

PUBLIC RESOURCE.ORG and DAVID L. HUDSON

VS

MATTHEW BENDER & CO., et al.

Hearing

August 23, 2022

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1 IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
2 TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART III

3
4 PUBLIC RESOURCE.ORG and)
5 DAVID L. HUDSON, JR.,)

6 Petitioners,)

7 vs.) No. 22-1025-III

8 MATTHEW BENDER & COMPANY,)
9 INC., a division of the)
 LexisNexis Group,)

10 Respondent.)
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14 HEARING

15 Before Chancellor Ellen Hobbs Lyle

16 August 23, 2022

17 1:35 p.m.

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23 Reported by:
24 Harpeth Court Reporters
 Franklin, Tennessee
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P R O C E E D I N G S

THE COURT: Good afternoon.

IN UNISON: Good afternoon.

THE COURT: When this oral argument was originally scheduled, I believe it was in a July order, it had been shown up as a show cause hearing under the Public Records Act. And since that time we've had a couple of developments. One, we've had the state intervene, and then we've also had the Respondent, Mr. Lee's client, raise the functional equivalency defense, that they are not the functional equivalent of the governmental entity. And they pointed out in their papers that in Memphis, publishing the burden is on -- the initial burden is on the petitioner to show that they are the functional equivalent.

So having said all that, how I would like to proceed, unless you-all have agreed otherwise, would be for the petitioner to present their arguments first. That would include not only functional equivalency but also our Georgia versus Publicresource.org case and all of those arguments. Then what I would like to do is hear from the attorney general's office, the intervenor, and in following that, Matthew Bender, and then we'll go back around.

1 We'll start back with the petitioner until everyone
2 has had an opportunity to say everything that they
3 want to.

4 Now, did you-all agree to a different
5 order? If you did, we can use that.

6 MR. PERA: We did not.

7 THE COURT: Does that work for everybody?

8 MS. KLEINFELTER: That's fine, Your
9 Honor.

10 THE COURT: All right. Then let's
11 proceed. Petitioner, with the argument.

12 MR. PERA: Good afternoon, Judge. It's
13 good to be in your court. I think that this is the
14 first time in my life I've been in your court, so
15 please be kind.

16 THE COURT: Well, welcome, and it's good
17 to see you from Memphis. And I hope you will have
18 safe travels back. And, you know, my daughter went to
19 Rhodes and so I've made that trip many times.

20 MR. PERA: It's a a lovely trip.

21 THE COURT: Yes. Cuba Landing in
22 particular. I've stopped there many times.

23 MR. PERA: I know all of the exits, I'm
24 afraid.

25 I'm Lucian Pera. I represent Mr. David

1 Hudson, a law professor at Belmont, also a Tennessee
2 citizen, of course, a non-profit organization,
3 Publicresource.org, and they're the petitioners in
4 this matter. And we're here today on, I was about to
5 say, a final show cause hearing but I guess it's a
6 final hearing just generally with respect to our
7 petition under the Public Records Act for access under
8 that act to the Tennessee Code Annotated and
9 respondent, Lexis.

10 Let me also say, just for benefit of the
11 record, what we are relying on in the record from an
12 evidentiary point of view would certainly be our
13 petition, its verified petition. We're also relying
14 on Mr. Malamud's affidavit and we're also relying on
15 the respondent's two affidavits, the revisor of
16 statutes and the gentleman, I think --

17 THE COURT: Mr. Ganton?

18 MR. PERA: Yes, exactly.

19 We submit, the petitioners submit that
20 the Tennessee Supreme Court's 2002 Cherokee decision
21 under that decision, Lexis is the functional
22 equivalent of government for the purposes of compiling
23 and publishing the Tennessee Code Annotated and thus
24 they are subject to the Public Records Act for
25 purposes of that request for that document. We also

1 submit that no exceptions to the access regarding the
2 act apply here. Neither of the two suggest the
3 legislative computer exception or the Federal
4 Copyright Act. And we submit on that basis we're
5 entitled to access and, further, that that we are
6 entitled to these because we submit that Lexis' denial
7 of our request was, in fact, willful.

8 Now, let me be precise about what we're
9 seeking. Now, there is no dispute, as I understand
10 it, about what the parties among themselves consider
11 the Tennessee Code Annotated. But, for the record,
12 the general assembly has told us by acting Tennessee
13 Code Annotated -- and, by the way, I will continually
14 cite the record I'm seeking which, by the way, I rely
15 on that fact in support of my argument. Not to be too
16 meddle, but it's very clear that it is a governmental
17 function to publish this document that is the law,
18 which I am not just forced to but want to rely on in
19 addressing these issues.

20 So stepping back from that a bit, the
21 statute, Tennessee Code Annotated 1-2-101(a) says
22 "This compilation," meaning the books that 46 volumes,
23 of which I think you might have one of them on your
24 desk, "This compilation of the laws of the state is to
25 be designated as the, quote, Tennessee Code, unquote,

1 and the annotated addition of the code provided for by
2 Chapter 1 of this title shall be designated as, quote,
3 Tennessee Code Annotated, unquote."

4 Now, that's what we mean, that's what we
5 requested. Neither Lexis nor the state has disagreed
6 with that description or suggested the request, the
7 description is in any way too vague or unclear.

8 Our request, likewise, was very specific
9 and very precise. We set it out in the request that's
10 now Exhibit 6 to our petition. And specifically what
11 it says is we wanted, quote, each electronic version
12 of those current Tennessee Code Annotated reproduced
13 in its entirety, period. And then we went on to say,
14 "Examples of such relevant versions include but are
15 not limited to files in the following formats listed:
16 Word, Excel, pdf and any other editable document or
17 database.

18 So next, who has the record. To be
19 clear, we're seeking it from Lexis because our first
20 request for this record was made to the State and the
21 state told us very clearly, they don't have it. And
22 of course that's a little remarkable. They're
23 entitled to have a copy of the Tennessee Code
24 Annotated in electronic version under the State's
25 agreement with Lexis. And we actually read that

1 provision as saying Lexis is required to provide it to
2 them. But Ms. Kleinfelter for the State has been very
3 clear that the State does not have this record. And,
4 by the way, that was pretty clearly, according to
5 Ms. Kleinfelter, a result of the decision by the State
6 not to request one. Her position is, the State's
7 position is they did not request a copy. So hearing
8 that from the State, we made our request to the entity
9 of Lexis that does have a copy. And they did deny our
10 request and that's why we're here, of course.

11 Now, further, to be clear, petitioners,
12 understandably, that Lexis does in fact have the
13 record we seek. I'm trying to be very clear here
14 about this. And before I go on, I need to point out
15 that at the very end of their corrected briefs amended
16 to their support on page 14, they say that, quote, an
17 electronic copy of the TCA, furthermore, does not
18 exist in the possession of the respondent. Now,
19 that's a little disconcerting since they didn't deny
20 our public records request on the grounds we don't
21 have it, which they very easily could have done. And
22 moreover, Lexis and the State write repeatedly in
23 their papers that they prepare and publish the
24 Tennessee Code Annotated on the web in various
25 formats. And it's simply literally unbelievable that

1 they don't have the record in electronic form. But
2 then you read into the footnote from what I just
3 quoted, and as the Court probably is aware, I think it
4 addresses what they might mean. All right? Their
5 footnote says they stopped publishing the CD-ROM and
6 they, quote, do not possess an electronic copy of the
7 TCA reproduced in its entirety in the following
8 formats, Microsoft, Word, XML, PDF, or any other
9 editable document or database. Now, of course that's
10 not what we asked for, right?

11 THE COURT: Yes. And you anticipated my
12 question because I want to join issue on this. I
13 don't want us just to be wandering around in the
14 wilderness. You know, and I'm going to ask them this
15 very directly, but your position is that that footnote
16 does not address what you've asked for? They didn't
17 deny when they received the petition, oh, we don't
18 have this. And so your position, from what you can
19 tell, is they have it based on what you've sought in
20 Exhibit 6 to the petition, which was that request,
21 that initial request?

22 MR. PERA: That's right, Your Honor.

23 THE COURT: Now, I'm going to obtain
24 clarification from them because I don't want this to
25 be a waste of time. And if we need to do more coring

1 down before it's prepared for an oral argument on
2 final issues, we'll do that. But is that where you
3 stand on it?

4 MR. PERA: Yes. That's exactly where I'm
5 going. And let me make one further point. I don't
6 think there's any plausible interpretation of the
7 papers they have filed, whether it's from the response
8 where they say we don't have it, which I would
9 appreciate them saying first that they don't have it.
10 But beyond that -- and I say that mostly in jest.
11 Beyond that, I could pull up the computer, pull up my
12 phone right now, and find it electronically on a site
13 they claim ownership of.

14 So I don't think it's credible that they
15 simply don't have an electronic copy. And if we have
16 to get into the whole question of format, we can
17 eventually.

18 But let me go on and advance to right now
19 to what I was going to say at the end which is, as the
20 Court is aware, 10-7-505 of the Public Records Act --
21 Section 10-7-505(b) buried at the end of the paragraph
22 it says, "This Court has authority to, quote, direct
23 that the records being sought be submitted under seal
24 or reviewed by the Court and no other party," the
25 point being the Court can say, all right, defendant,

1 respondent, bring the record that the other side is
2 looking for and deposit it into the Court. And we
3 move that the Court do that either at the end of the
4 day, the hearing today, or as part of the Court's
5 ruling so that we can avoid any later dispute about
6 what the record is.

7 THE COURT: Now, if you would, what was
8 that statutory site again?

9 MR. PERA: Sure. It's 10-7-505(b). 505
10 is the procedural part of the statute and (b) is a
11 longish paragraph, and towards the end of it is what I
12 just read.

13 THE COURT: And you want it deposited
14 into the registry of the Court, held in the Court. Is
15 that something that you are seeking regardless of
16 where we end up on --

17 MR. PERA: Yes.

18 THE COURT: -- on what format they have
19 it in or if they are claiming they don't have it at
20 all?

21 MR. PERA: Well, if they don't have it at
22 all, I suppose there's nothing to deposit, but it's
23 inconceivable to me that's the case. And we've asked
24 for each electronic version. We understand they may
25 have more than one. If they want to deposit more than

1 one, God bless them. But we know that they have it in
2 electronic format. And if, again, there is some
3 reason to address that, that motion further with the
4 Court, what format, I'm happy to do that. My client,
5 frankly, particularly Public Resource, has told me
6 that they are essentially format agnostic. That any
7 format that Lexis can throw at them, they're fine.
8 But since we've asked for each one, then my suspicion
9 is, it should be simple. They should probably be able
10 to present options and maybe we can say, okay, you
11 have five, that one, that one is fine, that'll do,
12 will relieve you of any need to produce the other
13 four.

14 THE COURT: And when you say deposit in
15 the registry of the court, and the only reason I'm
16 being very detailed about these logistics is because
17 August 31st is my last day here. I will not be back
18 and I don't want to leave something, you know, unclear
19 for the next chancellor, for the chancellor-elect at
20 this point. So what do you have in mind? That they
21 would just deposit what? A flash? I was going to say
22 a thumb drive.

23 MR. PERA: I don't know how big it could
24 possibly be. But in all candor, Your Honor, as sad as
25 a number of us are I'm sure in this courtroom that

1 you're not going to be here after August 31, the fact
2 is that was in my mind when I thought about this
3 because I can imagine some discussions about this and
4 it seems to me that if this Court -- if this judge is
5 going to address and resolve this case, that's an
6 issue that needs to be resolved. And even if the
7 Court denies our petition, of course, we may get taken
8 up. And so rather than sow the seeds of difficulty on
9 a remand, obviously so I think I've seen it from the
10 same --

11 THE COURT: And so just to be very clear,
12 logistically, you would have them file a notice with a
13 thumb drive and an attached envelope and I would have
14 to check with them about under seal, etc., which you
15 would not object to if it was filed under seal.

16 MR. PERA: The statute says no other
17 party; so that's exactly correct.

18 THE COURT: Okay. Anything else on that
19 small request?

20 MR. PERA: No. No. So, Your Honor, let
21 me turn with that to functional equivalence. We
22 contend that under the Tennessee Supreme Court's 2002
23 Cherokee decision, Lexis is in fact the functional
24 equivalent of government for the purpose of compiling
25 and publishing the Tennessee Code Annotated. Cherokee

1 and the law under it is all about the function.
2 That's the keyword. The function that a private
3 nongovernmental organization is being asked to perform
4 by the government. All the analysis flows from is
5 related to, depends upon that functions. Not the
6 overall size and scope and all the other myriad, if
7 there are any activities of the entity that is to be
8 held, is not the functional equivalent of government
9 for the purposes of that function. And here the
10 function is very clear. It is compiling and editing
11 and publishing, and there have been about six or eight
12 other verbs used on what they do. The Tennessee Code
13 Annotated, as the law of Tennessee, apparently the
14 State and Lexis believe that compiling and editing and
15 publishing the law in Tennessee is not a governmental
16 function.

17 And I have to say, Your Honor, I have for
18 some months had trouble getting my mind around that
19 concept. This country -- and I've never quite had to
20 make this argument in a Court. But this country is a
21 government of laws. Okay? And lawmaking is an
22 essential function, maybe the essential function of
23 government. Those laws are made by the people's
24 representatives, of course. And those laws are simply
25 not fully the law until they are published for all of

1 us to see, to read, to follow, to abide by, to study.

2 THE COURT: And I saw that argument in
3 the brief initially. And then when I compared the
4 opposition, what I found is that they separate the
5 Tennessee Code from the Tennessee Code Annotated and
6 they say that the annotations -- and I'm going to use
7 that term just kind of generically, but that includes
8 a lot, everything but just the code. They say that
9 the annotations are creative work that the respondent
10 prepares, and that they do this by reviewing the law,
11 determining what they're going to use, how they set it
12 up, the comments, you know, et cetera. What would be
13 very helpful to me is if you could explain why you
14 think that separation, why you think the code
15 annotated, is not a separate work from a private
16 entity. Are they doing creative writing or is it just
17 a ministerial task where they're taking decisions,
18 reading them, and putting them in a format? Give me
19 give me that basic point. Because it also is going to
20 help me with that Supreme Court case, the Georgia
21 case. And I'm going to ask you what the differences
22 were between that and what we have. But give me that
23 just elementary position on your part.

24 MR. PERA: Absolutely, Your Honor.

25 First of all, I've noticed in the last

1 few days that Lexis and the State do not -- that they
2 write their papers so as to suggest that the Tennessee
3 Code is something the legislature does. It's over
4 here and they don't touch that. Well, they haven't
5 read their agreement lately and they haven't read the
6 statute lately, because even the code is something
7 they do work on.

8 If you look at the agreement, for
9 example, the style guidelines even, those cover the
10 code. They don't just cover the code annotated. So
11 if there are two works for purposes of some copyright
12 law question, fine, there's two works. I don't think
13 that's necessary for the Court to decide in order to
14 reach the conclusion of the code annotated, which
15 includes both if you want to call them two things, is
16 the function of the preparing that, publishing that,
17 is a governmental function. So that's the first
18 thing.

