflected Lexis’s post-hoc additions. In truth, the OCGA is the only Code, and the private company’s website (and any other unannotated code) can only be produced derivatively from the OCGA itself.

2. Responsibility for creating the OCGA and its contents also clearly lies with Georgia’s legislative branch. The OCGA itself lists its authors as including the “Code Revision Commission” and the “Office of Legislative Counsel”—indeed, it lists them ahead of “The Editorial Staff of LEXIS Publishing.” Add. 2.

The “Office of Legislative Counsel” is the General Assembly’s legislative staff, tasked by Georgia law with advising “the legislative branch of government.” Pet.App. 29a-30a; OCGA §28-4-3(c)(4). They staff the Code Revision Commission in the same capacity.



OCGA §28-9-4. The Commission, meanwhile, is composed largely of Georgia lawmakers and funded out of appropriations “provided for the legislative branch of state government.” OCGA §28-9-2(c). Were there any doubt about its fundamentally legislative character, the Georgia Supreme Court has held that “the work of the Commission”—which includes “contracting for and supervising the codification of the laws enacted by the General Assembly, *including court interpretations thereof*”—lies “within the sphere of legislative authority” under Georgia’s Constitution. *See Harrison*, 260 S.E.2d at 34 (emphasis added). The Commission is thus “plainly an adjunct of the General Assembly.” Pet.App. 31a. It can even draft and “introduce legislation[] *through its members*.” JA252 (emphasis added); OCGA §28-9-3(17), §28-9-5(c).

3. In two key respects, the process of the OCGA’s creation also belies any suggestion that it represents only Lexis’s own additions to the otherwise “Official Code of Georgia.”

*First*, the Commission exercises complete control over the content of the OCGA and its annotations. This is not an implicit power, like “removal” authority. *Contra* U.S.Br. 25, 31. Instead, the “undisputed material facts” are that these annotations are “finalized under the *direct* supervision of and subject to the approval of the Code Revision Commission.” JA515-16 (emphasis added). The United States’ suggestion that “th[e] annotations [do not] bear the Commission’s imprimatur,” U.S.Br. 26, is therefore curious. For its part, Georgia nowhere contests that the work at issue should be considered the Commission’s for present purposes; indeed, it thinks “the Commission” should

be “considered the annotations’ author” under the work-made-for-hire doctrine. Ga.Br. 25.

In any event, reality confirms that the Commission is the OCGA’s fundamental creator. As the Eleventh Circuit explained, the Commission’s contract with Lexis provides “punctiliously specific instructions” on how the annotations are to be prepared and arranged. Pet.App. 27a. But that is only the beginning. The contract also incorporates a “Publication Manual” that is 180 Joint Appendix pages long and specifies the most minute details of what annotations to include and how to draft them. *See* JA255-435; *compare* U.S.Br. 26 (discussing only one aspect of contract and ignoring manual).

Any summary of this interminable manual will necessarily obscure its meticulous and imperious character. Among other things, it commands an exact ordering for at least fifteen different types of added material, JA275-76, sets forth the exact content of the different kinds of notes to create in a host of ultra-specific circumstances, *e.g.*, JA314-18, 332-43, 350-56, 375, 380-98, dictates which type faces, fonts, and sizes apply to different usages, JA276-78, and demands use of the “Harvard’ comma” in case notes, JA412. At one point, it tells Lexis to handle a situation by “add[ing] a note *precisely* as follows.” JA326 (emphasis added).

These directions are primarily substantive, however, not stylistic. For example, they set forth a precise standard on which cases to annotate. *See* JA404 (“The standard for determining if an annotation is necessary is: ‘is there any indication that the court is construing the Georgia Code or Constitution?’”). The Commission also makes important judgment calls, like whether annotations for unpublished decisions

should be included, *see id.*, and when uncodified acts should appear in the OCGA through its editorial notes—which is, notably, “where relevant to *interpretation or application of the Code*,” JA281 (emphasis added). Unsurprisingly, these notes are then regularly cited as authoritative legal statements by Georgia courts when they are trying to interpret or apply Georgia law. *See infra* pp.48-49 (collecting examples).

There is also every indication that the Commission reviews the annotations in fact. Lexis is required to place brackets around every new item so that the State can review it, including changes to “case notes, notes, amendment notes, etc.” JA285. Even for “research references,” the Commission instructs: “Do not delete any ALR notes without first notifying the state.” JA420-21. When a volume is being replaced, Lexis must “[x]erox all deleted case notes and opinions of the Attorney General, briefly state [the] reason for deletion ... and send to the state.” JA433. And, of course, nothing in the OCGA can change without the State’s say so. Pet.App. 29a.

*Second*, Georgia’s process for creating the OCGA is ultimately controlled by the legislature. The OCGA does not exist as an official state document until the “statutory portion” is “merged” with “annotations, captions, catchlines, history lines, editorial notes, cross-references, indices, title and chapter analyses, and other materials,” and the whole work is then “published by authority of the state.” OCGA §1-1-1. The entire OCGA as “merged” thus represents the State’s authentic publication of the law. And this is the exact *opposite* of the typical case with an unofficial compilation, where the State attaches its authority to official

documents, which someone else later compiles and expands with their own original work. *Compare infra* pp.32-35.

The General Assembly also chooses to retain this provision each year when passing a “Reviser Act” updating the OCGA as the only official codification of Georgia law. *See* Pet.App. 47a-48a. Accordingly, while its non-statutory portions are not technically enacted “as statutes,” and “do not constitute part of the law” in the same way as the statutory text, *see* Pet.App. 6a, the OCGA begins and ends with the work of the State’s legislative branch, Pet.App. 47a-48a.

**B. Georgia’s Copyright.** Georgia asserts a broad copyright over the OCGA. It is therefore untrue that Georgia only “claims copyright” in “annotations” like the OCGA’s judicial summaries. *Contra* Ga.Br. 8 & n.2 (citing JA496-97). In fact, Georgia expressly refuses to disclaim copyright in any OCGA matter save the statutory text and its numbering. *See* JA497-98. It asserted the same super-broad copyright claim against NBC’s local affiliate when it sought access to the OCGA for a segment covering Georgia’s choice to copyright its laws. *See* JA162. Georgia thus “claims copyright” over a host of materials scattered across every OCGA page and *inside* statutory paragraphs. That includes “*catchlines* of Code sections; *names* of Titles, Chapters, Articles, Parts, and Subparts; *history lines*; editor’s notes; Code Commission notes; annotations; research references; indexes; and *other such materials*,” all of which are “copyrighted by the State of Georgia and shall not be republished without permission.” *Id.* (emphasis added).

At least until now, Georgia has made quite clear that it views only the statutory text and numbering as

immune from copyright, while everything else is fair game for a future infringement suit. This case will thus control copyright claims extending to the names and captions of OCGA sections, along with material interlineated with statutory text.<sup>1</sup>

A few other States—including Georgia’s *amici*—assert even broader copyrights. For example, Mississippi’s Code provides that “[*a*ll parts of any act passed by the Mississippi Legislature, or of any [state authorized] code” including the laws themselves and “numbers assigned to sections,” are “exclusive property of the State of Mississippi, to be used only as the joint committee may direct.” Miss. Code Ann. §1-1-9(2) (emphasis added).

Such broad assertions seriously restrict the effective publication and circulation of official laws. For example, in order for Westlaw and other legal publishers to provide the OCGA’s statutory text to users, they must invent their own *titles* and *captions* for each provision, while scrubbing out all interlineated catchlines, history lines, and other matters, to say nothing of the various other “annotations” Georgia copyrights. Compare OCGA §1-1-4 (“Validating Acts”), with Ga. Code Ann. §1-1-4 (West) (“Validation of evidence of indebtedness”). The uncertainty surrounding a host of dubious copyright claims is thus shifted to anyone who might want legitimately to republish some or all of the State’s officially adopted legal work. The apparent object of such broad claims is not to spread the cost of

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<sup>1</sup> That is true both practically and formally, because respondent countersued seeking a declaration that the whole of the OCGA is uncopyrightable. JA40.

creating “annotations” through licensing *those annotations*, but rather to profit-maximize on the “Official” status of the OCGA as a whole—which only Lexis can publish. Accordingly, when other publishers like Fast-case seek licenses for the OCGA, they are told that they are not available “at any price.” JA207.

Georgia’s broad copyright also leads to problems with the “free” website Lexis maintains for the “unannotated” code. Because this website includes section titles and history lines, Georgia continues to assert copyright over it, while Lexis requires users to agree to its Terms and Conditions before using it. Those Terms and Conditions disclaim any warranty of accuracy, JA186, require users to “agree that the Content and Web Site are protected by copyrights,” JA166, ban “copy[ing],” even for “public purposes,” JA165, and demand submission to the jurisdiction and laws of New York, JA179-80. Georgia’s copyright assertion over the OCGA as a whole thus puts far more at stake here than just “annotations.” *Contra* Ga.Br. 8 & n.2.