19 The second thing is, the government
20 function was determined -- is determined by the
21 legislature, and it's in the statutes. And,
22 literally, you know, we've got the code commission,
23 which is, by the way, undoubtedly the state, for any
24 legitimate purpose, it is one of the most, you know,
25 luminary heavy groups, right? It's got -- let's

1 see -- it's got the chief justice, it's got the
2 attorney general, it's got the director of legal
3 service and general assembly, plus two other
4 positions, one which I think is currently filled by a
5 former chief, plus a private practitioner. So, first of
6 all, you've got a formal body with some heavy hitters,
7 ex officios, but look at what they're charged with
8 doing. This is the function. Right? And I'm looking
9 at, let's see, at paragraph 23 and 24 of my petition.
10 But, specifically, this is Tennessee Code Annotated
11 1-1-105. It says that, "The commission is authorized
12 and directed to formulate and supervise the execution
13 of plans for a compilation arrangement,
14 classification, annotation, editing, indexing,
15 printing, binding, publication, sale, distribution and
16 the performance of all other acts necessary for the
17 publication of an official compilation of the
18 statutes, codes, and sectional laws of the State of
19 Tennessee of a public and general nature now existing
20 and to be enacted into the future, including an
21 electronically searchable database of such code, which
22 official compilation shall be known as the Tennessee
23 Code Annotated."

24 Your Honor, the legislature this day, in
25 1950 said this was a governmental function. And it's

1 not limited to code. It's just not. The word
2 annotation is used. The defined term Tennessee Code
3 Annotated, which I pulled out of the code a few
4 minutes ago. That's the word they use. And then they
5 go further in 106. And this is the commission being
6 charged with this function. All right.

7 And then the commission, this is 1-1-106,
8 "The commission has" and here quoting, "full power and
9 authority on behalf of the State of Tennessee to
10 perform all acts and to negotiate and enter into all
11 contracts necessary for and expedient to the
12 successful production and publication of a revised
13 compilation of the statutory laws of Tennessee,
14 including the power and authority to enter into
15 contracts with a law book publisher for the editing,
16 compiling, annotating, indexing, printing, binding,
17 publication, sale and distribution of the revised
18 compilation and the performance and execution of all
19 other publication plans formulated by the commission."

20 Your Honor, this is the Tennessee Code
21 Annotated. Regardless of who owns the copyright, if
22 there is a copyright to it.

23 THE COURT: So if you round out the
24 argument that they've made in their papers where they
25 separate the code itself from the Tennessee Code

1 Annotated, it's your assertion that Tennessee Code
2 Annotated Sections 1-1-105 and 106, do not make that
3 separation?

4 MR. PERA: I'm not sure if they make the
5 separation or not, Your Honor. For purposes of
6 editing, these guys edit both.

7 THE COURT: So I stated the argument
8 incorrectly. What you're saying with 105 and 106 is
9 that the commission has powers, duties, with respect
10 to the annotations?

11 MR. PERA: Absolutely. It is a product,
12 the Tennessee Code Annotated --

13 THE COURT: And that gets you back to the
14 function argument.

15 MR. PERA: Yes, yes. Because the
16 function is literally, unlike Cherokee, you know,
17 where you had to pull out the contract and read the
18 contract, and the function was in the contract and not
19 sort of, but it's tied to the statute of broader
20 authority, here it's in the statute. It's in the
21 statute. The legislature said this.

22 And I want to go back for that reason. I
23 think the legislature today and the current scheme,
24 recognizes that publication of the law, publication
25 accurately and completely and indeed annotated, if I

1 could make a verb out of annotated, an annotated
2 fashion, is absolutely necessary the law exists and
3 for it to have any force or effect, the law is not the
4 law until it's published. That's my position. My
5 position is the law is not the law until it's
6 published. If the law were not published, I don't
7 know what it is, but it's not the law.

8 THE COURT: And their position on this
9 is, well, we're publishing the law because we have the
10 Tennessee Code made available to everyone in libraries
11 to everyone across the state. You can get the code
12 online 24/7/365 their papers said, and so they say
13 someone can read the law. And that's why I keep
14 returning to this point about annotations, because
15 they say the annotations are not the law. The law is
16 just the code itself and we've already got that out
17 there free.

18 MR. PERA: Your Honor, the code
19 commission may today say that. Lexis may today say
20 that. The legislature disagrees with it. And I just
21 read you the statutory enactments on that.

22 THE COURT: And that's 105 and 106?

23 MR. PERA: Yes. And, by the way, I can't
24 help saying this, but I'm not sure how pertinent it is
25 so I won't go too far down this, but if you pull up,

1 the, frankly, very cranky and not useful free
2 un-annotated code on the web, all right, you'll find
3 there, something that is not just the code. Now maybe
4 we should just be thankful for Lexis' generosity, but
5 you remember those little history pieces at the
6 bottom, those are on for free on their un-annotated
7 version. I don't know why that is, but I'll submit to
8 you, Your Honor, that I do know why it is. I have no
9 evidence of this, but I submit that somebody on the
10 code commission or somebody, maybe the reviser said,
11 you know, that's really important. We really need
12 that.

13 You know, I can't tell you, for example,
14 that the public records law dates the 1957 from Lexis
15 without that annotation. That's an annotation. But,
16 frankly, you know, I can't count the number of times
17 it's been necessary for me to look at that to advise a
18 client or two to make an argument.

19 And I also say this, Your Honor. You
20 don't have to be a sort of Scalia inspired originalist
21 to note that within a decade of statement, within a
22 decade, in 1803 the government of Tennessee recognized
23 this basic principal that I'm talking about here. And
24 as a result, as an official act of government, hired a
25 public printer to compile the public Tennessee laws,

1 1803.

2 Now, compiling and publishing the law of
3 Tennessee has been a function of government since the
4 first decade of statehood for more than 200 years. Of
5 course, I don't think I need to point out that in
6 1803, that was before the government ever contemplated
7 providing childcare brokerage services. See Cherokee
8 before sports arenas were a public function. Before I
9 think a prison was ever built in Tennessee. I could
10 be wrong about that. All those functions, of course,
11 have been recognized as government functions under the
12 Public Records Act, and for the Public Records Act to
13 apply in that context.

14 Now, I think we see behind their argument
15 what's going on when they use the phrase, internal
16 government function, to describe what they argue is
17 required for us to show, in order to prevail. And I
18 think it clearly reveals their misconception. Okay,
19 Your Honor. Despite their argument, it is just not
20 legally relevant whether or not the government carries
21 out this function through an employee or an
22 independent contractor, or whether the government owns
23 the printing presses or computers on which the work is
24 done. That is not the law under Cherokee. It's just
25 not. It's about the function, it's about the nature

1 of the function.

2 THE COURT: And in their opposition, they
3 say, and they didn't use the word superficial, I'm
4 just going to use it because it communicates quickly,
5 but they say that's a bit superficial because there
6 are four factors and two of those factors are not
7 addressed. They say in your papers in terms of, I
8 guess it's funding, and I can't remember the other
9 one. So what -- you've given me a bit of a glossy
10 argument with the Memphis Publishing case. Tell me
11 about those factors. Are they correct that only two
12 of them you can address or present in our case? And
13 if that is so, does that matter or not? Core down on
14 that if you would, please.

15 MR. PERA: Sure. I think it's a gross
16 misreading of Cherokee to suggest that it's a
17 four-factor test. That is literally not what the case
18 says. Justice Birch's clearly says something flatly
19 contrary to that. He says in making this
20 determination -- I don't know what page that is.

21 THE COURT: I remember that point because
22 I was looking for it. And we're talking over each
23 other and the court reporter is having a problem so I
24 apologize. I'll try to do better. But, yeah, keep
25 talking.

1 MR. PERA: I think it's notes, I'm
2 showing it as notes. This is Westlaw's products so
3 I'm sure, you know, whatever, but I think it's notes
4 11, 12, 13 what I'm seeing toward the very end. The
5 paragraph begins, "Consequently, in light of our
6 duty." And it says, "In making this determination, we
7 look to the totality of circumstances in each given
8 case and no single factor will be dispositive. The
9 cornerstone of this analysis, of course, is whether
10 and to what extent the entity performs a governmental
11 or public function for we intend by our holding to
12 ensure that a governmental agency cannot intentionally
13 or unintentionally avoid disclosure obligations under
14 the act by contractually delegating its
15 responsibilities to a private entity. Beyond this
16 consideration, additional factors relevant to the
17 analysis include but are not limited to," and then it
18 lifts the four factors.

19 So I don't quibble with the notion that
20 those were important factors but, for example, you
21 know, control. Let's see what they are here. The
22 level of government funding. Let's talk about that
23 for a minute. It's all well and good for Lexis to
24 stand here and say, well, we don't get any money from
25 the State. Well, okay. Let's take a look at the

1 TSSAA case. I think it's the City Press case is what
2 it's called?

3 THE COURT: Yes.

4 MR. PARA: It's indirect government
5 funding. I mean, if indeed there's a copyright here,
6 then the copyright holder or in any event, the state,
7 is foregoing any revenue it might itself collect from
8 the sale of this and begin ceding that to Lexis. I
9 don't -- I'm sorry. I'm not able to ignore what their
10 business people surely will see as a business effect
11 here. And so the notion there is no government
12 funding here I think is a little bit disingenuous. So
13 that's the first factor. And, as I say, City Press
14 recognizes indirect government funding as relevant.

15 Secondly, the extent of government with
16 government involvement with regulation under control
17 over the entity. Again, here I think they
18 misconstrue. In Cherokee it says the entity because
19 the entity got 98 percent of all of its money from the
20 State. It didn't do anything else. Okay? They were
21 not a 30 country, 180 country customer enterprise.
22 Okay? So I think the relevant inquiry here in terms
23 of the extent of government involvement is to read the
24 agreement as to this function. I, frankly, find it
25 hard to understand how there could be more control.

1 They control the price, they control where commas go,
2 they control where words are hyphenated, the weight of
3 the paper used to print it, what goes and how many
4 volumes. Your Honor, I could go on. You've seen the
5 agreement.

6 So, yes, it is true, they do not say,
7 well, you need to fire editor Jane and hire editor
8 Jill. They don't say that apparently. The contract
9 doesn't let them do that. But the notion that somehow
10 there's no control, I think is, again, not the case.
11 The third factor, whether the entity was created by
12 act of the legislature or previously determined by law
13 to be open to public access. No, that is obviously
14 not the case. Lexis says not created by the state.

15 So, Your Honor, I simply think it's a
16 misreading of Cherokee to limit the analysis to those
17 factors, first of all. Or, secondly, and to ignore,
18 for example, the traditional government functions that
19 is going on here. Or, for that matter, to do the
20 analysis on the level of all of Lexis as opposed to
21 the part of Lexis devoted to this function.

22 And, by the way, this is not a novelty,
23 Your Honor, you know, Corrections Corporation of
24 America, when they were core civic. When they were
25 running a prison in Tennessee, the Public Records Act

1 applies to the running of the prison in Tennessee. It
2 doesn't apply to whatever else they do in Kentucky, or
3 it doesn't apply to them. So it's a misreading of the
4 statute.

5 I think I'm going to stop there on
6 functional equivalence and simply touch on a couple of
7 other points unless you have questions.

8 THE COURT: No. But you are going to
9 address Tennessee Code Annotated 3-10-108(d)?

10 MR. PERA: I am right now.

11 THE COURT: Let me think if I have any
12 other questions about functional equivalent. We were
13 talking about compiling and publishing the law, that
14 that's been the function of government since the
15 state, right after the state was founded. You include
16 in that the annotations.

17 MR. PERA: I do.

18 THE COURT: By virtue of Tennessee Code
19 Annotated sections 1-1-105 and 106.

20 MR. PERA: Which I would have to check my
21 Lexis annotations, but I think that part of the law
22 has been essentially the law since the 50s.

23 THE COURT: All right. That's all I had
24 on functional equivalency. If you want to move onto
25 something else that will work. And I do want to hear

1 about Tennessee Code Annotated 3-10-108(d), but in
2 whatever order works best for you.

3 MR. PERA: That's where I'm at, Your
4 Honor. As you know, the respondents both point to two
5 exceptions. The access requirements of the act, and
6 there's the first, you just mentioned this provision
7 concerning the legislative computer system, and then
8 the Federal Copyright Act. And the first one,
9 Section 3-10-108(d), this is the first of two
10 rhetorics, in our view.

11 First of all, Your Honor, it was passed
12 in 1987. The Court might be -- I know we attached it
13 to our brief, right? The Court might be helped by
14 simply reading the public chapter before it was, you
15 know, fit it into the code as the code commission
16 does. Right? And the law has passed concerns,
17 certain computer systems of the legislature. And,
18 frankly, neither the code commission nor Lexis is part
19 of the general assembly. The state goes to great
20 pains to make clear page 3 of the memo, the code
21 commission is not part of the legislature. So, you
22 know, I think we can easily deduce from Lexis's
23 affidavits. Of course they're not part of the
24 legislature, their systems are not part of the
25 legislature. So that statute says nothing at all

1 about any documents anywhere other than in the
2 legislature's computer system. So they don't have
3 them. So Lexis -- I don't see how it's coming. It's
4 just really quite that simple, to be honest. I don't
5 know what else to say about that.

6 THE COURT: Well, does that undercut or
7 contradict any position you've taken with respect to
8 the function of the commission? Does it in any way
9 undercut or contradict 105 and 106? Or do you just
10 see the commission as a separate -- you've argued that
11 the commission is an arm of the legislature, and so I
12 need that to be cleared up because it seemed like it
13 was contradictory.

14 MR. PERA: Well, I do think for purposes
15 of the Georgia case under copyright law, that is a
16 part of what the Supreme Court has found in Georgia,
17 and I think that analysis applies here. Now, maybe --

18 THE COURT: That may be where my mind was
19 saying hmm, there's a contradiction because I really
20 focused on that Georgia case. And we'll come to it in
21 a moment. It's so copyright oriented that you have to
22 keep that in mind when you read it. So we'll put that
23 aside. But your position is, no, the argument that
24 you've just made doesn't contradict anything else in
25 your papers?

1 MR. PERA: That's right.

2 THE COURT: The commission is not the
3 legislature for purposes of 3-10-108(d).

4 MR. PERA: That's right, Your Honor.

5 And, further, the other thing I would say
6 is it's sometimes lost in arguments by the State, is
7 that the statute is very clear in 10-7-105, and the
8 case law even clearer, that the courts are supposed to
9 have an interpretation bias to interpret the law
10 broadly in favor of access.

11 THE COURT: Right.

12 MR. PERA: Now, if you're interpreting an
13 exception, that clearly means that you have to
14 interpret it in a way that favors access if there is
15 room to do so. To interpret that exception the way
16 they're describing -- let me put it this way. If you
17 were writing that exception, if this table of lawyers
18 here were tasked to go fix that exception, they would
19 say, or add language that says, or in the hands of any
20 contractor hired by the Tennessee Code Commission
21 under 1-1-106. It doesn't say that. It just says the
22 legislature's computer systems. It's very clear.
23 It's very crisp that's what it's about. And to add
24 that additional reach outside of government, well,
25 okay, but that's not a simple interpretation, not a

1 clear interpretation, not an interpretation that is
2 broadly in favor of access, for sure.

3 THE COURT: When the petition was made
4 initially to the government, to produce the electronic
5 version of the TCA, would that have been on the
6 legislature's computer? Or would the commission have
7 had a different computer?