## II. Procedural History

Respondent Public.Resource.Org, Inc. (PRO) is a public interest organization that promotes access to government records and primary legal materials. Pet.App. 8a. It publishes online the official codes and other rules, regulations, and standards legally adopted by federal, state, and local authorities. In so doing, PRO digitally transforms the content to make it more accessible to blind users, easier to find through search engines, and easier to work with in general. *See* JA224-25. This has earned it the ire of States that copyright their only official codebooks, as well as standards organizations that copyright the codes they

successfully lobby authorities to enact into positive law. *See, e.g., Am. Soc’y for Testing & Materials v. Public.Resource.Org*, 896 F.3d 437 (D.C. Cir. 2018) (*ASTM*). That said, several States that have initially threatened PRO have later determined that PRO’s efforts actually further the State’s interest in disseminating its official legal materials. JA221-23.

PRO has no commercial interest in this work: Its site is free and unencumbered by advertisements, conditions, or assertions of rights. PRO and its founder simply believe that the materials it posts belong in the public domain, so that citizens can better know and understand the rules governing their lives.

After PRO scanned and published the OCGA, Georgia sued it for copyright infringement. PRO defended on multiple grounds including merger and fair use, and also countersued, seeking a declaration that the complete OCGA was an uncopyrightable government edict. JA40. The district court rejected these arguments and entered an injunction broadly prohibiting PRO from posting the OCGA. Pet.App. 74a-75a.

The Eleventh Circuit reversed. Echoing other courts, it understood the question in terms of “authorship,” posing the question as whether the OCGA was constructively authored “by the People” and not its allegedly private authors. *E.g.*, Pet.App. 21a-26a. The court identified three factors affecting this authorship inquiry: (1) the identity of the relevant state actors and whether they exercised state lawmaking authority, (2) the authoritative nature of the work, and (3) the process through which it was created. Pet.App. 4a. Because these combined inquiries identified the OCGA as “sufficiently law-like” to be attributed to public authorship, it could not be copyrighted.

Pet.App. 26a. The court thus did not reach PRO's fair use defense.

In reaching this conclusion, the court of appeals exhaustively analyzed and characterized the relevant state law. It emphasized the provision "merging" the OCGA's statutory text with its annotations before rendering it "Official," and contrasted such provisions with others disclaiming any legal effect in the non-statutory elements of the OCGA. It found that Georgia courts cite those non-statutory elements as authoritative, and recognized that both state law and the publishing contract give state legislative actors direct supervision over the OCGA's creation. It carefully balanced these points against the counterpoint that OCGA annotations are not enacted through bicameralism and presentment. And it ultimately concluded based on this meticulous and even-handed state-law analysis that the OCGA was properly understood as an authoritative work of the State's legislative branch. *See generally* Pet.App. 24a-53a.

Georgia sought certiorari, asserting a clean circuit split. Pet. 15-24. PRO acquiesced because it is frequently sued and needs a clear rule governing when and to what extent it can post official codes adopted by state legislatures. BIO 9-14. It warned, however, that this case would not be a suitable vehicle if Georgia intended to contest the Eleventh Circuit's very particularized determinations surrounding Georgia's state-law regime. BIO 5 n.1, 14 n.3. Certiorari was granted.



### SUMMARY OF THE ARGUMENT

Georgia is correct that this case proceeds from common ground. Ga.Br. 3. All agree that, under the government edicts doctrine, there is an “established” rule that no one can copyright “the law.” *Id.*; U.S.Br. 20. That agreement makes for some easy cases. For example, as Judge Katsas has put it, access to any “binding legal texts” cannot “be conditioned on the consent of a private party.” *ASTM*, 896 F.3d at 458 (Katsas, J., concurring). Accordingly, any text a federal, state, or local authority adopts as controlling can be reproduced in full from *any* book in which it is found. *See Howell*, 91 F. at 137. Because some States and private parties nonetheless claim copyright in laws, regulations, adopted ordinances, or other binding legal materials, *see supra* pp.12-14, an unambiguous endorsement of this proposition under the modern Copyright Act is an important place to start.

The parties disagree, however, on whether and how far the government edicts doctrine extends beyond such easy cases. Georgia seems to argue that *only* texts with binding legal force can fall within the doctrine—though it seems unwilling to defend that position in the final analysis. *See* Ga.Br. 47-49; U.S.Br. 24 n.6 (“[P]etitioner recognizes [that] ... the rule announced in *Banks* is not limited to opinions having binding legal effect.”). The United States disagrees and advocates a broader rule where any works created “in the performance of [a state actor’s] lawmaking function[] are not entitled to copyright protection even though they lack the force of law,” U.S.Br. 24—a rule it says roughly accords with the Eleventh Circuit’s general analytic approach. *See id.* at 23-24.

Our rule largely tracks the federal government’s and Eleventh Circuit’s, albeit in terms drawn more directly from this Court’s case law. Works that represent an “authentic” exercise of state legal authority—including legal works adopted by or “published under the authority of” the State—are uncopyrightable edicts of government and “not the proper subject of private copyright.” *Banks*, 128 U.S. at 253; *Gray*, 10 F. Cas. at 1039 (Story, J.); *Callaghan*, 128 U.S. at 649-50 (adopting Justice Story’s understanding of *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834)). Even if they lack what Georgia calls “independent legal force,” Ga.Br. 3, 48, works that embody the authority of a state actor and not just the creative expression of their putative “author” are not “original works of authorship” under 17 U.S.C. §102. See *Banks*, 128 U.S. at 253 (“In no proper sense can the judge ... be regarded as the[] author” of materials drafted “in his judicial capacity.”).

In most cases, this line is easily drawn. Justice Scalia’s dissents, published under the authority of Congress and this Court, cannot be copyrighted; SCALIA DISSENTS, published under the authority of Antonin Scalia (and Kevin A. Ring), can be—though neither has “the force of law.” Similarly, “statements of the case” and “syllabuses” are copyrightable when they convey only the authorship of “Norman L. Freeman, counselor at law,” see *Callaghan*, 128 U.S. at 652; Add. 5 (Freeman title page), but not when they convey the legal authority of the State of Ohio, see *Banks*, 128 U.S. at 253. The only thing that makes this case more difficult than those is Georgia’s intentional blurring of this very line in the OCGA.

This rule also best explains the precedents and how the terms “author” or “authorship” have been understood in the copyright laws since 1790. Indeed, Congress chose to retain those terms in 1976 with a fulsome understanding that it would preserve this Court’s doctrine foreclosing copyright in states’ official legal documents. There is thus no basis in history or the law of statutory interpretation to apply the government edicts doctrine restrictively, as Georgia suggests. Meanwhile, Georgia’s alternative, force-of-law-based rule conforms to neither the precedents nor common sense. And while the United States’ rule is far better, it too fits uncomfortably with both ordinary intuitions and the statutory text. *See infra* Part I.

In any event, the OCGA bears sufficient imprimatur of state authority to fall within the government edicts doctrine under any plausible rule. This Court could and should simply adopt the Eleventh Circuit’s reasonable holdings on these state-law driven questions. But reality also bears this out in spades. The United States reaches the wrong result mostly because it fails to account for undisputed or undisputable facts. Most important: (1) the OCGA holds itself out as published under the State’s authority; (2) the Georgia courts thus routinely treat its *non-statutory* material as authentic sources of legal meaning; and (3) the Georgia Supreme Court has itself held that the Commission that “directly supervis[es]” the creation of all OCGA content does so while operating “within the sphere of legislative authority”—a holding neither Georgia nor the United States even acknowledges. *See infra* Part II.

Finally, Georgia’s policy arguments are upside-down from the perspective of the Copyright Clause.

Because Lexis’s annotations can be copyrighted in a work that does *not* hold itself out as a government edict, the only real upshot to Georgia’s theory is that it allows Lexis to use copyright to appropriate the value of the State’s legal authority and the “official” status of the OCGA. That value does not and cannot belong to a copyright “author” under this Court’s precedents. The “uncertainty” in this case is also Georgia’s doing, and can be easily dispelled. Indeed, all it takes is a rule that encourages state and local authorities to create clarity by choosing between copyrighting a legal work as an author’s personal creation, or holding such works out as official legal documents published under the authority of the State. *See infra* Part III.

## ARGUMENT

### **I. Legal Works Adopted by or Published Under the Authority of the State Cannot Be Copyrighted.**

While some of its language may have been unnecessarily metaphysical, the Eleventh Circuit correctly identified the relevant statutory and constitutional criterion (*i.e.*, “authorship” under 17 U.S.C. §102), and the critical issue (*i.e.*, whether the work in question conveys personal authorship or sovereign authority). It also correctly recognized that this Court’s precedents do not limit the government edicts doctrine to works that have binding legal effect. *Accord* U.S.Br. 24 (citing *Banks*). As explained below, Georgia’s efforts to disparage the government edicts doctrine as atextual philosophizing are thus safely ignored. This Court long ago founded that doctrine in the statutory term “author,” and Congress understood that well in

enacting the copyright acts of 1909 and 1976. Georgia's various efforts to cabin the government edicts doctrine or freeze it in the 1800s thus misunderstand the precedents, the legislative history, and the applicable doctrines of statutory interpretation.