8 MR. PERA: I don't know the answer, Your
9 Honor. The code commission, as I read the agreement
10 says -- or excuse me. I think the agreement reads in
11 a way that it's the code commission that has a right
12 to the electronic.

13 THE COURT: Yes. They're the ones, that
14 section, I want to say two point something. 1.6
15 maybe. But anyway, go ahead.

16 MR. PERA: Right. And what I don't know
17 is if they had it, where it would be. I don't know
18 whose computer system -- I mean, it just hasn't been,
19 frankly, relevant to us, because they've said we don't
20 have it. But it is certainly possible that if it were
21 on the computer system because the code commission,
22 that's just the computer systems they use. If that's
23 the way that statute defines them, maybe that means we
24 don't get them then, but they don't have it. So I,
25 frankly, haven't done a lot of thinking about that, to

1 be honest.

2 THE COURT: All right.

3 MR. PERA: And, finally, let's talk about
4 the even bigger red herring that respondent's want to
5 draw across the boards, and that's copyright. And I'm
6 really, actually, I probably shouldn't say very much,
7 because we have Mr. Bowler here, who is a copyright
8 expert. I first got involved in this matter, and I
9 was, I immediately learned about the Georgia case, the
10 Georgia versus Publicresource.org case from 2020, it
11 was just two years ago. One of my clients was
12 involved in it. I had been under the impression --
13 and Mr. Bowler corrected me this morning -- I had been
14 under the impression I think that Lexis or one of its
15 companies was a party to that case. Apparently they
16 were not. I apologize for any error about that. But
17 I certainly -- I would expect they would have followed
18 it closely since they are the publisher of the Georgia
19 Code Annotated. But I've been waiting to hear what it
20 is exactly about Tennessee's process that somehow --
21 because that apparently will be their argument, that
22 it makes it somehow the case that the Georgia case
23 doesn't apply.

24 You know, Your Honor, they don't even
25 mention the Georgia case. We mentioned it in our

1 original -- we might have even mentioned -- I don't
2 think we mentioned it in the petition, but we
3 mentioned it in our original memo. And so we were
4 fully expecting to hear about that. We haven't heard
5 about that. I don't know what that's about. So what
6 they've really done in their papers here until this
7 afternoon is simply say copyright. In truth, we
8 believe the facts in Georgia were legally and
9 distinguishable for copyright purposes. It reads to
10 me, and we've done this analysis in our papers, our
11 reply papers, to be the same kind of process. I don't
12 understand. And so, as a result, that would mean the
13 state has no valid copyright.

14 I think, as the Court pointed out, and
15 the Court said this afternoon, you know, the burden is
16 on them on exceptions. There's no question about
17 that. And, you know, there's no Tennessee authority
18 that says that the copyright act is an exemption,
19 exception to the access requirements for the Public
20 Records Act. They cited an AG opinion that makes a
21 very generic statement that doesn't come close -- it
22 states the general principal that the supremacy clause
23 may mean that some federal law providing privacy
24 rights -- or privacy rights is not the right way to
25 put it. Put limitations on production. Some federal

1 law that says that might trump public records law.
2 Fine, I think that's true. I think that's true. But
3 that's all it says.

4 The office of open records counsel
5 opinion is about a copyright held by a private third
6 party, not by a governmental agency. So there's no
7 authority in Tennessee that gets them to where they
8 want to go, first of all. But it says that the
9 copyright act works as an exception.

10 And here, what I really do want to hear
11 from Mr. Bowler, Your Honor, is whether there is
12 anything in the Federal Copyright Act that would in
13 any way prevent the owner of a copyright from putting
14 it out there, for publishing it. I've never
15 understood that to be the way a copyright works. And,
16 you know, it's not like HIPAA where, you know, this --
17 I've see the state or local agencies say, well, we
18 can't produce this record because of protections. And
19 I guess the open records office opinion that says,
20 well, you know, what about a situation where there is
21 public record, and you know, Jim Jones has a copyright
22 in it, third party, you know. Okay, I understand
23 you've got to sort that out. That's not our case.
24 Our case here is the state has a copyright they claim,
25 and here, Lexis, they're the functional equivalent for

1 the public records law of the state. So how do we get
2 to the place where copyright law that would somehow
3 limit production under the public records law -- I
4 don't get that. That's not how copyright law works,
5 as I understand it.

6 I will say, I can conceive -- I think my
7 client is listening on the Zoom, I think he would be
8 comfortable with me saying this, if indeed somehow
9 down the road it's -- the copyright rights of the
10 state are vindicated here somehow, if Chief Justice
11 Roberts writes another opinion and says, you know, I
12 was wrong in Georgia, or Tennessee is different, or
13 whatever he says, I don't think that controls this
14 Court's decision on a Public Records Act. Because I
15 don't understand the production under state law
16 mandated by state law of a record copyrighted by a
17 state, allegedly. I don't see how that production
18 itself operates somehow an infringement. And, oh, by
19 the way, let's assume that it does not. Let's assume
20 I'm right on that. And let's assume Mr. Malamud at
21 Public Resource decided well, you know, we're going to
22 do what we're on a mission to do all over this country
23 which is to make the law free, and they publish it the
24 day after this work releases it. Well, then Ms.
25 Kleinfelter and Mr. Bowler can sue my client for

1 copyright infringement. God bless them. That would
2 be interesting to see. I gather something like that
3 happened in Georgia, but I don't get how that works as
4 a limitation on the Public Records Act. The decision
5 by the legislature, that the State is going to make
6 certain public records available to the people that
7 own it. I think I'll stop there.

8 THE COURT: I have three areas I need to
9 talk to you about on this Georgia case. The first one
10 really doesn't have to do with copyright, so let's
11 just start there.

12 In the beginning, well, actually, yeah,
13 it's in the summary part, but it's a good way to start
14 in. They speak in terms of Georgia's characterization
15 of the OCGA annotations is non-binding and
16 non-authoritative undersells the practical
17 significance of the annotations to litigants and
18 citizens and its approach would logically permit
19 states to hide all non-binding judicial and
20 legislative work product, including dissents and
21 legislative histories behind a pay wall.

22 When I read that, where my mind went is
23 it connected it to the initial opposition that the
24 defendants had filed where they separated the code
25 from the code annotated. Is this supportive of your

1 argument that the two, that the TCA is compiling and
2 publishing the law, that that's that function? Is
3 this characterization of the annotations the
4 recognition by the U.S. Supreme Court consistent with
5 that argument?

6 MR. PERA: Absolutely, Your Honor. Look,
7 almost everyone in this room is a lawyer, and those
8 who aren't, know as much about the law as we do. And
9 if you separate into these two buckets they're talking
10 about, the code and the annotations all around it,
11 those annotations are vital. They're just vital. I
12 mean, for gosh sakes, Lexis has admitted that. They
13 publish them for free, 24/7/365 on the web. They
14 publish the history. So I'm with Justice Roberts on
15 that. And besides that, it doesn't matter what I
16 think. The legislature has said in Sections 105 and
17 106 that's the policy of the state.

18 THE COURT: So in addition to the
19 arguments you've made, statutory construction of 105
20 and 106, we've got what would be dicta because this is
21 not a copyright that we're discussing. It's a little
22 bit different, I'm going to get to the copyright in a
23 moment. But you would say that that dicta is
24 supportive of the policy?

25 MR. PERA: Yes, Your Honor.

1 THE COURT: Now, let's talk about the
2 copyright aspect of it. It was argued in the papers
3 that there is a practical problem here. And that is
4 that the way that the respondent is able to make any
5 money so that this is just, you know, economically
6 viable and attractive to them, is by the limitations
7 on the annotated part of it. And they say, you know,
8 we need that copyright. What about that practical
9 aspect of it? Does that matter? Is your client just
10 -- I know that there was the argument made, well, if
11 someone reproduces it and it's a violation of the
12 copyright law and you just made this argument, sue us,
13 but what are you really saying there?

14 MR. PERA: I'm saying a couple of things,
15 Your Honor. First of all, let me be, you know, hard
16 nosed about the law. The Public Records Act says what
17 it says. Back in the 90s, case that proceeded
18 Cherokee, the Creative Restaurants case, the city
19 didn't like the fact. They said, competitively, we'll
20 be out of business on Beale Street. And I'm trying to
21 remember what judge it was on western section that
22 wrote, you know, this Court is not Mr. Goodwrench. I
23 thought that was very colorful. But you have got to
24 go to the legislature for that.

25 And so there could be a fix, for sure, to

1 this by the legislature. So that's one answer.

2 But I also want to say this, and this is
3 outside the record but the Court invited me. Okay?
4 So I'm a huge fan of the Tennessee Code Annotated. I
5 mean, when we got rid of the hard copies, I saved a
6 few volumes not just for old times' sake, but I'm old
7 and there's something tangibly helpful, and even apart
8 from the paper, thinking of the Tennessee Code
9 Annotated as a product electronically or otherwise, I
10 can't practice law without it, period. And the
11 annotations are something I can't practice without.
12 Period. So that said, I agree with the legislature
13 that this is a legitimate governmental function. And
14 I further think it's essential to the rule of law in
15 Tennessee, to be very clear.

16 So before the very first contact I had
17 with this client was the Public Resource, was when
18 they reached out to us to see if we could reach out to
19 the State about this problem, the problem that the
20 United States Supreme Court has said they don't have a
21 right anymore to a copyright. And my client, having
22 been in the business literally all over the world of
23 publishing law, was prepared to sit down with them and
24 say, look, let me see if I can work with you to help
25 you find another business model to make this work.

1 Because, yes, it would mean this business model would
2 have to be dramatically changed. Okay? The response
3 we got from Mr. Irvin was, sorry, it's copyrighted.
4 And so we never had substantive discussions.

5 My client, having nothing to do with this
6 lawsuit, and I said it's outside the record, I
7 understand, it's somewhat, whatever, inappropriate for
8 me to get into this. But the bottom line is my client
9 is on a mission and if there were anything they could
10 do to help find a new business model to make this
11 work, they would. But the notion that this is the
12 only way that would ever work, I'm sorry, that's just
13 not true factually.

14 So I sort of feel like I should say I
15 feel their pain. Because if we lose -- we're not
16 going to lose the Tennessee Code Annotated, I don't
17 think. But if we do lose this method of producing it,
18 yes, we might put it at risk, and I'm not happy about
19 that. But I have no doubt whatsoever that there is
20 another business model that would make it work.

21 THE COURT: When I read the Georgia
22 versus Publicresource.org case, what I concluded was
23 that this answers, this addresses the copyright
24 defense that's been raised. So when I thought that,
25 then I went through to see, well, is there a

1 difference in the evidence that I have in the record
2 with what was described in this case. And I had boxed
3 in an area where it says the annotations in the
4 current OGCA were in the first instance by Matthew
5 Bender. And then it goes on to state that Matthew
6 Bender did the lion's share of the work in drafting,
7 but the commission supervises that work and specifies
8 what the annotations are. So you were nodding your
9 head when I said, does this take care of the copyright
10 defense, does this answer it, and you said yes.

11 But my next question is, is there
12 something distinguishable about our facts? I saw a
13 reference and it was one of the exhibits, the State's
14 response, well, this case doesn't apply. Georgia
15 doesn't apply. It's different. Do you know what the
16 difference is between the evidence we have in the
17 record and the Georgia case?

18 MR. PERA: I do not. Because what you
19 just read is true in Tennessee. I mean, the notion
20 that the -- I mean, the co-commission is in charge.
21 They're in charge of the annotations. They're in
22 charge of the substance of them. They say, the
23 contract says they need to include all published
24 cases, they say it has to include all AG opinions,
25 and, yes, the affidavit from Lexis talks about how

1 their staff does that. But there is no question that
2 the co-commission is in charge. They're in charge of
3 the substance and the form of what's in the
4 annotations.

5 THE COURT: Well, what I saw in the
6 Georgia case was that Justice Roberts emphasized who
7 was the author. That was very much the touchstone of
8 their copyright analysis. Who was the author. And of
9 course that goes back to copyright law in cases that
10 they've developed. And they said although Lexis
11 expends considerable effort preparing the annotations
12 for purposes of copyright, that labor redounds to the
13 commission as the statutory author. Georgia agrees
14 that the author is the commission.

15 Where do you stand on that? Because
16 that's very much a key to this Georgia decision.

17 MR. PERA: I read their papers, Lexis
18 papers, I read the agreement of this is a work of our
19 agreement. The author is whoever they're working for,
20 reads under the statute to be the co-commission. And
21 I don't see how from a copyright point of view,
22 looking at the facts here and the facts in Georgia,
23 you can distinguish the code commission from the
24 legislature in this way.

25 Now, I understand Ms. Kleinfelter's

1 argument that they're not the legislature. Okay.
2 Maybe for some purposes that's true. You know, you
3 read the statute on the legislative computer systems.
4 I read that differently than she does because of the
5 Public Records Act requirement that it be very broadly
6 public access. But the co-commission, you know, they
7 work fundamentally for the legislature in the sense of
8 the legislature gave them their mandate, the
9 legislature gives them every year -- the legislature
10 approves their work every year to the extent it's the
11 code and the codification bill, Your Honor.

12 I mean, this is a circle. This is not a
13 -- I mean, the code of commission is no freelancer.
14 Right? And I don't believe, as I understand it, that
15 the codification bill codifies the annotations. I
16 don't think that's how it works. But I know it
17 covers -- I know what happens because I've had this
18 come up, is that sometimes a legislature doesn't get
19 it quite right. And the co-commission under statutes,
20 they have this as their job, and I know I'm going to
21 say this too crudely, but they go in and fix things,
22 right? And they sometimes -- frankly, I found one
23 instance amazingly enough from a year or so ago where
24 they messed up, they admitted it, and we got
25 legislature to fix it.

1 But so legislature passes a bill, bill
2 goes to code commission. Code commission, you know,
3 figures out where it goes to code, breaks the new
4 section, maybe adds a semi colon, whatever they have
5 to do, and then that goes back to the legislature and
6 the codification bill blesses them. So I don't get
7 how the legislature is not for copyright purposes, the
8 author. That's what I thought the Supreme Court
9 resolved.

10 THE COURT: I've got one more question
11 and then what we'll do is take just a short break,
12 just a 10-minute break and we'll come back and start
13 with the State.

14 But my question relates to, yes, it's in
15 the response of Matthew Bender, the opposition that
16 was filed August 12th, and they assert in there that
17 the annotations are not a governmental function
18 because of, I guess, the creativity, the managing
19 creating -- what's your position on that?

20 MR. PERA: I think Sections 105 and 106
21 answer that.

22 THE COURT: Okay.

23 MR. PERA: I've never looked back. Maybe
24 somebody has the 1803 code that Mr. Ralston created.
25 I would be willing to bet that he had to make some

1 creative decisions, you know. I mean honestly, having
2 lived as long as I have and had interactions with the
3 code commissions' work, they do real work. There's no
4 question. It's serious work, it matters to the law.
5 And part of that work is done by, for them, Lexis.

6 THE COURT: All right. Very good. Thank
7 you so much. This has been an informative argument.
8 I appreciate it. We'll be in recess for ten minutes.
9 We'll come back at 20 till. And at that time, General
10 Kleinfelter, we'll start with your argument. Thank
11 you.

12 (Off the record.)

13 THE COURT: At this time, General
14 Kleinfelter, you may proceed.

15 MS. KLEINFELTER: Good afternoon, Your
16 Honor. And I planned this so I would have the
17 opportunity to get back in front of you one last time.
18 When this case came I thought, oh, no, we've got to
19 find a reason to get involved just so I would have one
20 last opportunity.

21 THE COURT: Well, thank you so much. I
22 felt the same way when I saw it come in, and we've
23 rounded out some usual suspects here so it all works
24 out great. So, yes, thank you very much. And it's
25 wonderful to have you in the Court this afternoon.

1 MS. KLEINFELTER: And it's very nice to
2 be here. And I will say, I plan to be here on
3 Thursday, but if something comes up and I don't make
4 it, you will be greatly missed.

5 THE COURT: And I hope to be here on
6 Thursday, too. But when we get petitions like this
7 and other things, you know, Phyllis and I are like
8 fingers crossed that we can make it.

9 MS. KLEINFELTER: So, Your Honor, I am
10 going to briefly address. We did not fully brief the
11 issue of the governmental function, but I do want to
12 bring to the Court's attention some statutes which I
13 think are relevant and which might help the Court in
14 making that determination because I think that is sort
15 of the threshold issue here to determine whether or
16 not Matthew Bender is the functional equivalent of a
17 governmental entity. Obviously if they're not then,
18 you know, case over with, basically. So I wanted to
19 bring those to your attention and then I'm going to
20 address the issue of the exception that we cited in
21 3-10-108(d).

22 Mr. Kreutz with our office is going to
23 address the copyright because I am not a copyright
24 lawyer. I don't pretend to be and don't even want to
25 try and educate myself at this point on that. Very

1 complicated body of law. So I'm going to let him
2 address those arguments.

3 What I want to go back to is this
4 argument that counsel for the petitioners made that
5 the idea that we're a government of laws and the laws,
6 they don't become effective until they're published
7 and, you know, that's why there's really no
8 distinction between the Tennessee Code and the
9 Tennessee Code Annotated. It's really all one big
10 thing because they're the laws. And, Your Honor, I
11 think the legislature has said, no, they're not. They
12 are two different bodies of work. The laws are the
13 public acts that are passed by the general assembly.
14 And with all due respect, I think the constitution,
15 Article II, Section 18, speaks to when a law becomes
16 effective. And it becomes effective once it's been
17 passed by the general assembly and signed by the
18 governor and the effective date that is set forth in
19 that public act; not when it's actually published. I
20 don't know about you, but I don't get the published
21 copy of the code usually until eight or nine months
22 after it's actually been enacted by the general
23 assembly and become effective. And just because I
24 don't get this published version until eight or nine
25 months later doesn't mean that that law was not

1 effective upon the effective date. So that's the
2 first point.

3 And the second point, Your Honor, is that
4 the legislature has, for a long time, recognized that
5 those laws are the Tennessee Code and that those laws,
6 they had vested the duty to publish and distribute
7 those laws in the Secretary of State. And that's set
8 out, Your Honor, in Title 12, Chapter 6, Part 101
9 through 119. In particular, 12-6-102 says it's the
10 duty of the Secretary of State to distribute the
11 printed acts upon written requests received not later
12 than February 1 of each year, and then it goes forth
13 and sets out all of these people that they're supposed
14 to distribute, the Secretary of State is supposed to
15 distribute the acts to.

16 Subsection E -- or Subsection A of that
17 section specifically says though, that it shall not
18 apply to the Tennessee Code Annotated, any supplement
19 thereto or any replacement volume thereof.

20 So, Your Honor, I would submit that's the
21 first indication that the legislature sees the code,
22 the acts, separate from the Tennessee Code Annotated.
23 And I think that also goes back to the statute that
24 counsel already cited, 1-2-101, where they say, that
25 the compilation of the laws is designated as the

1 Tennessee Code, and the annotated addition of the code
2 provided by Chapter 1 is the Tennessee Code Annotated.
3 I'm not sure how much clearer you can get in
4 designating them as two different bodies of work.

5 And then you have, Your Honor, actually
6 the provisions of 12-6-116, which actually puts the
7 duty upon the Secretary of State to furnish to any
8 person, firm, or corporation so requesting in writing,
9 copies of the public acts of the general assembly.
10 And they can fulfill that by publishing the text of
11 the public acts in electronic form for use by the
12 Internet.

13 So, Your Honor, I think that this
14 argument that there is a governmental function to
15 publish the code, I would agree that is a governmental
16 function, and that function has also always been
17 vested in the Secretary of State. The statutes that
18 I'm citing to, Your Honor, were first passed by the
19 general assembly back in the 1920s, 1923, long before
20 the code commission was ever created. And so I would
21 entirely agree that the function of publishing the
22 laws is a governmental function, but that function has
23 been vested in the Tennessee Secretary of State. And
24 what you have with the Tennessee Code Annotated is
25 what has been set forth in Title 1, Chapter 1, Part 1

1 of the Tennessee Code Annotated, which gives the
2 Tennessee Code Commission the authority and the
3 ability to create a plan for having an annotated code
4 and to contract with the publisher for the development
5 and the preparation and the annotating and the
6 indexing, the sale and distribution of a Tennessee
7 Code Annotated. And that is what the petitioners have
8 asked for, and that is not a governmental function.
9 That is something that the legislature said, you come
10 up with a plan and you can -- they don't require them
11 to, but they give them the authority to contract with
12 somebody for all of that, and that's exactly what
13 they've done. They've entered into a contract.

14 And, you know, to the extent we're going
15 to talk about the contract detailing how the Tennessee
16 Code Annotated is supposed to be done, Your Honor, I
17 would like to produce the contract for when our
18 building was renovated. And I can promise you that it
19 was extremely detailed with the contractor because our
20 building is designated as a historic building on the
21 national historic register. So it was extremely
22 detailed in terms of what the contractor had to do in
23 terms of renovating our building, the John Sevier
24 building. But that contract -- and by virtue of its
25 detail, did not convert the contractor. And I'm

1 trying to remember who it was. Gosh, somebody local.
2 But that did not in any form or fashion convert them
3 into the functional equivalent of a governmental
4 entity. They were an independent contractor that was
5 hired to provide very specific detailed services to
6 the State of Tennessee.

7 So that's where I wanted to get just on
8 that. And I'm going to let Matthew Bender continue
9 the argument with respect to 3-10-108(d), Your Honor.
10 So the argument there is, well, this only applies to
11 the copy of the Tennessee Code Annotated that exists
12 on the legislative computer system. Well, the problem
13 with that argument, Your Honor, and I think you kind
14 of touched on it, is that if Matthew Bender is the
15 functional equivalent of a governmental entity, well,
16 who is the governmental entity? The governmental
17 entity here appears to be the legislature. And this
18 is the legislative computer system that we're talking
19 about. So if they are the equivalent of a
20 governmental entity, then this exception does apply.
21 You can't have it both ways. You can't say, you're a
22 governmental entity, but this exception that applies
23 to that governmental entity doesn't apply to you
24 because it doesn't say that it applies to you.

25 THE COURT: When I put that question to

1 Mr. Pera, how he answered it is he said the
2 governmental entity is the commission.

3 MS. KLEINFELTER: And the code
4 commission, Your Honor -- so the code commission, as
5 you've noted, is a bunch of individual people.
6 However, there is one person who is the executive
7 secretary who has also revised our statutes.
8 Ms. Seals, whose affidavit we provided, Ms. Seals is
9 an employee of the office of legislative legal
10 services. So she is in the legislature. She is on
11 the legislative computer system.

12 THE COURT: When I probed that a little
13 more with Mr. Pera he said that the State has stated
14 that they don't have an electronic version of the TCA.
15 And so we -- he said it makes it irrelevant, that
16 argument, whether it would be housed on this computer,
17 that system of the legislature. What's your response
18 to that?

19 MS. KLEINFELTER: Well, Your Honor, I
20 don't think it makes it irrelevant because, again,
21 they're arguing that Matthew Bender is essentially the
22 equivalent of the code commission, and the code
23 commission is housed, for practical purposes, the work
24 of the code commission is housed on the legislative
25 computer system. Yeah, the legislative computer

1 system is the right terminology.

2 THE COURT: Yes.

3 MS. KLEINFELTER: So I think it is
4 actually relevant. Because if Matthew Bender, like I
5 said, if they're the same thing, or they're
6 functioning as the code commission, then this
7 exception does apply to them.

8 Now, the code commission, that is
9 correct, we do not have. What they asked for was the
10 current copy of the Tennessee Code Annotated, and we
11 don't have that. What we have are bits and pieces
12 because they don't, every year, redo the entire code.
13 What you might have happen is that you might have one
14 volume of the code. They say, okay, we're going to
15 do, well, this version is Title 2. This is a 2014
16 replacement. So they might have an electronic file
17 that has that. But they don't have, the code
18 commission, I mean --

19 THE COURT: So where we are in the real
20 physical world, although it's an electronic one, is
21 that that electronic version is presently in the
22 custody and possession of the respondent, Matthew
23 Bender, assuming they have it. I mean, I'll get that
24 answer, but we don't have it on the legislative
25 computer?

1 MS. KLEINFELTER: We don't have the
2 complete version.

3 THE COURT: Correct. So in terms of the
4 application of the statute 3-8, et cetera, the facts
5 are -- and I want to be very clear on the record, the
6 facts are, in reality, we do not have the public
7 record that they are seeking on that legislative
8 computer system.

9 MS. KLEINFELTER: That is correct. Okay.
10 But, Your Honor, just because it says -- I don't think
11 that you can construe this as being limited to what's
12 on the legislative computer system because, again, if
13 you look at the entire statute, for example, it
14 says -- actually, if you look at D and C, the
15 provision above it, it says the provision of 10-7-503
16 shall not apply to records or information otherwise
17 available in printed form. Okay. Tennessee Code
18 Annotated is available in printed form. So the Public
19 Records Act and Subsection C right there says it's
20 not -- it doesn't apply to records or information
21 available in printed form. And if that's the case,
22 then why do you need the language in D where it says
23 that the reproduction publication and sale, the
24 Tennessee Code Annotated in any form, in whole or in
25 part, shall be pursuant to the provisions of Title 1,

1 Chapter 1. I mean, it makes that superfluous. You
2 don't need that language if you've already said in C
3 that anything that's printed is not subject to the
4 Public Records Act. D is an indication, is an
5 expression of the legislative's intent, that if you
6 want a copy of the Tennessee Code Annotated, then it's
7 done pursuant to the provisions of Title 1 in
8 Chapter 1. And we've pointed out, Title 1, Chapter 1
9 authorizes code commission to enter into a contract
10 which is what they've done, and the contract is where,
11 is how, through those procedures, is how you can get a
12 copy of the Tennessee Code Annotated. Not the
13 Tennessee Code, not the compilation of the laws, but
14 the compilation of the laws with the annotations.

15 And so, Your Honor, again, under the
16 rules of statutory construction as we pointed out
17 here, when the legislature passed this back in 1987,
18 they knew what the Public Records Act said, and there
19 wasn't any need for them to say, and to add this
20 language in there, if they didn't intend for it to be
21 an exception.

22 THE COURT: So if we join issue with what
23 the other side has said, what is your response to
24 their argument that 1-1-105 and 106 indicate that
25 they're -- that this publishing and compilation of the

1 Tennessee Code Annotated is a government function? Is
2 it just the separation that you've argued to the Court
3 of the Tennessee Code and the TCA by virtue of
4 12-6-102(e) and 12-6-116 versus 1-1-101 --

5 MS. KLEINFELTER: Yes.

6 THE COURT: Then let me bring in the
7 argument from the Georgia case. And it's not the
8 copyright argument, it's what I called the dicta that
9 Justice Roberts had provided where he says that the
10 distinction between annotations and the law, the code
11 itself, that that is not a substantial distinction.
12 How do you handle that part of that Georgia case?

13 MS. KLEINFELTER: So no disrespect to
14 Justice Roberts and, again, it's a copyright case and
15 that is totally outside my wheelhouse.

16 THE COURT: And I'm not asking you to put
17 it through that filter because I'm not a copyright
18 expert myself. Fortunately in those cases I've had,
19 I've been educated by the lawyers whom we've had
20 pretty insulated issues. But if we take aside the
21 copyright filter, what's your response more in terms
22 of 105 and 106?

23 MS. KLEINFELTER: No disrespect to
24 Justice Roberts, I would disagree. And I would say
25 that counsel for the petitioners made my argument for

1 me this afternoon because counsel said that just the
2 statutes by themselves, without the annotations, are
3 not helpful, that it's the annotations that he goes
4 to, that he looks at, that he wants, that he needs.
5 And I'll agree, Your Honor, I can't tell you how many
6 times -- I'm kind of old school, too, as you can see.
7 I've got the book. I like to sit down and go through
8 the book. And I can't tell you how many times
9 scrolling through the book, just looking, I'll see, oh
10 look, here is an AG's opinion. I wonder what that
11 says. The worst thing is when it's an AG's opinion
12 that I go look at and I discover it's one that I wrote
13 and I don't remember it.

14 THE COURT: Well, I have to admit, being
15 an old contracts lawyer, where I always start is with
16 the original text. So I'm always focused on the text
17 of the law itself, the TC, the Tennessee Code. And
18 then if I see, well, there's some ambiguity or some
19 need for explanation, just like the Rules of Contract
20 Construction, then at that point I go to the
21 annotations. So I may be a little bit different in my
22 use of it. I use it but, like I say, being an old
23 contracts lawyer, that's my orientation. I do
24 understand your point, though, and wanted to hear what
25 your response was, because this is a U.S. Supreme

1 Court case and the Court needs to be --

2 MS. KLEINFELTER: And the other thing,
3 they will oftentimes begin here, compiler's notes,
4 which will reflect that there was a particular
5 provision that was in the actual act, like a preamble
6 or something like that, that was in the actual act but
7 it's not -- doesn't appear in the codification. And
8 those notes I think are extremely helpful.

9 THE COURT: And that's why I just go by
10 the text. And if there is an ambiguity, I start
11 looking at the different version. So, anyway, maybe
12 sort of a commercial lawyer approach to statutory
13 construction. But, okay, that's a footnote. Maybe
14 not even relevant.

15 So let's go back to 105 and 106, where we
16 take that in terms of the U.S. Supreme Court case and
17 what Justice Roberts said, you just disagree
18 basically.

19 MS. KLEINFELTER: I disagree. And I'm
20 not sure that you can necessarily take that language
21 outside of the context of it being a copyright case.

22 THE COURT: Okay. All right.

23 What else did you want to argue to the
24 Court in terms of the functional equivalency issue?

25 MS. KLEINFELTER: Your Honor, that wasn't

1 our primary argument. I mean, we agree with Matthew
2 Bender. We do not intend to be the functional
3 equivalent. I would say if they are, that's going to
4 be problematic because there are lots and lots of
5 contracts out there where the state has contracted for
6 various services that I think would fall under this
7 rubric. And if that somehow converts them into being
8 the functional equivalent of governmental entity, I
9 will say --

10 THE COURT: Let me address that because
11 Mr. Pera says, you know, that's the Pandora's box
12 argument, and that that interpretation of the Memphis
13 publishing is too drastic an interpretation, that what
14 we look at is what's the issue, what's the task being
15 performed, and we focus on that. We don't just go
16 generically and look at the entity itself. We look at
17 what the task is being performed. I thought that that
18 was a distinction in the papers. Have I missed the
19 State's position? Or is the State's position very
20 starkly that we look at, you know, how big this entity
21 is and are they getting government funding?