**A. The government edicts doctrine is tied to the textual term “author.”**

As the United States correctly recognizes, the government edicts doctrine is rooted in the term “author.” *See* U.S.Br. 4-6, 17-22. That term appears in both the Copyright Clause and the Copyright Act of 1790, which permitted copyrights for “the author or authors” of certain writings. Act of May 31, 1790, ch. 15, §1, 1 Stat. 124, 124.

This requirement was retained in the Copyright Act of 1909, ch. 320, §4, 35 Stat. 1075, 1076, which provided for copyrights in “all the writings of an author.” And by that time, it was understood that the term “author” imposed a constraint, limiting a copyright holder to claiming only what he produced through his personal creativity, and not facts or other authorities he assembled or compiled by the “sweat of [his] brow.” *See Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346-47, 351-54 (1991). Likewise, a lack of “authorship” was by then the basis on which judges and others had been prevented from claiming the value legal works acquired by having been adopted by or “published under the authority of” the State. *See infra* pp.22-35.

Georgia's statutory analysis (at 21-26) simply overlooks the “authorship” requirement, which has real teeth—as a matter of both statutory interpretation and constitutional law. This Court held in *Feist*

that the term “author” in the Copyright Clause means that “[t]he originality requirement is *constitutionally mandated* for all works.” 499 U.S. at 347 (quoting L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 U.C.L.A. L. Rev. 719, 763 n.155 (1989) (Patterson & Joyce)). And that originality requirement means in turn that an “author” can only claim acts of “original—*personal*—authorship.” *Id.* at 352 (quoting Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 Colum. L. Rev. 1865, 1895 (1990)) (emphasis added). The upshot is that copyright will cover only the value of the author’s personal creativity and expression and nothing more.

The Copyright Act of 1976 took these concepts, embedded by case law in the term “author” and made them even more explicit. Today, copyright extends only to “original works of *authorship*” that are “‘fixed’ in a tangible medium of expression ... *by or under the authority of the author.*” 17 U.S.C. §§101, 102 (emphasis added). These word choices were intentional, and designed not to disturb the very doctrine at issue here. *Infra* pp.36-40. In fact, while some of the terms in the 1976 Act were new, they were if anything chosen to make it *more* clear that only those “elements of a compilation of public domain materials are copyrightable” which “contain an indication of ‘personality’ which is ‘recognizably the author’s own.’” Patterson & Joyce at 763-64 (brackets omitted). And as explained below, this Court made clear 150 years ago that official legal pronouncements published under the authority of the State lack “personality” or “authorship” in this sense,

whether they have “independent legal force” or not. *Contra* Ga.Br. 48-49.

**B. This Court’s cases have long held that legal works published under state authority are not works of authorship.**

Recognizing the role that “authorship” now plays in the Copyright Act requires a comprehensive understanding of the key cases through which this Court articulated the government edicts doctrine in the nineteenth century. In general, the United States appears to correctly understand that these cases are about the meaning of the term “author” and the ability of a drafter to claim authorship in materials embodying state legal authority. *See* U.S.Br. 18-20 & n.2. Georgia does not. Because of the historical happenstance that reporters who compiled judicial decisions in the 1800s typically added *their own* syllabi and annotations before privately publishing their legal books under *their own* authorship, Georgia suggests that the operative distinction was between the elements of a law book that did and did not have “the force of law.” But attention to historical context and the facts of the cases demonstrates that this is incorrect. The critical question in each case was whether the work in question represented only the authorship of the private reporter or instead embodied the authority of the State.

1. The government edicts doctrine originates in *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834). Henry Wheaton was the third reporter of this Court’s decisions; Peters the fourth. After Peters took over, he allegedly copied considerably from Wheaton’s books in preparing condensed reports concerning the Terms be-

fore he started his own run. Most of the case concerned questions not relevant here. *See id.* at 654-67. But among the argued issues was whether Wheaton acquired a copyright in this Court's opinions themselves "by judges' gift." *Id.* at 614 (argument). Indeed, Wheaton expressly argued that "copy[ri]ght] in the opinions, as they were new, original and unpublished, must have belonged to some one," and "[i]f to the judges, they gave it to Mr. Wheaton." *Id.* at 615.

This Court unanimously rejected that proposition in terms. It held, instead, that *no one* could claim copyright in the opinions, however new or original they might be. In this Court's words, it was "unanimously of opinion, that no reporter has or can have any copyri]ght in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right." 33 U.S. (8 Pet.) at 668.

This was a remarkable holding against the Justices' own pecuniary interests. Justices Story and McLean had apparently assumed their decisions would be copyrightable; both even purported to assign their rights to Peters in 1830, just in case. *See* Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 Mich. L. Rev. 1291, 1377-78 & n.478 (1985) (Joyce). But upon considering the question, the Justices unanimously surrendered the idea that they could assert the rights of authors in their opinions, thereby promoting the widest possible circulation of this Court's pronouncements during a nascent stage in its development. *Id.* at 1386. *Wheaton's* holding was thus fundamentally opposed to copyright in works of state authority, and it had an immediate salutary "effect on



law reporting at every level,” unleashing a “surge of entrepreneurial energy.” *Id.* at 1386 n.524.

Georgia correctly notes that *Wheaton* was later interpreted to support the copyrightability of *Wheaton*’s own marginal notes. Ga.Br. 33; *infra* pp.31-32. But Georgia misses what made those notes different from the “opinions delivered by this court.” *Wheaton*, 33 U.S. (8 Pet.) at 668. The distinction was not drawn in terms of the works’ “binding” legal effect—Justice Thompson’s dissent in *Wheaton*, in which he had just disclaimed any copyright, certainly lacked any binding effect at all. Instead, what mattered was whether the authority being claimed through the copyright belonged to the author or the State.

Georgia misunderstands *Wheaton* and its progeny in part by ignoring their historical context in three critical respects.

*First*, although Georgia argues that these cases represent a special view about judicial works, *see, e.g.*, Ga.Br. 36-37, 47-49, the assumption at the time was that, to the extent judges and judicial reports were different from legislators and legislative reports, the judicial work was *more* copyrightable, not less so. *See* Joyce at 1378-79. *Wheaton*’s counsel thus fought mightily to dispel the argument that, if *Wheaton* were right, “one employed by congress to revise and publish the statutes, might as well claim a copyright as a reporter.” *Wheaton*, 33 U.S. (8 Pet.) at 616 (argument). The distinction, in his view, was that a judicial reporter was “understood to be engaged *for himself, as principal*” whereas those employed by legislatures “act as a mere agent or servant, or clerk of the legislature, to prepare the laws to be properly promulgated.” *Id.* (emphasis added). *Wheaton*’s counsel thus conceded

outright that the legislative-branch version of Henry Wheaton “is engaged to do what is well understood *never* is copyrighted, and does not admit of copyright.” *Id.* (emphasis added). And, conversely, Peters’s counsel tried to defeat Wheaton’s argument by analogizing him to “the clerk of the house of representatives, keeping the journals,” *id.* at 649—even though the “journals” of course lack “independent legal force.”

*Second*, although Wheaton’s Reports were (eventually) included in the now-familiar U.S. Reports system, they were *far* more personal to Henry Wheaton than this Court’s reports are today. Indeed, “the series of volumes known now as *U.S. Reports* [were] known then by the names of the first four Reporters.” Craig Joyce, “A Curious Chapter in the History of Judicature”: *Wheaton v. Peters and the Rest of the Story (of Copyright in the New Republic)*, 42 *Hous. L. Rev.* 325, 344 (2005). This Court itself still cites to *Martin v. Hunter’s Lessee* exclusively as “1 *Wheat.* 304 (1816).” *See, e.g., Ortiz v. United States*, No. 16-1423 (Jan. 16, 2018), slip op. 12.

At that time, the reporter’s *personal* decisions—which included even which cases to include in the reports—were so consequential that Peters ended up being the target of severe criticism for work product that was viewed as far less reliable than Wheaton’s. In particular, the “abstracts” in these volumes were readily identified as conveying only the authority of Henry Wheaton or Richard Peters, Jr., not this Court. An influential legal magazine thus published a review of what it entitled “*Peters’s Reports*” in which it noted that there was “scarcely a single abstract in the volume ... which is not open to serious objections” and criticized one instance in which Peters’s abstract

stated “directly the reverse of the opinion’ handed down by Marshall.” Joyce at 1361. In other words, there was no mistaking whose authority each part of these reports conveyed.

Unlike the OCGA, Wheaton’s title page also bore no official Supreme Court or U.S. markings and announced him only as “Henry Wheaton, Counsellor at Law.” Add. 4. It was important for Wheaton that the work convey *his* personal authorship—and not the Court’s—because he hoped the quality of his identifiable work would encourage clients to hire him for Supreme Court arguments. Joyce at 1340-41. Wheaton even drafted a preface to his reports, written from a first-person perspective, promising that he would personally resolve to add “annotations” with “a less timid hand” if those in the first volume were “favourably received by the public.” 14 U.S. (1 Wheat.) iii, v. Thus, the defining characteristic of annotations in early legal reports was that they were recognizably the reporter’s authorship and conveyed no authority but his own.