22 MS. KLEINFELTER: No. In fact, I would
23 say that while Memphis Publishing is the first case,
24 that's the case where the Supreme Court came out with
25 this concept of there being the functional equivalent

1 of a governmental entity, that, therefore, could be
2 subject to the Public Records Act. I think there have
3 been subsequent cases that have refined what it means
4 to be the functional equivalent. And I think many of
5 the cases that counsel cited, when you look at the
6 function that was performed -- so, for example,
7 obviously the core civic cases. Operating a prison
8 has always been a governmental function. There have
9 never been, that I'm aware of, at least in the State
10 of Tennessee, private prisons. That has always been a
11 function that the government's office has operated.
12 And so that was kind of a no-brainer to say that a
13 prison, a company that is operating a private prison,
14 is the governmental -- the equivalent of a
15 governmental entity.

16 But then you have the case that he cited
17 to with respect to, I think it's the Allen versus Day
18 case, which is the -- I mean, it's a Sports Authority.
19 Your Honor, there, that case turned on the fact that
20 the enabling legislation that created the Sports
21 Authority specifically said that this was a
22 governmental function. And if I remember correctly,
23 Judge Cantrell wrote that opinion, and she said, or
24 maybe she wrote a concurring opinion, that she said
25 that she did not consider this to be a governmental

1 function but for the fact that the parties had
2 specifically said in the enabling legislation that it
3 was a governmental function. And, therefore, in that
4 instance, they found the Sports Authority to be
5 subject to the Public Records Act.

6 The TSSAA case, the City Press case, they
7 are the TSSAA, was operating, for lack of a better
8 word, you know, the sports activities for public
9 schools. I mean, it also involved private schools,
10 but they were operating the, all of the basketball
11 games and the football games, and all of the sports
12 activities for public schools.

13 Again, that is -- operating schools is
14 clearly a governmental function, has always been
15 recognized as a governmental function. In fact, the
16 constitution says we are supposed to provide an
17 education. And so, again, it's a no-brainer.

18 I'm not sure though that any of those
19 cases, though, would say that contracting with someone
20 to take the laws that have already been passed, and to
21 put those laws together and then to go through and
22 create those annotations, to go through and find the
23 AG opinions, to go through and find the cases that
24 might be relevant and summarize those cases, to
25 organize all of that, that that's a governmental

1 function. I think historically it has not been a
2 governmental function. I think the book that
3 Mr. Week's wrote -- if you're not aware, Mr. Weeks is
4 the legislative librarian. Fascinating guy. He knows
5 everything about the legislature. But I think that
6 would reflect that's never been something that the
7 government has done. It's always been done by someone
8 in a private capacity.

9 THE COURT: And that, of course, gets me
10 back to the Georgia case where Justice Roberts was not
11 persuaded by that. Truly it was through a copyright
12 lens. But he notes that usually the work is done by
13 someone in the private sector and yet he says,
14 nevertheless, that it's outside of this -- we've got
15 the government edicts document applies.

16 Anything else that you want to argue
17 before I hear from your colleague?

18 MS. KLEINFELTER: No. I'm going to let
19 him address the copyright stuff.

20 THE COURT: All right. Thank you.

21 MS. KLEINFELTER: Thank you, Your Honor.

22 MR. KREUTZ: Good afternoon, Your Honor.
23 Kevin Kreutz for the State.

24 Before I forget, I want to address the
25 Court's question about the dicta from Justice Roberts,

1 and I had a couple of thoughts to share with the
2 Court.

3 THE COURT: Thank you. Yes.

4 MR. KREUTZ: First, I think that General
5 Kleinfelter was right that it really was a fact driven
6 comment by Justice Roberts because in Georgia, the
7 actual Georgia legislature, when they reenact the code
8 as law, they actually merged the annotations with the
9 code. It has, to borrow a word, gloss or a premature
10 of legislative --

11 THE COURT: And pardon me for
12 interrupting but is the way that you distinguish it
13 from what happens in Tennessee is by virtue of the law
14 that talks about what's certified? Is that how you
15 distinguish it?

16 MR. KREUTZ: No, Your Honor. It goes
17 back to the point from counsel for petitioner.

18 THE COURT: Okay. Just walk me through
19 this. Because I saw that in the Georgia case and I
20 wondered if we had that kind of merger. And so I was
21 reading through the papers trying to see, and the only
22 thing that I could come up was where we talked about
23 certified. What statute would you cite the Court to
24 that would distinguish this case from the Georgia case
25 on the facts?

1 MR. KREUTZ: It is Section 1-2-114 that
2 discusses the codification bill.

3 THE COURT: 1-1- what?

4 MR. KREUTZ: 1-2-114. I am getting a bit
5 ahead of myself on a couple of procedural arguments
6 that we have.

7 THE COURT: We'll come back to them. You
8 wanted to jump in because you knew I was interested in
9 this, which I appreciate.

10 MR. KREUTZ: I didn't want to lose it in
11 my notes, Your Honor.

12 THE COURT: Right. So I've got it.
13 1-2-114. Okay.

14 MR. KREUTZ: So actually there's two
15 statutes. But 1-2-114 talks about what's actually
16 reenacted by the legislature. And it's 1-2-114(b).

17 THE COURT: Upper case B. No?

18 MR. KREUTZ: It's lower case b, 2, I
19 believe.

20 THE COURT: The supplemental reenactment
21 set out in (b)(1) shall be deemed reenactments, et
22 cetera?

23 MR. KREUTZ: Sorry, Your Honor. I need
24 to pull something real quick and I can answer your
25 question to the actual subpart. Bear with me one

1 second.

2 THE COURT: Sure.

3 MR. KREUTZ: 1-2-114, lower case b, part
4 1, upper case C. It's quite far down the rabbit hole.

5 THE COURT: Okay.

6 MR. KREUTZ: It says the material will be
7 contained in replacement volumes, and it lists all of
8 them. Shall be deemed, and if you go to the very end
9 of C, "shall be deemed mandatory of and supplemental
10 to and become part of the Tennessee Code, but just the
11 Tennessee Code, which we talked about in 1-2-101, is
12 just the Public Acts codified, and act that is Chapter
13 6 of the Public Acts is those such material were
14 specifically reenacted in its entirety.

15 So the reenactment is of the code,
16 Tennessee Code as it is presented in the Tennessee
17 Code Annotated volumes they ever not enacting the
18 annotations and therefore not doing the merger that
19 Georgia is doing.

20 THE COURT: And that's where I would
21 extract that to distinguish the facts from the Georgia
22 case.

23 MR. KREUTZ: Yeah, I think that's one of
24 many distinguishing facts, Your Honor. But just to
25 the point that Justice Roberts raised, that is one

1 distinction. The other being that even though Justice
2 Roberts seemed to suggest that he felt that the
3 annotations carried some weight if they weren't the
4 law, the Court still, nevertheless, adopted a fact
5 specific and a fact heavy test for whether annotations
6 prepared by a state agency are a government edict, and
7 said for the opinion in Georgia, that non-law making
8 bodies who are not engaging in law-making functions to
9 agree to possess copyrights of works.

10 THE COURT: Right.

11 MR. KREUTZ: So getting back to a couple
12 of points in our brief. I believe that there are sort
13 of two or three separate issues on the copyright
14 issue, Your Honor.

15 The first is whether or not a claim or
16 cert'd copyright qualifies as an exception to
17 Tennessee Public Record Act laws in such that it
18 otherwise provides for the treatment of something that
19 would be considered a public record.

20 Our position is that under Seaton and
21 Peterson, the Tennessee Court of Appeals have held
22 that federal law can provide otherwise the treatment
23 of public record, and that the legislature need not
24 codify these federal exemptions in 10-7-503 or 504 to
25 give them the supremacy that the constitution already

1 provides.

2 And Seaton is a Public Records Act case,
3 Your Honor. It is a case about whether railroad
4 acts -- it's a railroad crossing. I understand that
5 you've probably read the decision. Were subject to
6 disclosure, and the Court said no, because federal law
7 provided otherwise.

8 The opposite of open records counsel with
9 not finding or persuasive authority on the state of
10 Public Records Act request in the State of Tennessee
11 have similarly held. I do not believe that the
12 distinction between a public and private author is a
13 material distinction for purposes of determining
14 whether the Copyright Act provides otherwise, and it
15 does so here. Because under the Copyright Act,
16 Section 106 authors, which is the Tennessee Code
17 Commission, have the exclusive right to distribute,
18 display, or produce works. The Commission has
19 contracted with respondent Bender, and I believe it's
20 under 6 and 7 of the contract, that they have the
21 exclusive right to distribute and sell essentially
22 access to the electronic version through these legal
23 research websites, such as Westlaw or LexisNexis and
24 it's on that basis that the state argues that the
25 federal law provide otherwise with respect to the

1 treatment of the electronic version of the TCA, and
2 that provides a valid basis to exempt the electronic
3 version from disclosure and the act.

4 As it relates to the substantive issue of
5 copyright law, it's our position that questions about
6 the validity or infringement upon a copyright are
7 within the exclusive jurisdiction of the federal
8 district, and that's pursuant to 28 U.S. Code 1338,
9 which actually says that the state courts do not have
10 jurisdiction to hear issues arising under copyright
11 law. The Tennessee Supreme Court in the 40s, in a
12 case called High Stitch, which I can provide the
13 citation, was considering the question of the validity
14 of an asserted patent, and it held the challenges to
15 patent validity arise under federal law. And one of
16 the reasons we didn't bring those arguments into the
17 briefing is because we do believe that that is a
18 matter within the jurisdiction of the federal district
19 court.

20 It's also -- I went back and looked at
21 the petition to see whether or not the petition raised
22 the Georgia case and I did not -- I don't remember
23 seeing it in the reply. And it was consistent with
24 our understanding that if there was a challenge to the
25 validity of an asserted copyright, that would be

1 within the province of the district courts, not an
2 issue for the state courts to decide.

3 If the Court were to find that it has
4 jurisdiction over this challenge that's embedded in
5 the reply in this matter to the asserted copyright of
6 the State and the annotations, our position is that
7 the way in which the code is -- the annotations are
8 put together, who the author is, and how they're put
9 together, are distinguishable through Georgia on a
10 variety of factors. One of the first distinctions is
11 who --

12 THE COURT: Let me stop you before we go
13 there because I want to make sure that I understand
14 the argument about this Court's jurisdiction. I need
15 for you to be very clear about what you think this
16 Court can determine in this case.

17 There have been defenses made under the
18 Public Records Act that the copyright law accepts this
19 case from the record being made available. What, in
20 your view, can this Court determine with respect to
21 that? Nothing? Is that something that has to be
22 determined by the Federal Court? I need an
23 understanding from where you say the limitation is.

24 MR. KREUTZ: Sure, Your Honor. The
25 State's position is that the Court can decide where

1 the U.S. Copyright Act otherwise provides for the
2 treatment of the electronic version of the TCA; so
3 whether or not that exception is legitimate or not.

4 THE COURT: And how would I get there?
5 I'm not seeing the link. You've gotten pretty far in
6 the weeds on that. So tell me, how would that be
7 presented in this case? Let me just set it up for
8 you.

9 So if I were to determine that under the
10 Georgia case, the copyright exception did not apply,
11 that the Tennessee exception, the public records
12 exception for copyrights did not apply by virtue of
13 the Georgia case, is that something that I can
14 determine? Or is that something that a federal court
15 has to determine? In other words, if I said that
16 defense is not valid under the Georgia case and so
17 that's not a defense to the petition we have here, is
18 that something I can determine or is that something
19 that the federal court has to determine, in your view?

20 MR. KREUTZ: So I hear two arguments in
21 there. So I would say, yes, there's a part of that
22 that this Court has jurisdiction here and there's part
23 for a federal court to decide. The part that this
24 Court has the authority to decide is whether or not a
25 copyright assertion is a recognized exception to

1 disclosure of a public record under the Public Records
2 Act, and that would require looking at the Public
3 Records Act, construing Seaton and Peterson and
4 reaching a decision on whether or not that's a
5 recognized exception. If someone wants to argue that
6 that exception is not legitimate because it is not --
7 the copyright is invalid, that would be within the
8 province of the federal --

9 THE COURT: Yeah, so the distinction
10 you're making is really one I guess of law and fact.
11 I can make a statutory determination on Tennessee law,
12 that's within my purview. But once we get to the
13 application of the copyright statute itself, those
14 protections, that's going to be something that is in
15 the federal domain?

16 MR. KREUTZ: Yes, Your Honor. The
17 question of whether the copyright that is asserted is
18 valid. Because that question that is raised by
19 Georgia is not whether a state can hold a copyright,
20 but whether a state -- whether the arm of the
21 legislature can be an author under 17 U.S.C. 102.

22 THE COURT: Right.

23 MR. KREUTZ: So that's a different
24 argument, in my view, from the question of whether a
25 copyright argument or copyright exemption -- is a

1 copyright exemption to the Public Records Act.

2 THE COURT: Okay. Okay. I understand.
3 I understand your position.

4 MR. KREUTZ: For example, if Public
5 Resource ever wanted to try to invalidate the State's
6 copyright, they could bring an action in federal court
7 to do that and the State could sue for infringement.

8 THE COURT: Yeah. I understand your
9 position. Okay. Next argument.

10 MR. KREUTZ: So if the Court decides they
11 have jurisdiction to hear the questions on validity of
12 the State's asserted copyright, the State's, the
13 author of the annotations and the process by which --
14 or the function by which they are prepared are
15 distinguishable from Georgia for a few reasons.

16 First, the Georgia Code Commission was
17 controlled by a majority controlled by a legislature
18 by statute. There had to be a majority of
19 legislatures on the commission. That's not true here.
20 The Tennessee Code Commission has --

21 THE COURT: How do I know that from the
22 case?

23 MR. KREUTZ: It's in the case, Your
24 Honor, the Georgia court actually addresses that.

25 THE COURT: Just cite me in the page and

1 verse on the Supreme Court case. Where do I find
2 that?

3 MR. KREUTZ: One second, Your Honor.
4 It's on page -- it's on page 1508 of the Georgia
5 decision.

6 THE COURT: Okay.

7 MR. KREUTZ: And under, I believe, it's
8 Section 103 of the Tennessee Code Annotated, or maybe
9 it's 101, it's, there are three ex officio members of
10 the commission, and they are the chief justice, the
11 director of the office of legal services who is not a
12 law making official. Again, the attorney general
13 issues opinions, it does not make laws either. The
14 other two are appointed by the chief justice and they
15 are currently, I believe, a retired justice as well as
16 a private practitioner in Nashville.

17 So from a control perspective, the
18 Tennessee Code Commission is distinguishable from the
19 Georgia Commission because the Georgia Commission was
20 controlled -- its majority was always going to be its
21 legislators.

22 THE COURT: I'm sorry. I'm at 1508 but
23 I'm not seeing where you're referring to.

24 MR. KREUTZ: I don't actually have a
25 printed copy.

1 THE COURT: Here you go. Just ignore my
2 underlining there.

3 MR. KREUTZ: Okay. Actually, it's -- so
4 it's addressed in the analysis but it's 15-04 it says
5 that the majority of the commissions 15 members must
6 be members of the Georgia Senate or House of
7 Representatives.