*Third*, nineteenth-century judicial reporters like Wheaton were entirely unsupervised. Justice Story provided friendly reviews to Wheaton and Peters, but only *after* their reports were published. See Joyce at 1330, 1360. In fact, Story collaborated heavily with Wheaton because of their close friendship, but tellingly, that was *intentionally kept secret* for Wheaton’s benefit. *Id.* at 1336-37. So while Georgia suggests that something can be inferred from Wheaton’s “official” post, Ga.Br. 32, his role bore no resemblance to the highly supervised one Lexis now plays in creating the OCGA. See *supra* pp.8-10.

2. In *Banks v. Manchester*, 128 U.S. 244 (1888), this Court would expressly recognize that legal materials prepared by state court judges were not copyrightable—not because they had the force of law, but because they lacked an “author” for copyright purposes. *Banks* is by far the most on point decision here.

In *Banks*, the defendant printed in the American Law Journal two Ohio Supreme Court decisions in the precise form that they had been reported in the Ohio State Reports. Ohio law required the reporter of the Ohio State Reports to take out a copyright “for the benefit of the State of Ohio,” which then assigned its rights in relevant part to the plaintiff publishers. 128 U.S. at 249. The copied material consisted entirely of matters prepared by Ohio judges, however, including the “statement of the case and the syllabus or head note.” *Id.* at 251.

There is no colorable argument that the “statement of the case” or “head note” had independent legal force. In fact, the published statement of the case did not (like the syllabus) even require the assent of the concurring judges before inclusion in the reports.<sup>2</sup> Accordingly, the facts of *Banks* include a copyright claim in (1) material falling outside the court’s “binding” opinion or decision; that (2) was not approved through the required channels for judicial lawmaking; and which (3) was then copied wholesale by the defendant,

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<sup>2</sup> See 128 U.S. at 250 (defendant averred, and Court accepted, that it “is the universal custom and practice of those courts that the judge to whom the duty is assigned of preparing the opinion, prepares ... also the statement of the case and the syllabus, *the latter* being subject to revision by the judges concurring in the opinion”) (emphasis added).

without omitting any of the material that lacked independent legal force.

But while Georgia says those very facts resolve this case in its favor (*e.g.*, Ga.Br. 3, 40), it led to the opposite result in *Banks*. That decision held that “[i]n no proper sense can the judge who, in his judicial capacity, prepares the opinion or decision, the statement of the case and the syllabus or head note, be regarded as their author or their proprietor, in the sense of” the copyright laws. 128 U.S. at 253. *Banks* also unambiguously explains that this rule “extends to *whatever* work they perform in their capacity as judges, *and as well to the statements of cases and head notes* prepared by them as such, as to the opinions and decisions themselves.” *Id.* (emphasis added). As the United States recognizes, U.S. Br. 24 & n.6, this holding cannot be reconciled with a rule permitting state officers exercising judicial or legislative authority to copyright material published under the authority of the State so long as that material lacks so-called “binding” or “independent legal force.”

Georgia mainly tries to escape *Banks* by misdescribing it. It says that “*Banks’s* denial of copyright protection to state judicial opinions merely reflects the rule that ‘the law’ itself is uncopyrightable.” Ga.Br. 19. But this misses twice. First, *Banks* did not deny copyright only “to state judicial opinions”—instead, it *expressly* extended its holding beyond “the opinions and decisions themselves.” And, second, *Banks* excluded from copyright items like “head notes” and “statements of cases” that were not approved by a majority of the court, and so can only be “the law” in a sense that necessarily concedes this case.

Georgia also seeks to replace what it acknowledges is *Banks*'s "rule" with what it deems *Banks*'s "rationale." Ga.Br. 47-49. According to Georgia, *Banks*'s operative reasoning was confined to a single sentence opining 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." Ga.Br. 46 (Georgia's emphasis). This passing reference to "binding every citizen" then makes repeated, out-of-context cameos in Georgia's brief, *see, e.g.*, Ga.Br. 37, 40, 47-49, while Georgia consistently pooh-poohs *Banks* as nothing more than "public policy" making by this Court, *see, e.g.*, Ga.Br. i (first of twelve mentions). This, however, is unfair to *Banks* and its well-reasoned conclusion.

As an initial matter, *Banks* is not just a public-policy decision. As the United States recognizes, U.S.Br. 18-20, and Georgia eventually concedes in a telling footnote, Ga.Br. 45 n.15, *Banks* is explicitly based in an understanding of the statutory term "author." *See* 128 U.S. at 253. And though *Banks* says that "[t]he question" whether judges can copyright their judicial labors "is one of public policy," it rightly recognizes that the *answer* to that public-policy question is provided by "a judicial consensus, from the time of the decision in the case of *Wheaton v. Peters*, that no copyright could *under the statutes passed by Congress*, be secured" in such materials. *Id.* (emphasis altered). A consensus about the proper understanding of a statute, announced in one of the Marshall Court's most famous cases and left undisturbed by Congress for fifty years while it amended the same statute, is excellent evidence of the appropriate conclusion this Court

should reach—as a matter of statutory interpretation, public policy, or both.

Meanwhile, Georgia’s argument that *Banks*’s holding only applies to laws “binding every citizen” simply reads the opinion backwards. By its grammar, *Banks* was clearly explaining that “the whole work done by the judges constitutes ... the law,” and then holding that “the law” so defined is “free for publication.” 128 U.S. at 253. The clause “binding every citizen” was merely describing “the law” as *Banks* had *already* defined it, not imposing a limitation on what counts as law. *Id.* That description is also obviously poetical, because the binding force of Ohio’s law (and the right to publish it) has zero to do with being a “citizen” of Ohio or anywhere else.<sup>3</sup>

In any event, *Banks*’s holding and this single poetical clause are easily reconciled, if reconciliation is required. All *Banks* is saying is that whatever information a judge conveys under the authority of her office is equally authoritative (or “authentic” in *Banks*’s words) for everyone in later efforts to understand the law.

Importantly, the Court’s use of “authentic” in *Banks* meant something different in its nineteenth-century context—something more like “official” or “authorized” and less like “genuine.” More precisely, it meant a judge’s words could be accepted as official evidence in an effort to ascertain the law’s meaning because they were published by state authority. As this Court put it in 1842:

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<sup>3</sup> For example, non-Ohio citizens are “bound” by Ohio’s criminal laws inside the State.

[I]n all public matters, the journals of Congress and of the state legislatures are evidence; and also the reports which have been sanctioned *and published by authority*. This publication does not make that evidence which, intrinsically, is not so; but it gives in a most *authentic* form certain papers and documents.

*Watkins v. Holman's Lessee*, 41 U.S. (16 Pet.) 25, 56 (1842) (emphasis added). As this usage demonstrates, when *Banks* says that “[t]he whole work done by the judges constitutes the authentic exposition and interpretation of the law,” 128 U.S. at 253, all it means is that a judge’s work is accepted for what it is worth as evidence of the law at face value because it is published by authority and bears the State’s imprimatur, whereas a mere reporter’s work is not.

3. *Callaghan v. Myers*, 128 U.S. 617 (1888), decided later that Term, predictably underscored the same distinction. The plaintiff in *Callaghan* was the assignee of Norman Freeman—the well-known reporter of Illinois decisions. The defendants had engaged in full-blown commercial piracy of his work and reputation: They even initially marketed their copies as “*Freeman’s Reports*.” 128 U.S. at 629 (statement) (emphasis added). This Court’s very first paragraph stressed that Freeman’s reports were in “the usual form of such works,” where it was clear that “all but the opinions of the court and what is contained in those opinions is the work of the reporter.” 128 U.S. at 645. Freeman’s works bear a remarkable resemblance to Wheaton’s: They say merely that the report is “By Norman L. Freeman, counselor at law,” show no indication of publication under the State’s authority,



and clearly distinguish between the judges' writings and the reporter's own. *See* Add. 5.

This Court held in *Callaghan* that the matter that Freeman added himself and published under his own authority as the reporter could be validly copyrighted, while judicial work could not. It stressed again that the "author" requirement excluded not only judicial *opinions*, but *any* work conveying judicial authority—that is, "there can be no copyright in the opinions of the judges, or in the work done by them in their official capacity as judges." 128 U.S. at 647 (emphasis added). It then adopted the understanding of *Wheaton* that Justice Story had provided in his circuit decision in *Gray v. Russell*, 10 F. Cas. 1035, 1039 (C.C.D. Mass. 1839), distinguishing work "published under the authority of Congress," which was "not the proper subject of private copyright," from the reporter's "own marginal notes" and the other materials he "prepared and arranged in his work." 128 U.S. at 649-50 (quoting *Gray*). This Court then concluded that the mere fact that, like *Wheaton*, Freeman was appointed by the Court and eventually received a salary for his work did not alter the result.

Interestingly, the distinction between the reporter's own authorship and the authority of the State made a difference in how *Callaghan* understood the very text of *Wheaton* itself, as reported in Peters's eighth volume. *Callaghan* recognized that "[i]n a note by Mr. Peters," "he states that he has been informed that the court did not consider the point whether reports of the decisions of the court, published by a reporter appointed under the authority of an act of Congress, were within the provisions of the law for the protection of copyrights." 128 U.S. at 648; *see Wheaton*,

33 U.S. (8 Pet.) at 618 n.(a) (argument). And yet, this Court did not accept Peters’s own authority on this point, instead agreeing with Story’s account as a Circuit Justice, where he explained that the *Wheaton* Court (on which he sat) had no doubt that a reporter could copyright his own work. So by its very actions, this Court in *Callaghan* recognized the critical difference between material that is published “under the authority of Congress” and material that is not.

4. A final decision from Justice Harlan riding circuit in *Howell v. Miller*, 91 F. 129 (6th Cir. 1898), bears discussion, because Georgia misdescribes it in a crucial respect. In 1882, apparently on his own initiative, Andrew Howell prepared his own, two-volume compilation of Michigan’s laws, together with annotations and other materials he decided to include. *See id.* at 131 (explaining history of such compilations in Michigan). *After* he did so, in 1883, the Michigan legislature passed an act directing that “the general laws of the state, as collected and arranged in those volumes, should be received and admitted in all courts and proceedings, and by all officers, ‘as evidence of the existing laws thereof, with like effect as if published under and by the authority of the state.’” *Id.* Howell’s work was clearly not by, for, or published under the authority of the State because, when the legislature passed an act directing defendant Miller to prepare a new, official compilation in 1897, Howell sued Miller and a *host of state officers* for violating his rights. *Id.* at 132.

Georgia leans heavily on this case’s dicta, but it must know *Howell*’s holding hardly helps. *Howell* ultimately determined that Miller had *not* infringed any valid copyright because he had prepared his own addi-

tional materials from “volumes of decisions *as published under the authority of the state*,” 91 F. at 140 (emphasis added), and not from Howell’s personal work. That holding cannot support anyone but respondent here.

To be sure, *Howell* also delivered a stirring statement on the uncopyrightable nature of state laws:

[N]o one can obtain the exclusive right to publish the laws of a state in a book prepared by him. This general proposition cannot be doubted. And it may also be said that any person desiring to publish the statutes of a state may use any copy of such statutes to be found in any printed book, whether such book be the property of the state or the property of an individual.

91 F. at 137. The court then noted that, even though Howell’s “book” as a whole was his intellectual property—and he could validly claim copyright in the materials he added to it that were “clearly the result of his labors” or “plainly produced” by him—Miller or others could still freely cut and paste the laws themselves from Howell’s volumes if they wanted. *Id.* at 137-38. That reasoning is what makes the easy cases easy, *supra* pp.15-16, but does not inform a case like this one, where the whole “book” at issue was “published under the authority of the state.”

To make this decision appear on all fours, Georgia overstates its facts. It suggests that this case permitted copyright even though it involved a “**code book** that state law mandated be treated with the ‘like effect as if published under and by the authority of the State.’” Ga.Br. 43 (emphasis added). But Howell’s

“code book” was never adopted by or published under state authority; when Michigan authenticated Howell’s work after the fact, it adopted *only* “the general laws of the State of Michigan” as they were found therein. In contrast, the *whole* OCGA is “published under authority of the State of Georgia” *after* it is “merged” into a unified edict, and so it embodies the authority of the State and the many legislative officials involved in its creation in a way that Howell’s book did not.

In sum, these cases recognize not the distinction between materials that do and do not have “the force of law” (as Georgia submits), but rather the distinction between works that embody the authority of the State on the one hand, and works that are “clearly the result” of private authorship on the other. *Howell*, 91 F. at 138. In the historical context of the 1800s, and in their “usual form,” the work of the reporter in a volume of law reports was easy to distinguish from the official legal documents it compiled. Not only was the role and limited authority of private reporters well known, it was easy for readers to distinguish a note by Peters from the work of the judges, or even the personal style (and trustworthiness) of different reporters in different years. Meanwhile, the language attributing significance to whether a work was “published under the authority of the state” crops up again and again in these cases as the critical consideration, while “force of law” does not. *Supra* pp.31-34. Accordingly, the rule this Court should draw from these cases is the precise one advocated by Justice Story and endorsed in *Callaghan*: Legal materials adopted by or published under the authority of the State are not the proper subject of private copyright.

**C. Principles of statutory interpretation and the history of the Copyright Act support this rule.**

1. These precedents fully support a finding that the OCGA is an edict of government, and this Court should apply them without hesitation. Georgia itself acknowledges that the Copyright Act has been repeatedly amended since these cases were decided, Ga.Br. 5, and we “presume[ Congress] to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.” *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). Moreover, when Congress “disclaim[s] any intent to change” an existing judicial doctrine, it does not engraft some new, permanent, and inflexible meaning on the underlying statute, but rather “le[aves the issue] to the courts.” *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 238 (1987). There is thus no reason to apply these precedents narrowly, or to freeze them to their nineteenth century facts, as Georgia suggests.

That well-settled approach to statutory interpretation would be unchanged even if this Court understood *Wheaton* and its progeny to be based purely on precedent and public policy, rather than the Copyright Act’s text. In fact, copyright law is replete with doctrines, tests, exemptions, exceptions, and even forms of liability that have arisen entirely from judicial decisionmaking, without any anchor in the text. For example, none of the different types of “secondary liability” this Court has repeatedly recognized is mentioned in Title 17. See, e.g., *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 936-37 (2005). Nor is “merger” doctrine, which has a similar nineteenth-

century origin to the doctrine at issue here. *See Baker v. Selden*, 101 U.S. 99, 102-03 (1880). There would thus be no reason to apply the government edicts doctrine with any special skepticism, even if it were only a public policy precedent. *Contra* Ga.Br. 21-22.

But it is not; *Banks* was clearly based on an understanding of what constitutes an “author” under the copyright laws. *See* U.S.Br. 19 & n.2. The retention of an “authorship” requirement in the modern Copyright Act thus reflects unreserved congressional endorsement of the government edicts doctrine. Many essential doctrines of this Court derive from policy concerns embedded in equally short but historically meaningful phrases—“Cases or Controversies,” for example. Particularly because copyrights are limited to “authors” by the Constitution, it is appropriate to conclude that Congress intentionally preserved *Banks*’s understanding of that term.

2. The Copyright Act’s history strongly reinforces this conclusion. Indeed, it reveals that Congress had a much broader and more positive understanding of the government edicts doctrine than Georgia lets on.

When *Wheaton* and its progeny were decided, there was no U.S. Government Printing Office. With its creation in 1895, however, Congress chose to forbid copyright in any U.S. “Government publication.” Act of Jan. 12, 1895, ch. 23, §52, 28 Stat. 601, 608. That prohibition is presently embodied in the Copyright Act at 17 U.S.C. §105, which prevents copyright in any “work of the United States Government,” defined as any “work prepared by an officer or employee of the United States Government as part of that person’s official duties,” *id.* §101. As the United States recognizes, that prohibition is *much* broader than the one

at issue here, *see* U.S.Br. 22 n.5—it extends, for example, to a trail map created by the U.S. Forest Service. It thus says nothing about the government edicts doctrine, which “would independently apply to the federal government (as well as the States) even if Congress had never enacted Section 105.” *Id.*

When Congress incorporated this rule into the copyright laws in 1909, however, it considered whether it should apply an equally broad prohibition to state publications. That, of course, reflects a *skepticism* in Congress toward copyrights in state publications of any kind, which supports respondent’s argument here. Congress ultimately chose not to take that step. But that was because it viewed retaining the doctrine as an appropriate compromise, not because it doubted its wisdom. The very article on which Georgia heavily relies explains that the “compromise” that excluded state materials from mention in the 1909 Act was “not that they should have copyright protection, but that the issue *should be left to the courts.*” Patterson & Joyce at 754-55 (emphasis added); Ga.Br. 27 (quoting same article).

Before the 1976 Act was passed, Congress received what Georgia correctly calls an “influential report ... that served as the foundation for the modern Copyright Act.” Ga.Br. 28-29. But Georgia’s snippets of quotations from that Report entirely obscure its meaning, which strongly favors respondent. That Report advocated no special rule for state documents, recognizing:

The judicially established rule would still prevent copyright in the text of State laws, municipal ordinances, court decisions, and similar *official documents*, [while] other State or

local government publications—such as those containing *historical, technical, educational, or other informational material*—may be copyrighted.

U.S. Copyright Office, *Copyright Law Revision: Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law*, 87th Cong., 1st Sess. 129-30 (1961) (1961 Report) (emphasis added). The Report also of course recognized that, under existing law, a person “publishing an official document *with his own additions*—such as annotations, headnotes, or commentaries—could secure copyright in them.” *Id.* at 129 (emphasis added). But it repeatedly clarified that copyrighting “court decisions, governmental proceedings, and similar official documents,” or “official documents in the nature of governmental edicts” was prohibited. *Id.*

Nothing about this helps Georgia. In particular, it is hard to place the OCGA on the “historical” or “technical” side of the line the Report describes. Read in context, the Report also plainly recognizes that an “official document” setting forth legal pronouncements or “governmental proceedings” cannot be copyrighted, although an individual’s “own additions” on top of that official document may be. 1961 Report at 129-30. Here, the “official document” is the OCGA, which is “merged” into a single, “Official Code” *before* it is “published under the authority of the state.” Put otherwise, the Report’s focus on “official documents” and “publications” only belies Georgia’s view that an otherwise official legal document like the OCGA, after being published by the State, can still be dissected into its “binding” and non-binding parts. Indeed, this is yet another context where nothing about “the force



of law” or “binding” legal effect can be found to support Georgia’s rule.<sup>4</sup>

**D. The proposed alternative rules produce indefensible results.**

The foregoing establishes Congress’s understanding that official legal documents adopted by or published under the State’s authority are not “original works of authorship” for copyright purposes. But it bears noting that Georgia’s force-of-law-based rule independently fails to capture the precedents or foreclose absurd results. The United States proposes a better rule, but it too fails to capture cases where copyright seems wholly inappropriate.