8 THE COURT: Okay. Thank you. All right.
9 If you don't mind handing that back up because I may
10 need to refer to it. Thank you.

11 MR. KREUTZ: Of course.

12 THE COURT: Okay. What other distinction
13 factually?

14 MR. KREUTZ: So the Georgia Court put
15 together a two-part test for whether an author of the
16 state, a state author is essentially issuing a
17 government edict, and the first of whether they are a
18 judicial -- excuse me -- legislative body.

19 THE COURT: Right.

20 MR. KREUTZ: And one of the points that
21 the Georgia courts makes is that the Georgia Supreme
22 Court essentially found that the commission carried
23 out a governmental function -- I'm sorry -- served a
24 legislative purpose. And Tennessee's courts, both the
25 Supreme Court and Appellate Courts have consistently

1 found a distinction between the work of the code
2 commission and the work of the legislative, various
3 cases are cited in our brief, which talked about how
4 the compilations by the commission carried no weight
5 for statutory destruction, they're a distinguished
6 body.

7 When it comes to the second factor --
8 sorry. Before we get to that to that we recognize
9 that there are similarities to how the commissions are
10 staffed and financed. They both come from legislative
11 funding and receive legislative staffing. But the
12 actual government brought in and makes the decision is
13 distinguishable for points that we discussed
14 previously. And how the body is construed by the
15 courts of the state is also very different. When it
16 comes to the legislative function, it was found that
17 Georgia carried on a legislative function because it
18 merged the annotations with the code. And for the
19 reasons that we discussed previously, 1-2-114(b)(C),
20 there's a different process.

21 THE COURT: Got it. Okay. Anything else
22 on the Georgia case why it's distinguishable?

23 MR. KREUTZ: I think those are the
24 primary distinguishing factors, Your Honor, that this
25 is not a legislative body acting in a legislative

1 capacity. It's more analogous to the compiling of the
2 code which, as General Kleinfelter explained, there's
3 a period where it's not the law, it doesn't present a
4 true and correct copy of the law. The annotations
5 aren't given -- it is essentially an ad hoc commission
6 carrying out a very specific purpose comprised of a
7 variety of individuals not controlled by one branch,
8 and that even though there are judicial officers on
9 the commission, they are not writing these annotations
10 or summaries of their own opinions.

11 For example, there are some historical
12 cases that were summarized in Georgia, where I believe
13 it was either Callahan or Myers, the Court said when a
14 judge offers explanatory material adjacent to their
15 opinion, that is still a governmental edict. The same
16 is not true here, even though are a few judicial
17 members on this body, because it is not controlled by
18 a majority of justices and is not -- the annotations
19 that are presented are much broader than simply the
20 Supreme Court opinions of the State of Tennessee.

21 THE COURT: So for all those reasons, you
22 assert that this doesn't fit within the government
23 edict doctrine that was found to apply in that Georgia
24 case?

25 MR. KREUTZ: That's right, Your Honor,

1 because it is a fact specific test and it's focused
2 upon law making bodies and exercising law making
3 functions.

4 THE COURT: Anything else on the Georgia
5 case?

6 MR. KREUTZ: No, Your Honor. Thank you.

7 THE COURT: Thank you. Okay. Does that
8 complete the State's argument?

9 MS. KLEINFELTER: Yes, Your Honor.

10 THE COURT: At this time, then the Court
11 will hear from the Respondent.

12 MR. BOWLER: Thank you, Your Honor.

13 MR. LEE: Your Honor if I may, just
14 briefly introduce Mr. Bowler to the Court. His motion
15 for admission I believe has been granted.

16 THE COURT: Yes.

17 MR. LEE: Mr. Bowler is a 1991 graduate
18 of Vanderbilt Law School, and we're glad to have him
19 back in town.

20 MR. BOWLER: Thank you, Your Honor.
21 That's very kind. Thank you, Mr. Lee, for the nice
22 introduction. And I will say it's after 31 years
23 graduating here, it's my first time actually in
24 Tennessee State Court having practiced in Chicago and
25 Atlanta. So thank you for the privilege. I'm going

1 to focus on the functional equivalence argument, Your
2 Honor.

3 There are certain questions you raised to
4 petitioner's counsel, which may still be relevant.
5 And kind of before I do a deep dive into the argument,
6 I want to talk about this whole notion of the
7 electronic format and what my client has and doesn't
8 have.

9 THE COURT: Yes.

10 MR. BOWLER: And I also want to put this
11 back. This doesn't come out in the papers, but it was
12 kind of important, at least to me, as I thought about
13 these things and was approached by the client.

14 So LexisNexis got a letter in or about
15 May from petitioner's counsel. It's not attached to
16 the -- there's a second letter. It's not attached to
17 the petitioner's paper. But it came out closer in
18 time to when he, to when counsel, petitioner's counsel
19 is writing to the state for materials. I can speak
20 for my law firm, I think that I can speak candidly for
21 my client. We did not know at that time when we got
22 that letter that was forwarded to me that the state
23 had ever received a Public Records Act request. If
24 you go back and look at the letters to us, that was
25 not mentioned at all in the letter, so we were a bit

1 puzzled. It was outside counsel, what's this about.
2 We had some idea given that Public.org was behind it
3 and that this had probably something to do with the
4 Georgia Supreme Court decision and their desire to
5 publish all this stuff online.

6 But it was not articulated to us that the
7 state was approached. So the left was quite
8 perfunctory and just cited, you know, cited Cherokee,
9 we're not a governmental act or we're not functional
10 equivalent of a governmental agency, but we didn't get
11 into what -- we sat on it, and what we don't have.

12 But I think you've heard from the State
13 today, from the attorney general's office that, and
14 it's clear from the papers, we've never provided,
15 never provided to the State or to the commission an
16 electronic -- access to our electronic database or
17 some -- today Your Honor noticed a lot of information
18 is moving into the cloud. And that's the reason I
19 can't walk over and hand Mr. Pera like a thumb drive
20 that has the, you know, that has the TCA on it.
21 That's not how it's stored, that's not how it's kept.
22 There is -- and I need to be careful as an officer of
23 the Court, and I want to be very honest, and maybe
24 that's another issue for another day depending on
25 where your reasoning goes. But is there some

1 electronic database that, you know, recall the 46
2 volumes of this. It's not data the size that can be
3 put on, you know, downloaded to a thumb drive. Could
4 something be -- could 46 pdfs be created? I don't
5 want to give you the impression --

6 THE COURT: Let me ask a question. What
7 I understand they are seeking is in whatever format is
8 easiest for your client, that you provide the
9 electronic and electronic version of -- what I'm
10 holding up is the code book, the Tennessee Code
11 Annotated, the current one. That's my understanding.
12 Now, Mr. Pera can clarify that. Can you provide that?

13 MR. BOWLER: In talking to Mr. -- in
14 speaking with my client and in speaking with the
15 stakeholders, the answer was no.

16 THE COURT: And why is the answer no?
17 And I may need an affidavit on this.

18 MR. BOWLER: And you might need and
19 that's why I said I need to be very careful.

20 THE COURT: I'm not asking you to
21 testify. But what you do need to do is to provide
22 some information so that we can know what we're about
23 in this case. This is a core question, especially for
24 the petitioners. If this information had been given
25 before today's hearing, this would have been more

1 productive. I'm not sure where this will take us, and
2 that's unfortunate because we've done a lot of work
3 here and I hope it's not going to be wasted. Before I
4 hear your answer, I want to turn to Mr. Pera.

5 And you may need to state it better than
6 the Court did. So state exactly what it is that you
7 want deposited in the registry of the Court as the
8 electronic version. State it for the record so that
9 Mr. Bowler can then provide the Court a response. And
10 we may need to get an affidavit, ultimately.

11 MR. PERA: Your Honor, our request was
12 for, quote, each electronic version of the most
13 current Tennessee Code Annotated reproduced in its
14 entirety.

15 THE COURT: That's what I thought.

16 MR. PERA: And may I just add, if I'm not
17 out of order, you know, I used to be able to buy a
18 CD-ROM of this.

19 THE COURT: We know why they quit
20 producing that, that's in the papers, because not too
21 many people ordered them. And so anyway, okay.

22 Now, you've heard Mr. Pera state what it
23 is that he wants deposited in the registry of the
24 court and you're telling me your client cannot provide
25 that. We'll get testimony from someone in an

1 affidavit, but if you could tell the Court what your
2 understanding of those facts are.

3 MR. BOWLER: My current understanding of
4 those facts is this information exists in a database
5 of some sort that has artificial intelligence that a
6 lot of intellectual property --

7 THE COURT: Can it be searched? So we
8 put in the search and we say we want the current
9 Tennessee Code Annotated pulled out of the cloud, the
10 one that you're going to sell to everyone?

11 MR. BOWLER: Those are questions, Your
12 Honor, that I would approach my client and glad --

13 THE COURT: So you can't even tell me? I
14 mean, you-all are going to sell this. We get it every
15 year. We get replacement volumes, et cetera. But
16 you're telling me that you cannot put in the registry
17 of the Court what it is that, I guess I have on my
18 shelf that is the current version of the code?

19 MR. BOWLER: Your Honor, what I'm telling
20 you honestly, is that what I imagine can be done,
21 because I have some knowledge of computers, is that at
22 a minimum probably pdfs, you know, pdfs, could be
23 created of these 46 volumes. Those would be
24 searchable. I would be happy to have that
25 conversation with my client if there would be anything

1 that would be more accessible or, you know, putting
2 this on some -- as I said, I know it can't be done due
3 to the data size on a thumb drive, but could this be
4 done on some large external drive that the petitioners
5 want it downloaded on? I certainly have that
6 question. It was just something -- as strange as that
7 may sound, it's just not the way my client looks at
8 this information. It is things that they've
9 traditionally provided to the commission in the 46
10 volume hard bound, paper code, with the paper
11 supplements, and the CD-ROM, we've just never sent
12 this thing over to the commission by some -- like
13 today we think of e-discovery through some zip drive.
14 That is just not the way my client thinks of this.

15 THE COURT: Can they put it on a CD-ROM?

16 MR. BOWLER: I assume. I'll check with
17 the fact that it has been on a CD-ROM until it was
18 discontinued. That might be able to be updated and
19 put on a CD-ROM.

20 THE COURT: So I guess the challenge is
21 it's maintained in a certain form in the cloud and
22 then it's just updated? Is that the challenge to
23 providing it to us electronically.

24 MR. BOWLER: I'm not sure I would
25 articulate it that way.

1 THE COURT: How would you articulate it?
2 Let's get it on the record here.

3 MR. BOWLER: I would articulate it that
4 after today, we'll go back today and say can this
5 thing be put on an external drive in a manner that
6 could be deposited into the Court as it exists
7 currently.

8 THE COURT: Okay. All right. What else?

9 MR. BOWLER: Then I turn, Your Honor, the
10 rest of my argument on the functional equivalence
11 test.

12 Respectfully, Matthew Bender disagrees
13 with the petitioner, the conclusion that we're the
14 functional equivalent of a government agency. I think
15 some of my arguments addressed -- I won't be redundant
16 on that -- they've been addressed very well by the
17 attorney general's office and Ms. Kleinfelter here
18 today, which I appreciate. But I think that when I
19 listen to counsel's argument, I listen to their gloss
20 or their shine on Memphis Publishing and some of the
21 cases. But it sounds to me, and they haven't
22 articulated it that well, but I know counsel was
23 involved in Creative Restaurants, I think he was
24 involved in that case before Judge Adolpho Birch,
25 Jr., and the Supreme Court came out with Creative

1 Publishing. But back then was, the Court kind of
2 applied an agency test, or an independent contractor
3 test. And when I hear this discussion that Lexis
4 performs, you know, functioning, which is their
5 argument, we perform the function of researching,
6 publishing, distributing with TCA, we do so under
7 contract, there's no law with our government, the law
8 must be published in order to be the law and,
9 therefore, ipso facto and ipso dixit, my client must
10 be a government actor or the functional equivalent,
11 that's just not the case. It sounds to me like the
12 agency, like an old agency analysis that doesn't want
13 to go through in detail the four factors.

14 I created -- and if I may approach
15 counsel and the bench.

16 THE COURT: You can put it on the
17 evidence presenter.

18 MR. BOWLER: Is Your Honor able to see
19 that?

20 THE COURT: We have people listening so
21 we may be not able to do it. I may just have to use
22 the paper. But it's easier if we put it on the
23 evidence presenter because everyone can see it, and
24 you refer to it. But let's see if we can do it. Did
25 we cut those folks off? Now hold on a minute. We

1 want to make sure our folks are still able to hear.

2 MR. BOWLER: And if I may speak.

3 Counsel behind me has informed me that he
4 prepared a similar chart, so this is interesting so we
5 can see if we can agree on kind of where our
6 interpretation of the law. There is some
7 interpretation in this. If counsel finds any errors
8 in it, it's not Mr. Lee's doing, it's mine.

9 But I handle, as counsel said, a lot of
10 intellectual property cases, and I actually looked at
11 this fascinating Cherokee test as being not unlike
12 this likelihood of confusion factors that Courts apply
13 all the time in trademark cases. The Court has very
14 clearly told us in Cherokee that it's a totality of
15 the circumstances test that no single factor is
16 disposed in all of that. And it's not quantifiable.
17 I'm not going to tell the Court it's four versus two
18 versus three, but when you look through these cases, I
19 think they're all pretty remarkable how many factors
20 are found before the Court came to its conclusions.
21 And I think it was given by counsel, the public, on
22 factor two, which is the public funding factor because
23 the State, Your Honor, the commission and the statutes
24 make it very clear that we can't get paid a dime.

25 THE COURT: His argument was a little

1 different. He went with the indirect funding case.

2 MR. BOWLER: And I will --

3 THE COURT: So I understand they're not
4 saying that you're funded by it. I get that. That
5 was clear to me.

6 MR. BOWLER: I also want to make sure I
7 was clear on the point of why we're not indirect. If
8 you look at City Press, which counsel had cited that,
9 you know, it was undisputed, two percent of the
10 revenue did come from public and private schools.
11 That's two percent more funding than we have here.
12 That other 98 percent of funding came from contracts,
13 determinate games and ticker receipts. And the Court
14 found, the Court said that if TSSAA did not collect
15 that revenue, the schools would be collecting that
16 money and spending that revenue. And that way, only
17 the tournament revenue was, in a way, was government
18 funding because it did not come from the educational
19 component of the Department of Education that is the
20 athletic program.

21 Here, if Matthew Bender were not
22 collecting his revenues, which we're statutorily
23 allowed to do under statute, that money would not be
24 going to the state, it would be going to some other
25 private publisher before my client, Michie Publishing,

1 published the TCA in 1980, and before that was the Bob
2 Sperry company beginning in, I think 1953 with the
3 exception of the TCA through 1980. So it has always
4 been a public -- always been in the public sector,
5 that role.