The biggest problem with a force-of-law rule is that it can’t explain *Banks*. The United States so recognizes, and Georgia pretty much gets that, too. *See supra* p.16. The best Georgia can muster is that *Banks*’s language was “somewhat overinclusive” and that it “adopted a slightly broader (and more administrable) rule than its rationale might justify as a matter of abstract theory.” Ga.Br. 47, 49. These euphemisms for “wrongly decided” are unhelpful. The problem for Georgia is that it has proposed a rule under which *Banks* must come out the other way; *Banks* denied copyright to materials that lacked legal force, and Georgia’s rule would reach the opposite result. This

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<sup>4</sup> Georgia also seeks support from a snippet of the Copyright Office manual that prohibits copyrighting annotations if they have “the force of law.” Ga.Br. 6-7, 30. But as the United States itself explains, this language merely sets forth a sufficient condition for denying copyright, not a necessary one, and so does not even provide support under *Skidmore* for Georgia’s force-of-law-based approach. *See* U.S.Br. 24 n.6.

Court should discard Georgia’s suggestion for that reason alone.

It is instructive, however, to consider some other unacceptable oddities of Georgia’s approach. Georgia would apparently permit a State to copyright the entirety of its legislative history—committee reports, unenacted bills, and even the floor debates of its chambers. States could also copyright non-binding regulatory decisions that are critical to private decisionmaking, or “guidance” from an agency or Attorney General on how they understand and plan to enforce the law.<sup>5</sup> Cities already use what purport to be copyrighted guidelines on police use of force,<sup>6</sup> and may well feel emboldened to threaten legal action against critics who publish them. Other examples range from what Georgia calls “exotic hypothetical scenarios,” Ga.Br. 49 (maybe Thomas Jefferson could copyright the Declaration of Independence) to all-too-real abuses. *See Georgia v. Harrison Co.*, 548 F. Supp. 110, 114 (N.D. Ga. 1982) (Georgia attempting to prevent publication of revised *statutory text* of the OCGA prior to its effective date), *vacated*, 559 F. Supp. 37 (N.D. Ga. 1983).

What this demonstrates is what everyone implicitly knows: “The law” necessarily includes more than just those materials with “binding” or “independent”

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<sup>5</sup> *See, e.g.*, Ga. Office of the Attorney Gen., Opinions, <https://law.georgia.gov/opinions> (purporting to present both “official” and “unofficial” opinions of Georgia’s Attorney General “for informational purposes only”).

<sup>6</sup> *See* Salt Lake City Police Dep’t, *Policy Manual* (2019), <http://www.slcdocs.com/police/ppm.pdf>; Santa Monica Police Dep’t, *Policy Manual* (2018), <https://www.santamoniacpd.org/uploaded-Files/Police/Policies/Policy%20-%20Use%20of%20Force.pdf>.

legal effect, because it must also include the set of authoritative state legal materials citizens and courts will reasonably look to when they try to predict what “the law” is within Justice Holmes’ famous formulation. See Oliver Wendell Holmes Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 461 (1897) (“The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”). Legal materials published under the State’s authority easily fall within this set; it is hard to imagine prosecutors, police officers, regulators, and county clerks regularly ignoring the OCGA’s non-statutory content in exercising the power of the State. In fact, the Georgia *courts* routinely cite to parts of the OCGA that supposedly “do not have the force of law” despite Georgia’s supposedly “pellucid” scheme that tells them not to. See *infra* pp.48-49; Ga.Br. 40. Thus, at a minimum, “the law” must include the State’s own authentic legal publications, even if it disclaims the controlling effect of those publications over other sources in the final analysis.

Recognizing that Georgia’s force-of-law approach is untenable, the United States offers a different view. It says that any material produced by state actors while exercising their lawmaking function cannot be copyrighted as their authorship, even if those materials lack legal force. U.S.Br. 21. This at least captures floor statements and unenacted legislation, along with the non-binding judicial material from *Banks*. But, at least as the federal government purports to apply it here, this rule still fits uncomfortably with commonsense intuitions and the statutory text.

The most problematic example of what this rule misses is enforcement or compliance guidance from

state authorities setting forth a regulator's understanding of the statute it administers. For example, regulators at all levels of government routinely put out FAQs or other non-binding guidance that dramatically affects private behavior, even though they disclaim any binding force. Tax agencies also issue a range of different guidance documents that may not be binding but still have plenty of predictive power in understanding how the tax laws will be enforced in practice. Unless the United States understands this as a law-making function, its rule is troubling. Though they may not be technically binding, access to authentic predictions of "the law" that will be applied to one's case (or state tax return) should not "be conditioned on the consent of a private party," *Am. Soc'y for Testing & Materials v. Public.Resource.Org*, 896 F.3d 437 (D.C. Cir. 2018) (Katsas, J., concurring), potentially available only to customers, and not to citizens as such.

Moreover, the way the United States applies this rule to the OCGA is bizarre. It would seem clear that, under the United States' rule, if the Georgia legislature or its Legislative Counsel prepared the OCGA's non-statutory text, it would be uncopyrightable as part of the "whole work" of the legislators. But, the United States says, the same material *can* be copyrighted when it is prepared by Lexis's editors as a work-made-for-hire on behalf of the same state actors, who retain complete control over the OCGA and publish the whole of it under the legislature's authority. *See supra* pp.7-11; OCGA §1-1-1. This makes no sense.

The Copyright Act specifies that "[i]n the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author

for purposes of this title.” 17 U.S.C. §201(b). Works made for hire include certain “work[s] specially ordered or commissioned,” *id.* §101, as well as works made within the context of an employment relationship, see *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989). Given both the contract and the Commission’s unambiguous “right to control the manner and means by which” the OCGA is created, both definitions easily fit here. And yet the United States apparently rejects the idea that the hiring and supervising legislative authorities here should be “considered the author for purposes” of assessing “authorship” under the government edicts doctrine. See U.S.Br. 25. It does not say why, but the opposite rule seems essential unless judicial opinions can be copyrighted by judges when initially prepared by law clerks, or floor speeches can be copyrighted if initially drafted by freelance speechwriters.

The far simpler approach is to deem a legal work an edict of government if it is ultimately adopted by or published under the authority of the State, thus conveying the State’s legal authority and not just the personal authorship of a legal publisher, speechwriter, or law clerk. *If* it accounts (as it seems to) for works that “bear the Commission’s imprimatur,” or whose “content” is “dictat[ed]” by those who speak with authority for the State, then the government’s rule is not too wide of that mark. See U.S.Br. 26. But if the United States seriously believes that *direct* supervision of a work by someone ineligible for authorship of it under the government edicts doctrine is irrelevant, U.S.Br. 25, its rule should be rejected with Georgia’s.

## **II. The OCGA Is a Government Edict Under Any Proper Approach.**

The OCGA is plainly a legal work adopted by or published under the authority of the State. But the Court need not adopt that precise statement of the rule to affirm. Under any reasonable standard, the OCGA represents “the law” or a part of the “whole work” of Georgia’s legislative branch, and so is an uncopyrightable edict of government.

### **A. The whole OCGA is published under, and intentionally conveys, state authority.**

The authoritativeness of the purported government edict is, naturally, the strongest indication of whether it conveys the State’s legal authority. And by any measure, the OCGA is authoritative enough to disqualify it from copyright. That is evident both in how it represents itself and how it is understood and employed by Georgia authorities themselves.

1. The OCGA clearly holds itself out as an authoritative government edict. Each volume unambiguously announces that it has been “published under authority of the State of Georgia.” *See supra* p.5. It would be impossible to come more clearly within the rule of *Wheaton* and *Banks* as Justice Story conceptualized it and this Court explained it in *Callaghan*—namely, that legal works “published under the authority of” the State are “not the proper subject of private copyright.” *See supra* p.32.

The cover and title page also announce the book as “Official,” and both prominently display the state seal, which would be a crime had the legislature not specifically permitted it. *See supra* p.5. This is all calcu-

lated to convey that the whole document is an authentic embodiment of state law. The contrast with the title pages of Wheaton, Freeman, and Howell's reports—each of which conveyed only the personal authority of their author—is stark. The value of Freeman's reports reflected Freeman's reputation so much that the pirates of his work preferred to advertise their reports as "Freeman's reports" rather than even "Illinois reports." *See Callaghan*, 128 U.S. at 629. By contrast, Lexis and Georgia minimize Lexis's role in creating any part of the OCGA, and instead seek to appropriate value from the authority conferred on the whole document by the State.