6 And then Allen Day, he cited another case
7 that said that public funding was not actually, was
8 not even addressed in that opinion. And that isn't
9 exactly correct. The Court did find that I think in
10 the year 2007, that might have been City Press, 11.7
11 percent of CCAs, I think that was the CCA's case
12 funding came from the State. So --

13 THE COURT: It didn't seem in those cases
14 that the public funding that was provided was
15 material. They acknowledge in there that there is
16 some, but that wasn't a material factor. And so
17 that's why I had understood the argument to be more
18 focused on the indirect sources of income. And I
19 think that was the point that was made by the other
20 side. You can extract some facts of public funding,
21 but it wasn't material. The percentage is two
22 percent, 11 percent, and really what they were
23 focusing on, that was the indirect aspect of it. And
24 that's what they were asking me to do in this case,
25 acknowledging, no, we don't have any public funding

1 but there sure is a commercial benefit here.

2 So what's your response to that? That's
3 really the heart of the argument on all these cases
4 that I read that had been cited in the papers.

5 MR. BOWLER: I think that if you went to
6 1-1-113(b), the fact it was specifically set out in
7 statute, the legislature states very clear that the
8 commission is not going to spend any public dollars on
9 this effort with Matthew Bender.

10 The commission -- I'm quoting here --
11 "The commission shall not be authorized to subsidize
12 publication of the code out of public funds, but shall
13 require the cost of publication be borne by the
14 publisher and the publisher shall be required to
15 depend for compensation.

16 THE COURT: Which is where they derive
17 their indirect benefit argument from that.

18 MR. BOWLER: But I would submit that I
19 think that itself, 1-1-113(b), makes it very
20 persuasive evidence that because of this express lack
21 of public funding, that Matthew Bender is not a
22 government -- the functional equivalent of a
23 governmental agency.

24 THE COURT: Okay. I understand your
25 position.

1 MR. BOWLER: Your Honor, I could go
2 through the -- I know it's been -- I could go through
3 and will on each of these factors. We think they
4 weighed all of these heavily.

5 THE COURT: I'm not concerned with the
6 hour, so please take as much as you need to develop a
7 good record. So go ahead. I will stay here as long
8 as we need to.

9 MR. BOWLER: So, but before I jump to
10 factor two, which is public funding, we were talking
11 about the cornerstone inquiry and whether we perform a
12 governmental or public function. And I think other
13 counsel have here today done a very nice job setting
14 out kind of the statutory basis for why that isn't the
15 case. I think all of the counsel in the room thought
16 it, you know, relevant enough to cite the legislative
17 librarian Eddie Weeks book on the legislative history,
18 which is really a wonderful and delightful book. I
19 ordered it off my client website. It's published by
20 LexisNexis. And LexisNexis was not a public actor.
21 The government function, the functional equivalent of
22 a government actor when it published this book any
23 more than it is when it publishes the TCA. That is my
24 client's business, that is what they've done going
25 back for more than 100 years. It's a wonderful

1 service. It's helpful to lawyers, it's helpful to
2 private citizens. But at the end of the day, it's a
3 very private function and one in which the state is
4 always contracted out to do. So factor one simply
5 just isn't met.

6 We've discussed factor two in pricing.

7 On factor three, the extent of government
8 involvement or regulation or control. Matthew Bender
9 provides, as Your Honor knows, two functions. And I
10 think they've been, you know, collapsed together a
11 little bit by the petitioner. But we distribute this
12 publically and without cost, the un-annotated version
13 online. And we also research -- secondly, we
14 research, create, manage, and publish and distribute
15 annotations as a work for hire.

16 THE COURT: And one reason that I had put
17 those together was because of the Georgia case.
18 Counsel for the state has pointed out to the Court how
19 that is distinguishable, in their view, for what we
20 have in Tennessee. I can't ignore that Georgia case.
21 So my question to you is do you, I guess, just agree
22 with what the State has argued the distinction on the
23 Georgia case? Do you have anything to add to what
24 they've stated to the Court? Or is it your position
25 that it just doesn't apply?

1 MR. BOWLER: I believe that doesn't
2 apply, if I may add a few comments.

3 THE COURT: For the same reasons as they
4 or you have some additional ones?

5 MR. BOWLER: Well, yes, maybe no, but
6 I'll put my own gloss on it.

7 Lexis Bender -- Lexis was not a party to
8 the case. Yes, we submitted an amicus brief the same
9 way many states and other people did. I've read the
10 opinion, I've listened to moral argument. It's a 5-4
11 decision, it's the law of the land. I think counsel
12 said a couple of things to me that was my reading of
13 the case. I frankly agreed with the dissents, you
14 know, more than I do the Roberts' opinion. The
15 Roberts' opinion seized on that merger language, which
16 counsel cited. And I recall that being the privilege
17 at my own expense, not my clients going up and sitting
18 through oral argument. It was a very big thing for
19 the court. And I don't have that statute quoted. I
20 can't cite you the statute. But I think in Georgia it
21 said that the annotations, something like the code and
22 the annotations are hereby merged and they're approved
23 by, they are, they're approved and voted on I think by
24 the legislature. It may be a pro forma vote, but it's
25 a vote nonetheless. And that was very problematic

1 then.

2 And the other thing, and just a nuance,
3 it may just be my own thing. I didn't bring -- I had
4 my code, I left it, my Georgia code. But, you know,
5 Justice Roberts at the very beginning of the opinion
6 isn't focused even on something like the seal that we
7 had at the outset at the beginning of the OCGA. And
8 this is a paraphrase, but our seal is somewhat
9 different in Georgia, as many things are different
10 than they are here in Tennessee. But Tennessee chose
11 a code that says, you know, it's prepared under the
12 supervision of the Tennessee Code Commission. And
13 then it's got this code.

14 In Georgia, ours has some language that
15 chief justice sees that our TCA is approved by the
16 state. And I think that's what counsel said a lot
17 more eloquently than I did. And so in that sense I
18 agree very much with the opinions.

19 While we're on that copyright issue, I
20 want to finish the factors, but under copyright law,
21 the copyright holder in this case, which would be the
22 commission, has the exclusive rights, the exclusive
23 rights to make, use, distribute, copy, make derivative
24 copies of the copyright holder. That's copyrights
25 held, you know, by the commission, not LexisNexis. If

1 the State, you know, were to decide it didn't want to
2 claim copyrights, that's like the State's prerogative.
3 But under the Copyright Act, we're not just handing
4 over this TCA with this copyrighted revisions,
5 obviously ordered by the Court for somebody to just
6 put up online because we not only have the exclusive
7 review -- because of those exclusive rights, the state
8 has the right to bring actions for infringement, and
9 that's the whole nature of the copyright. It's a
10 monopoly, it's a limited monopoly. But like patent
11 law, it's somewhat of that contract you enter into
12 with the government that allows you some limited, you
13 know, rights to, you know, to control the work and its
14 distribution.

15 On factor three, finishing up there, I
16 view -- I view the level of dictation or, I guess, if
17 you would call it regulation or control, you know,
18 construing it in the light, even most beneficial to
19 the respondent or the petitioner, which isn't the
20 standard here, we just aren't, these are vendor
21 requirements. And I think the assistant attorney
22 general alluded to some other contracts, but to me
23 these are things that you just do for consistency,
24 that the paper has to be a certain weight, that the
25 color must be dark green and, you know, the TCA has

1 been green as far as I remember. And Matthew Bender
2 can't just go outside the contract and publish one
3 with a purple copy. These are things that are just
4 done for consistency and quality purposes. But this
5 is very different. And I just disagree with the
6 parsing.

7 I think that Judge Birch's opinion in
8 Cherokee, and has been interpreted and applied by the
9 Tennessee Supreme Court and the Court of Appeals since
10 then, is a very, very different kind of control. And
11 it was control over that the state or city governments
12 asserted over the private entities. Let's look at
13 some of those cases.

14 Memphis Publishing versus Cherokee. I
15 think there's a quote in petitioners's reply brief
16 that the TDHS, the Tennessee Department of Human
17 Services didn't execute complete control for
18 supervision over Cherokee, a significant level of
19 government control and oversight was evidenced by
20 provision in the 1992 and 1999 contracts requiring
21 advanced state approval of allowable costs under
22 contracts and the provisions on all three contracts
23 authorizing state audits of Cherokee's activities.

24 The 1992 contract, Your Honor, allowed
25 the state the right to audit Cherokee's records with

1 respect to work performed or money received under the
2 contract. And the State, there was evidence the State
3 routinely exercised this right by conducting regular
4 monitoring visits and by reviewing Cherokee's client
5 files.

6 Under the 1999 contract, still focusing
7 on Memphis Publishing, the State was allowed to audit
8 Cherokee's records relating to work and money received
9 under the contracts. In addition, Cherokee was
10 required to submit an annual independent audit to the
11 State after each reporting period.

12 Those facts simply don't exist here. I
13 think that there is some -- I don't have it, it's not
14 important, I think to the discussion, there's audit,
15 some kind of audit language in our contract, but it's
16 very different from the audit language that we've
17 contemplated and discussed in these cases, and I think
18 it was something I keep track of expenses in case we,
19 you know, want to look at those from time to time.

20 Allen versus Day, the operating
21 agreement, Your Honor, was replete -- this was the
22 Court's language -- was replete with evidence of the
23 Sport's Authority substantial oversight of Power's
24 management to the arena. The agreement expressly
25 states that Powers acknowledge that the metropolitan

1 government has substantial interest in all matters
2 related to management, operation, use, enjoyment of
3 the arena due in part to the fact that the cost of
4 constructing the arena was borne by the metropolitan
5 government and the metropolitan government has
6 provided and it's likely to provide substantial
7 funding for the Sports Authority for the operation
8 management prepared of the arena.

9 And then it went on. Powers not only
10 agreed to comply with the Sports Authority overarching
11 directives regarding the management of the arena, but
12 it acquiesced to the Sports Authority's control over,
13 quote, minute managerial decisions about spending
14 limits without approval, and what have you. So the
15 Sports Authority's regulation over Powers extended
16 beyond financial oversight as well, the Court said.
17 Again, Powers had to submit annual line item budgets
18 for the Sports Authority's review and approval.

19 It must also maintain complete financial
20 records, which are to be made available to Sports
21 Authority, and the right to Sports Authority to obtain
22 Powers' books and records and to audit such records is
23 unqualified. Sports Authority had the right to
24 inspect the arena at all times.

25 We believe that the government's

1 involvement with the Powers' management in the arena
2 is not merely limited to evaluating its performance,
3 but rather constitutes persuasive government control.

4 Freeman, another case relied on, the CCA
5 counsel I think said in its reply brief that the Court
6 kind of gave perfunctory analysis or didn't even
7 analyze that point. I disagree. Page 379, the Court
8 of Appeals said CCA was subject to significant
9 government control and oversight for prisoners being
10 housed in accordance with the Tennessee Corrective
11 Incentives Act, it cited, it's footnote 8 which went
12 on in further detail for those counties who chose to,
13 you know, house state prisoners, they had to abide by
14 all of these TCA regs. And then it goes on and on.
15 Your Court can refer to that footnote.

16 TSSAA's decision-making authorities
17 consisted of public officials, including public school
18 principals and representatives of public entities
19 creating substantial government quality and control.
20 The two primary governing bodies of the TSSAA were the
21 legislative's counsel and the board. The members of
22 each body must be the principals, assistant
23 principals, superintendent of member schools. All
24 members of the board of patrol were employees of
25 public schools at the time of the hearing. It just

1 went on and on. All sorts of, again, control over the
2 entity, not just the service being provided, not just
3 vendor, not just vendor contracts about size, volume,
4 what have you.

5 Woods -- this is my last on that point.
6 The Woods case, another one relied on by the defendant
7 on this point. There was substantial amount of
8 government involvement with the operations of the
9 Jefferson City Economic Development Oversight
10 Committee. The EDOC sent representatives to the
11 governments' work sessions, the voting meetings to
12 make presentations and explain what they were planning
13 to do with the funding. The EDOC had a representative
14 at each county commission every month at every
15 meeting, questions, making recommendations, and
16 answering questions. There was monthly interaction.
17 The county commission chairman finance director, two
18 of the city mayors served on the EDOC's board. The
19 county commissioner, chairman, finance director,
20 served on the EDOC's board. No check written by or on
21 behalf of EDOC, and it was valid unless it bore two
22 signatures, one of which was that of the county
23 finance director.

24 In one year, the county commission
25 director, the EDOC, quote, to change the

1 organizational structure, organizational flow chart of
2 the EDOC, which it did. For all these reasons, I
3 think the kind of control that was contemplated or
4 discussed, set out in the Cherokee decision is not met
5 in this case.

6 And then to the final factor is whether
7 the entity was created by government. You know, it's
8 undisputed that Matthew Bender was not created by the
9 government or the commission. So for all of those
10 reasons, Your Honor, looking at the totality of the
11 circumstances applying before non-dispositive factors,
12 we respectfully submit Matthew Bender is not the
13 functional equivalent of the government agency.

14 THE COURT: Anything else in support of
15 the opposition to the records request?

16 MR. BOWLER: No, Your Honor. Other than
17 we cited in our response memorandum and the Ganton
18 affidavit.

19 THE COURT: All right. If the Court were
20 to require by Thursday at noon you file an affidavit
21 of the respondent on the ability to file with the
22 Court under seal an electronic version, a CD-ROM of
23 the current Tennessee Code Annotated that's going
24 to -- or is being sold, will you be able -- do you
25 have time to do that? Do you have time to do that?

1 MR. BOWLER: Your Honor, let me make sure
2 I understand the request. Is the request -- and I
3 know my co-counsel is taking notes -- To deposit
4 under --

5 THE COURT: No, sir. The request is for
6 you -- you told me that you needed to talk with your
7 client before you could commit to filing anything in
8 the registry of the Court. And what I'm asking you to
9 do is to file an affidavit of the respondent on
10 whether they are, they have the ability to make that
11 filing of the Court. You gave an answer about the
12 cloud and we have different versions and we replace it
13 and, et cetera. And you did not want to give, or were
14 unable to give the Court a definitive answer and you
15 demurred to the client. So that's what I am asking
16 for, an affidavit. Will that work for you?

17 MR. BOWLER: And what time?

18 THE COURT: Thursday at noon. And that
19 would be central time.

20 MR. BOWLER: I'll make that happen. If I
21 learn of any unavailability of my client, I'll let the
22 Court know.

23 THE COURT: And just so we have the
24 record straight, Mr. Pera, will you repeat, again,
25 what the request is so that we have it and so that

1 Mr. Bowler will know that? Because I will not have
2 time tomorrow to issue an order on this. I'll try to,
3 but if I don't, let's get it so he can write it down.

4 MR. PERA: This is quoting directly from
5 our request, which is attached to the petition as
6 Exhibit 6. And it's the first sentence of that, each
7 electronic version of the most current Tennessee Code
8 Annotated reproduced in its entirety.

9 THE COURT: And the way that I would
10 change that is not each electronic version, but some
11 sort of electronic version. Because the petitioner
12 had said they were, I think the word you used was
13 agnostic, with respect to the format.

14 MR. PERA: That's right, Your Honor.

15 THE COURT: Does that help, Mr. Bowler?
16 Do you know what you need to provide the Court or do
17 you need more guidance?

18 MR. BOWLER: I do, Your Honor.

19 THE COURT: If you will file that, I'll
20 try and get an order out tomorrow. I don't know if
21 I'll be able to, so you've got it written down.