In the nineteenth-century cases, the "usual form" of the whole volume of law reports was a privately published book that incorporated certain official documents to which material had been added that was "clearly" or "plainly" the reporter's own. *See supra* pp.31, 34. As the Copyright Office explained it to Congress, the "official documents" were not copyrightable, though the reporters own additions were. *See supra* pp.38-39. This case is the reverse of those, and so is much easier: The whole OCGA is and purports to be an official legal document published under the State's authority, so that document is a government edict not open to copyright.

2. The OCGA's authoritative status is powerfully confirmed by the way Georgia courts invoke it. The Eleventh Circuit cited nearly a dozen cases where those courts—including Georgia's Supreme Court—have attributed conclusive force to OCGA materials that allegedly lack the force of law. *See Pet.App.* 43a-

44a. There are far more examples, involving the specific “annotations” in which Georgia claims copyright here. *Infra* p.48. But these cases alone easily suffice.

Georgia and the United States claim otherwise because Georgia does not claim copyright, in *this* litigation, in the precise type of annotation those cases cite. See Ga.Br. 41 n.12; U.S.Br. 28-29 n.7. But this misses the point entirely. What these citations show is that Georgia courts *routinely* cite the *non-statutory* portions of the OCGA as conclusive legal authority, even though Georgia claims it is “pellucid” that they do not count as authority under OCGA §1-1-1 and §1-1-7. A brief review of these cases shows clearly that Georgia courts attribute meaning to these parts of the OCGA not because of their putative authors (committees of the Georgia Bar) but because they are listed as “Comments” to OCGA sections—that is, because they appear in the OCGA itself.

In fact, these cases show the precise kind of confusion Georgia trades on when it professes that the OCGA’s annotations are “Official” but have no “official weight.” In *Jackson v. Southern Pan & Shoring Co.*, 369 S.E.2d 239, 241 (Ga. 1988), the Georgia Supreme Court pointed to one of these comments to establish “the express intent of [a] provision” in the OCGA. But according to Georgia, these “comments should not be considered to constitute a statement of *legislative intention*.” Ga.Br. 41 n.12 (emphasis added). Apparently, the temptation to treat the OCGA as an authentic source of legal meaning is too much for even the Georgia Supreme Court to avoid. It is unclear how respondent could possibly be expected to know better, especially because there are at least 15 different kinds of



“annotations” in the OCGA, and none tries to make its “author” clear.

In any event, the Georgia courts have also cited as authority the very kinds of “annotations” at issue here, too. For example, they repeatedly rely on the “Editor’s Notes” to establish whether and when a particular provision of the law was in force, or identify prior codifications or uncodified Acts.<sup>7</sup> They have cited as telling that the “annotations section of [one OCGA section] specifically cross-references [another section].” *Hogan v. State*, 730 S.E.2d 178, 179 (Ga. Ct. App. 2012). They have cited the annotations accompanying OCGA sections to establish doctrinal points. *See, e.g., Rowland v. Dep’t of Admin. Servs.*, 466 S.E.2d 923, 926-27 (Ga. Ct. App. 1996); *DeCastro v. State*, 470 S.E.2d 748, 752 (Ga. Ct. App. 1996). And in a striking example, they have cited the fact that a neglected legal proposition appears in the annotations to reject a party’s argument of excusable neglect. *Dominiak v. Camden Tel. & Tel. Co.*, 422 S.E.2d 887, 889 (Ga. Ct. App. 1992). These citations are not exhaustive.

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<sup>7</sup> *See, e.g., Perdue v. Baker*, 586 S.E.2d 606, 608 n.7 (Ga. 2003); *State v. Kampplain*, 477 S.E.2d 143, 145 (Ga. Ct. App. 1996); *Shaw Indus., Inc. v. Shaw*, 586 S.E.2d 80, 82 n.2 (Ga. Ct. App. 2003); *Davis v. Hawkins*, 521 S.E.2d 10, 11 n.3 (Ga. Ct. App. 1999); *Dallas Bldg. Material, Inc. v. Smith*, 388 S.E.2d 359, 360 (Ga. Ct. App. 1989); *South v. Bank of Am.*, 551 S.E.2d 55, 56 n.4 (Ga. Ct. App. 2001); *Brown v. Estate of Brown*, 539 S.E.2d 824, 826 n.1 (Ga. Ct. App. 2000); *In re Estate of Garmon*, 561 S.E.2d 216, 217 n.3 (Ga. Ct. App. 2002); *Driskell v. Crisler*, 515 S.E.2d 416, 418 n.1 (Ga. Ct. App. 1999); *SRM Realty Servs. Grp., LLC v. Capital Flooring Enters., Inc.*, 617 S.E.2d 581, 585 n.11 (Ga. Ct. App. 2005).

It is also notable that the only authority Georgia itself cites to establish the legal force of these non-statutory portions of the OCGA is *another* non-statutory portion of the OCGA that supposedly lacks legal force. *See* Ga.Br. 41 n.6 (citing OCGA, vol. 12, at 1-2; 14-15, 857-58, 968 (2017 ed.)). One cannot discern that fact from Georgia’s brief, however, because Georgia (understandably) cites only the relevant OCGA page numbers, without identifying the type of content cited—on the apparent and perfectly reasonable assumption that the whole OCGA can be taken as an authentic legal source on the meaning of its own content. In fact, it is unclear how one could even check this legal assertion by Georgia’s lawyers without access to *the printed OCGA*, because one cannot find any of this content on Lexis’s free site.

Though it tries, Georgia cannot save its argument with a sentence fragment from the Georgia Supreme Court that (according to Georgia) “authoritatively state[s] that the OCGA’s annotations lack ‘any official weight.’” Ga.Br. 41; *see also* U.S.Br. 28. That supposedly authoritative statement is not just dicta, but a hypothetical aside in a decision reached three years before the OCGA *even existed*. *See Harrison Co. v. Code Revision Comm’n*, 260 S.E.2d 30, 35 (Ga. 1979). And even if that language were less attenuated, the best evidence of whether the OCGA is given legal weight in Georgia is whether it is given legal weight in Georgia.

This underscores a critical point. In reality, the “legal force” and relevance of any legal source is a moving target, and so an improper touchstone for the government edicts doctrine. The Georgia Supreme Court (sort of) says one thing in 1979, but now clearly does another. Meanwhile, agencies may shift the weight

they give to their own published materials, and courts may doctor the doctrines that give or deny significance to particular materials at any time. *See, e.g., Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (reconsidering doctrine giving potentially controlling weight to agency interpretations of their own rules). The *sine qua non* of “the law,” however, is that it must embody the legal authority of the State. That is why this Court in *Callaghan* was right to distinguish between legal documents “published under the authority of” the State and legal volumes, like Wheaton’s reports, conveying only the authority of the author himself.

**B. The OCGA is created through a meaningfully legislative process.**

The OCGA is also the product of legislative processes. Every Georgia bill amends the OCGA. And the legislature also creates the OCGA by “merging” the statutory text and numbering with all the various annotations and *then* providing that the whole edict be published by state authority as the OCGA. *See* OCGA §1-1-1. Each time the General Assembly passes a Reviser Act, it chooses to “merge” these materials again in order to create the only official Georgia code. To be sure, not every line of the OCGA is a “law” in the sense of having been individually enacted. And yet the entire document owes its existence exclusively to the legislature; if the General Assembly wanted to stop investing special authority in the whole OCGA, it could simply forgo the merger in its annual reenactment of the OCGA, reenact the remaining statutory text as it always does, and then publish that alone “by the authority of the state” as “the Official Code of Georgia.”

Georgia and the United States both deny that this has any effect. Georgia says this pre-publication merger simply means the annotations will be “included in the same publication as” the “statutory portion.” Ga.Br. 24 n.7. But, critically, *that* merged legal document is the one the State *then* publishes under its own authority as its official code. This likewise answers the United States’ argument that the copyrightable and non-copyrightable materials were in “physical proximity” in Wheaton’s or Freeman’s reports as well. U.S.Br. 27-28. In those cases, the private publisher took the official legal documents, added his own materials, and then published the whole under his own name. Georgia does it in reverse: The *legislature* adds the allegedly copyrightable material *into* its official document and then publishes the whole under *its* authority. And it does that in OCGA §1-1-1, which *was* enacted through bicameralism and presentment. Pet.App. 32a, 40a.

### **C. The OCGA is the work of the legislature.**

It is also critical that the OCGA, “including [the] court interpretations” therein, is the work of state actors operating “within the sphere of legislative authority” in Georgia. *Harrison*, 260 S.E.2d at 34. The Eleventh Circuit highlighted this dispositive holding on the nature of the Code Commission from the Georgia Supreme Court. Pet.App. 30a. Its absence from Georgia’s (and its *amici*’s) briefing is thus inexplicable.

Indeed, this should decide the case for the United States, because it makes clear that the OCGA falls within the “whole work” of Georgia state actors exercising “legislative authority.” Instead, the United States tries in one paragraph to erect some kind of

wall between the Commission and legislature, suggesting that the former does not “exercise legislative powers.” U.S.Br. 25. The contrary views of Georgia’s Supreme Court resolve this question—particularly because, if the Commission was *not* exercising “legislative authority”—its composition of mostly legislators would be *unconstitutional* in Georgia. *Harrison*, 260 S.E.2d at 34. Moreover, the one provision the United States cites in fact authorizes the Commission to draft and introduce bills in the legislature, including those that annually reenact the OCGA. See OCGA §28-9-3(17); see also *id.* §28-9-5(c); JA252; *supra* p.8. This certainly seems like a lawmaking function.

Elsewhere, the government acknowledges that if the “annotations bear the Commission’s imprimatur,” or the legislators are “dictating the[ir] content,” the OCGA is uncopyrightable. U.S.Br. 26. It then rejects that view by analyzing only *one* directive from the Commission’s contract with Lexis, and dismissing it as a “generic comprehensiveness mandate.” *Id.* But this entirely ignores the rest of the contract, JA535-95, the 180-page manual it incorporates, JA255-435, and the “undisputed material fact” of the Commission’s “direct supervision,” JA515-16. The Commission *and* Legislative Counsel are listed on the title page as the OCGA’s primary authors. *Supra* p.7. The suggestion that its content does not bear the imprimatur of the legislature or Commission is confounding, and demonstrates the wisdom of deferring to the case-specific, state-law-driven conclusions of the local court of appeals.

Because of its force-of-law-or-nothing approach, Georgia makes no such arguments. But it does still

dissemble around who's authority the OCGA's annotations convey—suggesting that they represent only what “the *individuals* preparing the annotations consider noteworthy,” Ga.Br. 49 (emphasis added). This obfuscation is perhaps unavoidable given the sheer number of different “non-statutory” matters in the OCGA with different putative “authors.” And yet, it represents the fundamental problem with Georgia's argument here.

In marked contrast to the nineteenth-century reporters at issue in *Wheaton*, *Callaghan*, and *Howell*—where certain parts were “clearly” or “plainly” the personal work of the individual reporter—the OCGA reflects an intentional lack of clarity about who besides the State itself is standing behind its contents. That is mostly because the *whole* document holds itself out as “published under authority of the State of Georgia” in a way no copyrighted nineteenth-century legal volume would. But no matter how Georgia created this confusion, it must count against its copyright claim. Georgia is in complete and utter control of whether a document is cloaked in the authority of the State. The right rule thus places the burden to create clarity on Georgia, rejects a claim of copyright in official legal documents, and permits claims of copyright only over portions of volumes that are “clearly” or “plainly” acts of authorship not adopted by or published under the authority of the State.

If Georgia wants Lexis to publish an annotated code in Lexis's own name, there will be no copyright problem. West already produces its own annotated code from the Georgia statutory text, and respondent does not think it can republish it. Georgia can decide

whether it wants Lexis to produce a copyrightable annotated code under its own authorship, an official government edict as a hired hand, or both. The *only* thing it cannot try to do is both at the same time.

### **III. Georgia's Policy Arguments for Its Approach Are Backwards.**

Georgia closes with two policy arguments: (1) that respondent's rule will create "uncertainty," and (2) that it will eliminate Lexis's economic incentive to create annotations. Ga.Br. 55-58. Both are backwards. Respondent's rule eliminates uncertainty, and it fully preserves the incentive to create annotations if they have value as creative expression. In fact, the only incentive the right rule creates is for annotators to start being clear about whose authority the annotations convey, and to stop trying to claim through copyright value that they did not create.

In terms of "uncertainty," Georgia simply ignores its own control over the character of the OCGA. It can still authorize the publication of the official statutory text in a private, annotated code—it just has to stop practices that frankly seem calculated to confound readers about what's going on. If the annotations are works of authorship and not state authority, there is no reason to "directly supervis[e]" their creation, legislate the "merging" of an annotated code, stamp a state seal on the cover, call the whole work "official," or hold out the whole document as published under state authority. It would suffice to authenticate the statutory text in "Lexis's Annotated Code of Georgia" and leave it at that. If anything, Georgia's rule creates uncertainty, because it forces those like respondent who

seek to disseminate the law for the benefit of the public to guess at which dissected subsections of “Official” state legal works might smuggle in the basis for a future copyright lawsuit.

As to Georgia’s consequentialist arguments about economic incentives, there are numerous problems. The first is sheer implausibility. Georgia admits that the great majority of States do not follow its practice, Ga.Br. 56, so we know with certainty that prohibiting it will have no material negative effects. And perhaps more importantly, the suggestion that the practice of annotation will dry up, Ga.Br. 55-56, is belied by the many States that have unannotated official codes for which Lexis and/or Westlaw nonetheless produce their own private annotated versions. Moreover, because matching citing references to underlying legal materials is an essential aspect of what makes the Lexis and Westlaw research databases so valuable, it is certain that they would continue nearly all of the relevant work even if they were somehow fully barred from producing official annotated codes.<sup>8</sup> And, again, Westlaw already produces an annotated and copyrighted Georgia code without any official pretenses, and that code’s status will survive this case unchanged. That conclusively demonstrates that *if* annotations have economic value as original works, the incentive to create them will not change with any outcome here.

But here’s the thing: For Georgia and its “amicus” Matthew Bender & Co. (*i.e.*, Lexis), this case isn’t about whether they can copyright annotations and so

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<sup>8</sup> Westlaw has no copyright in any official Georgia code, but can instantaneously generate, for example, almost 1,800 fully searchable cases citing OCGA §16-5-21.



capture whatever value they have as creative property. Instead, they want to use copyright to capture the value of the OCGA's *official character*, which is what necessitates the OCGA's pendulating pretenses of state authority in the first place. The goal from Georgia's perspective has always been to subsidize the work Michie did compiling the statutory text itself with a copyright that most effectively conveys an exclusive right to publish *that* uncopyrightable text. And this is best accomplished by making the *whole* work look as official as possible, granting Lexis the exclusive right to produce it, and then hoping a copyright claim for some quietly *unofficial* portion of this government edict will still hold up in court.

This effort to obtain a proprietary interest in the underlying law and the appearance of state authority is squarely against the public interest. Indeed, it is foreclosed by the Copyright Clause's fundamental policy choice, which "is not to reward the labor of authors, but '[t]o promote the Progress of Science and useful Arts,'" by prohibiting efforts to own the "information conveyed by a work." *Feist*, 499 U.S. at 349-50. In adopting this view of the Copyright Clause, this Court cited favorably to commentators who opposed efforts to effectively "[m]onopoliz[e] the [l]aw" in much the way that Georgia and Lexis still seek to do. *See id.* at 347 (citing *Patterson & Joyce, supra*). If Lexis's annotations have value as creative expression, let them be copyrighted and sold as such. But there is no reason to let anyone monopolize the special value that inheres in legal works when they are adopted by or published under the authority of the State.

**CONCLUSION**

The Eleventh Circuit's judgment should be affirmed.

Respectfully submitted,

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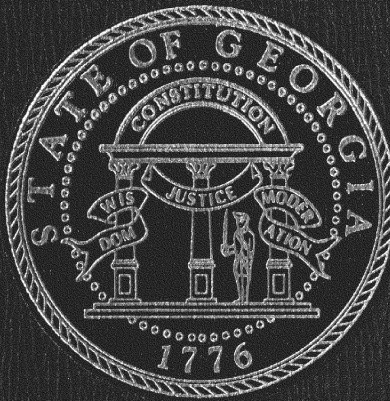
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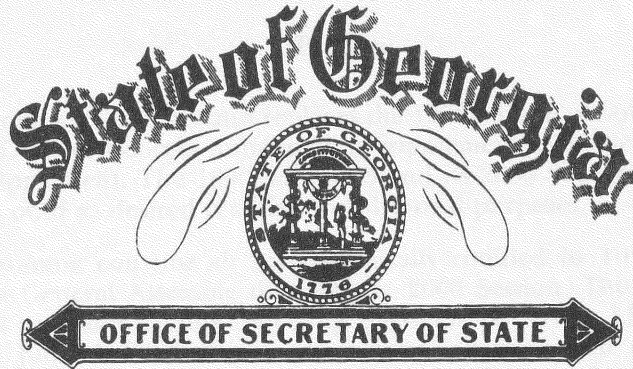
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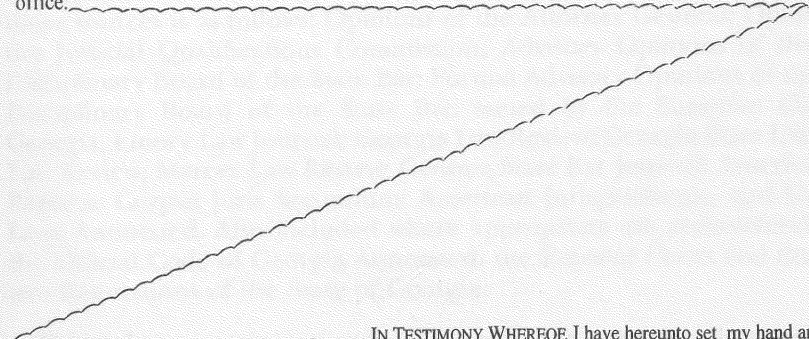
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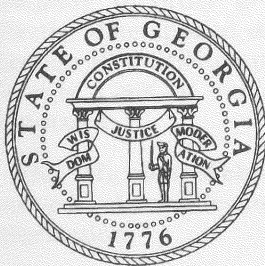
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