22 MS. KLEINFELTER: Your Honor, just
23 briefly, let me ask about statutory references to what
24 is codified. And there is just one other provision I
25 wanted to point the Court to and that is TCA

1 1-1-111(b). And that talks about that the text of the
2 statutes, codes, and code supplements, but not the
3 annotations, footnotes, and other editorial matter
4 that appears in the compilation. That's prima facie
5 evidence of the statutory law and it's recognized and
6 referred to as the official compilation of the
7 statutory law.

8 And then in 1-2-102, that required the
9 initial official code, the enrolled draft of the
10 official Tennessee Code back in 1955 upon approval of
11 this statute approved by the governor to be deposited
12 in the office of the Secretary of State and be
13 preserved as the official code of this state, as the
14 official code, and then 1-2-114(b)(5) says that any
15 reenactments, the reenactments that are done every
16 year, are to do the same thing. They're to be
17 deposited with the Secretary of State as the official
18 reenactment of the official code. And it specifically
19 just refers to the Tennessee Code, not the Tennessee
20 Code Annotated.

21 THE COURT: Right. All right. Thank
22 you, General Kleinfelter.

23 Mr. Pera, a reply.

24 MR. PERA: I will try to be brief and
25 organized, but I'll probably not be as organized as

1 I'd like.

2 Let me start with maybe going in a little
3 bit of reverse order. And let me talk about what
4 Bowler talked about in terms of the structure of the
5 law. And he is correct in saying that I was involved
6 in both the Creative case and the Cherokee case. And
7 without going too far into the back story, Cherokee
8 itself, reading the opinion, telling you nothing about
9 anything beyond the opinion, acknowledges sort of its
10 debt to the Creative Restaurants. And he's right, the
11 Creative Restaurants was Court of Appeals that talked
12 about agency. The Court says that. The Court says on
13 page 76, it points to that case. And it basically
14 says agency is not a nothing. Agency doesn't work in
15 an age of privatization. We need to go beyond agency.
16 We need to look beyond agency. And, in fact, the only
17 way to read Cherokee is to read it as a broadening of
18 that. It's more than just an agent. And so, in fact,
19 as I recall, not to go too far into the weeds, I think
20 the contract in Cherokee said, this doesn't make
21 Cherokee an agent. But it also said, among other
22 things, these records were public records. But in any
23 event, the bottom line is they lay out a new test, the
24 test, it is a totality of the circumstances test, a
25 few comments on that. One, significant control -- I'm

1 sort of working in reverse order -- significant
2 oversight and control, I think that's close to the
3 phrase from Cherokee.

4 You know, Mr. Bowler, I assume, works a
5 great deal with his client. I detected him saying we
6 see these as -- I'm not sure I can get the correct --
7 vendor requirements. Now, if I'm a publisher, that
8 sounds about right because this vendor requirement
9 goes into, okay, we're going to use green leather.
10 Okay, that's fine. But, you know, to Core Civic, the
11 company of the business running prisons, I would be
12 willing to bet you the 300-page manual the State gives
13 on how to treat prisoners is probably just vendor
14 requirements, too.

15 So the question is, tuned up to the
16 function and the function is back in 105 and 106,
17 tuned up to the function, are these things in this
18 agreement and what they reflect and how they're
19 grounded in the statutes themselves, the state's law
20 itself, the legislative's instructions itself, does
21 that amount to significant government oversight
22 imposed upon any outside vendor to be supervised by
23 the code commission. And I just don't see any way to
24 read this agreement, other than that it is. That is
25 for the Court to determine, obviously, but just a

1 couple of quick points.

2 Mr. Bowler passingly referred to audits.
3 Well, yes, there's an audit provision in the
4 agreement, Page 16, Section 10.11 says, "Publisher
5 shall maintain documentation of all charges against
6 the state under this contract. The books, records,
7 and documents of the Publisher, insofar as they relate
8 to work performed or money received under the
9 Contract, shall be maintained for a period of five
10 years."

11 If you look at page 33, I mentioned in
12 passing the State controls through this agreement
13 price. It controls price for every version of these
14 products. There are ten of them, eight of them. I
15 don't know how many. And the current version goes out
16 to 2029. So their pricing is set by agreement out to
17 2029. I venture to say, that's significant oversight.
18 I don't know what their standards are with respect to
19 other people they do this work for, but that sounds
20 like significant oversight and control by the
21 government under the color -- not color -- under the
22 letter of the law in the Tennessee Code.

23 Again, let me jump around a little bit.
24 You know, let's talk about indirect funding. Indirect
25 government funding. Mr. Bowler suggested that, well,

1 if money weren't -- or this is how I interpret what he
2 said. If the money for this publication weren't
3 collected by Lexis, it would be collected by another
4 company. Well, maybe. Maybe not. I don't know that
5 the same financial deal would be struck with another
6 company. They're all manner of commercial
7 arrangements that could be arranged here where in fact
8 that money might come to the State, just as is the
9 situation with Cherokee where the function was done by
10 the State, then done by Cherokee, then done by the
11 State again. Right? Could the state -- could the
12 code commission take back this function and get me to
13 write a check every year myself to the Tennessee Code
14 Commission for the Tennessee Code Annotated? Sure,
15 why not? They're the copyright holder, so they claim.

16 So I just don't, I think, again, for
17 purposes of Cherokee, the question of revenue,
18 indirect government financial support is relevant.
19 And I think it clearly weighs in favor of functional
20 equivalency.

21 I also really want to press back. It's
22 funny, hopefully we're both considered good lawyers.
23 Mr. Bowler and I both had the same thought to come up
24 with a chart, and we had a little color on ours and he
25 does not, but he had numbers on it and we did not.

1 But the fact is, Your Honor, that the analysis under
2 Cherokee is not a math test, it's not a spreadsheet,
3 it's not a check the box. It is a totality of the
4 circumstances test. And all the cases, and we don't
5 have that many cases, but they all show it. And I
6 just, I submit that we've been over this. I won't go
7 over it again, but I submit that functional
8 equivalence is met here under that totality of
9 services test.

10 I also have to comment on, although
11 maybe -- this copyright question, I'm not sure I
12 understand Mr. Kreutz's position, the State's
13 position. If I'm to understand their position that
14 this Court doesn't have jurisdiction to decide the
15 copyright question, so to speak, whether the Tennessee
16 Code Annotated is copyrightable -- I'm not a contract
17 lawyer, but I don't understand that to be the law. In
18 fairness, our position is the Court has the ability to
19 make that decision if it's necessary to make a
20 decision under the Public Records Act. That's how I
21 understand the law.

22 However, if the State is taking the
23 position that this Court cannot reach that question
24 one way or another, then it cannot apply an exception
25 to the Public Records Act because the State cannot, it

1 is their burden to establish exception. If this Court
2 cannot find that they have a legitimate copyright
3 interest in the code, then the burden is on them and
4 they fail.

5 Now, again, I hesitate to say that. I'm
6 sort of arguing against myself here, I think the Court
7 has the ability to make that decision. But that's the
8 State's position, as I understand it, as confused as I
9 am by it.

10 One last thing on that point, which is I
11 took Mr. Kreutz to suggest that somehow the State's
12 copyright rights enable or authorize it to restrict
13 the ability of Lexis to --

14 THE COURT: Furnish it publically.

15 MR. PERA: Yes, yes. That's what I took
16 him to say. That is a problematic position under the
17 Public Records Act. We have a statute that says that
18 by contract they can't make documents secret. I'm not
19 sure I've been able here, over the course of the last
20 hour, since I've heard that, to sort out what that
21 could possibly mean here. But I'm troubled by the
22 notion that the State is trying to use, trying to
23 argue that as a copyright holder that has the ability,
24 the power to publish or not publish at its will, at
25 its discretion, when the legislature has in another

1 body of law said these records are public. The notion
2 that the State could exercise what I gather is
3 unfettered discretion to close a record, is very
4 troubling under both the substance of the public
5 records law and maybe even that specific provision
6 about not being able to contract --

7 THE COURT: Well, I think that's what the
8 Georgia case was concerned about. They were troubled
9 by that.

10 Okay. What else?

11 MR. PERA: I think I'm done, actually.

12 THE COURT: All right. Then I need to
13 ask you a question, and it relates to 12-6-102 and
14 12-6-116.

15 MR. PERA: All right.

16 THE COURT: The State has argued, this
17 goes back to the separation of the Tennessee Code
18 versus the Tennessee Code Annotated. And they've
19 argued that 12-6-102 and 116 are evidence, make it
20 clear that the legislature was separating the
21 Tennessee Code from the Tennessee Code Annotated. And
22 then if we take that argument, they assert that the
23 Tennessee Code Annotated is not a public record.

24 What is your response, the statutory
25 construction, the interplay between 12-6-102 and

1 12-6-116 and 1-1-105 and 1-1-106.

2 MR. PERA: I have to say I haven't seen
3 the 12 code sections. I'm happy to look at them.

4 THE COURT: Let me hand them down to you
5 here.

6 MR. PERA: Your Honor, may I approach?

7 THE COURT: Sure. Here we go. So it's
8 12-6-102. Go to the end of the statute and that's
9 where we have the excepted out part about Tennessee
10 Code Annotated. And it sets up in 12-6-102 and 116
11 that, I believe it's the Secretary of State, some
12 government official --

13 MS. KLEINFELTER: It's the Secretary of
14 State.

15 THE COURT: -- that they're to make these
16 laws public and available. And of course that
17 responds that's the whole Georgia policy that we want
18 these to be available to the public. And the State's
19 argument is that if you look at 12-6-102 and 12-6-116,
20 it only pertains to the code, it excepts out the code
21 annotated. And when you go to 1-1-105 and 106, that
22 chapter is entitled Tennessee Code Annotated, and so
23 it's separate and indicating these aren't public
24 records.

25 MR. PERA: I'm under the delusion that I

1 understand. But let me take a crack at it.

2 I do know -- I do understand that the
3 Secretary of State, for example has separate and
4 independent responsibilities. Got it. And I also get
5 that it appears that that obligation under Title 12
6 focuses on the code and not the code annotated.
7 Right. That's lovely. God bless the Secretary of
8 State. But that's not the code annotated. And, in
9 fact, without losing your place, I have the code
10 annotated. And on the cover page, as Mr. Bowler
11 showed, there's the seal that's required by statute
12 from the code commission, the code commission seal
13 placed on not the code but the code annotated, which
14 includes the code. So, yes, I don't have any problem
15 with the code annotated, the Tennessee Code Annotated
16 and the Tennessee Code being different documents,
17 different records, different things. I'm looking for
18 the code annotated. And it's very clear to me that
19 the code commission under 105 and 106 has a mandate,
20 an obligation to publish the Tennessee Code Annotated
21 and they've hired Lexis to do it.

22 And, by the way, just to be very clear
23 about this, and let me hand this back to the Court,
24 and I've got a copy of another volume back here. I
25 don't know that I've ever read the title page of the

1 code before this matter, but if the Court turns to the
2 very first page it says, as we just saw, you know,
3 prepared under the supervision of the Tennessee Code
4 Commission and the seal, and it is a statutory
5 requirement that they go through a certain process to
6 impose, or what's the word, apply their seal, right?
7 They're obliged to do that and they have to do certain
8 things. But flip over past the copyright page. We
9 then have two other folks involved in this process
10 because they're involved in the code as General
11 Kleinfelter says. And that's, as I understand it,
12 about the code itself, right? And that's then the
13 certificate of the Tennessee Code Commission. And I
14 read that to be about more about the code than about
15 the code annotated.

16 And then certainly the next page, the
17 Secretary of State, that's his certificate, right? He
18 is talking about the code and not the code annotated.

19 So, yes, the code annotated includes the
20 code. I completely concede that. But that takes
21 nothing away from the code annotated itself being a
22 different publication that is under the purview of the
23 code commission to publish, who has hired Lexis to do
24 so. That may not be the answer to your question.

25 THE COURT: No, it is. But what's

1 different between 12-6-102 and 12-6-116 and 1-1-105
2 and 106 is you have this explicit statement about
3 distribution to the public by the Secretary of State.
4 And I don't see that in 105 and 106. You see what I'm
5 talking about?

6 MR. PERA: Well, let me look at 105 and
7 106 again.

8 THE COURT: I believe it's 116.

9 MR. PERA: Well, maybe I'm not addressing
10 the Court's question. But 105 and 106, I certainly
11 read those to very clearly talk about distribution to
12 the public. Because it says, among other things,
13 publications, sale, distribution. And I think the
14 other one -- yeah. The 106 says expedient to the
15 successful production and publication for revised
16 compilation.

17 So I don't -- and they even talk about in
18 106, entering into contracts with a law book publisher
19 for the editing, filing, et cetera. I don't really
20 think that there is any doubt. I don't think the
21 respondents would disagree that this empowers.

22 THE COURT: Right. But it's 12-6-102(b)
23 where it says that they are to be furnished, I guess,
24 free copies to be put in the library.

25 MR. PERA: But that's the code, Your

1 Honor.

2 THE COURT: Yes. That's right. And what
3 I was pointing out is you don't have a similar
4 requirement of 1-1-105 and 106 of the code annotated.
5 There's not a similar requirement that it be
6 furnished, be out there for the public.

7 MR. PERA: Well, that's an interesting
8 question. I'm not sure if that's in the code itself
9 or not, but it is in the contract that there be copies
10 be put in law libraries and there be an Internet
11 availability. That's in there.

12 THE COURT: You're talking about the
13 annotated?

14 MR. PERA: Yes, yes.

15 THE COURT: But the statute itself I
16 didn't see. I saw that as a difference between the
17 two.

18 MR. PERA: I think that may be correct.

19 THE COURT: Okay. I'll go back and look
20 at the contract. All right. Anything else on behalf
21 of the petitioner?

22 MR. PERA: No, Your Honor. Thank you for
23 your time.

24 THE COURT: You're welcome. What I'm
25 going to do then is I'm going to take the matter under

1 advisement. It certainly will be out by next week. I
2 don't know if it will be out by the end of the week,
3 but I certainly will try to do that.

4 And, Mr. Bowler, if you will file that
5 affidavit by Thursday, I will try to get an order
6 entered tomorrow, because it's going to be filed under
7 seal and they will need that when you ultimately, if
8 we were to file an electronic version. So please get
9 your affidavit in. And then if I need to order that
10 we file that, I would have to put in an order about
11 under seal, et cetera. So there are some hoops to
12 jump through if we were to get that in the registry of
13 the Court.

14 MR. BOWLER: Thank you.

15 THE COURT: All right. That concludes
16 our hearing. Thank you all very much. This has been
17 very informative and productive. I appreciate it.
18 Thank you. Court is adjourned.

19 (Proceedings were adjourned at 4:23 p.m.)
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REPORTER'S CERTIFICATE

I, Emily L. Sipe, Court Reporter and Notary Public, do hereby certify that I recorded to the best of my skill and ability by machine shorthand all the proceedings in the foregoing transcript, and that said transcript is a true, accurate, and complete transcript to the best of my ability.

I further certify that I am not an attorney or counsel of any of the parties, nor a relative or employee of any attorney or counsel connected with the action, nor financially interested in the action.

SIGNED this 6th day of September 2022.



Emily L. Sipe, RPR, LCR
Tennessee LCR No. 608
Expires: 6/30/2024

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