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SUPREME COURT HOLDS THAT COPYRIGHT PROTECTION DOES NOT EXTEND TO ANNOTATIONS ACCOMPANYING STATUTORY TEXT

To Our Clients and Friends:

On April 27, 2020, a divided Supreme Court held in *Georgia v. Public.Resource.Org, Inc*. that Copyright protection does not extend to the annotations contained in Georgia's official annotated code. 590 U.S. ___, No. 18-1150, 2020 WL 1978707, at *3 (U.S. Apr. 27, 2020). The "government edicts" doctrine, the Court held, puts Georgia's annotations outside the reach of copyright protection because they are created by an arm of the Georgia legislature acting in the course of its legislative duties. *Id.*

Background

The Official Code of Georgia Annotated ("OCGA") includes the text of every Georgia statute currently in force. *Public.Resource.Org*, 2020 WL 1978707, at *3. At issue in this case is a set of annotations that appear beneath each statutory provision, which includes summaries of judicial decisions applying a given provision, pertinent opinions of the state attorney general, a list of related law review articles and similar reference materials, and information about the origins of the statutory text. *Id.*

A state entity established by the Georgia Legislature, called the Code Revision Commission, assembles the OCGA. *Id.* Pursuant to a work-for-hire agreement with the Commission, Matthew Bender & Co., Inc., a division of the LexisNexis Group, prepared the annotations in the current OCGA in the first instance. *Id.* at *4.

Public.Resource.Org is a nonprofit organization that aims to facilitate public access to government records and legal materials. *Id.* Without permission, Public.Resource.Org posted a digital version of the OCGA on various websites and distributed copies of the OCGA to a number of organizations and Georgia officials. *Id.*

The Commission sued Public.Resource.Org on behalf of the Georgia Legislature and the State of Georgia for infringement of its copyright in the annotations. *Id.* Georgia did not contend that its state laws were subject to copyright protection. Public.Resource.Org counterclaimed, seeking a declaratory judgment that the entire OCGA, including the annotations, fell in the public domain. *Id.*

The District Court sided with the Commission but the Eleventh Circuit reversed. In a 5-4 decision, with two dissenting opinions, the Supreme Court affirmed the Eleventh Circuit, albeit for reasons distinct from those relied on by the Court of Appeals. The Supreme Court held that the annotations in Georgia's Official Code are ineligible for copyright protection.

The Government Edicts Doctrine

This case is the Supreme Court's most detailed discussion of the so-called "government edicts" doctrine in more than a century. The government edicts doctrine is a judicially created exception to copyright protection that originated in a trio of cases decided in the 19th century: *Wheaton v. Peters*, 33 U.S. 591 (1834); *Banks v. Manchester*, 128 U.S. 244 (1888); and *Callaghan v. Myers*, 128 U.S. 617 (1888). These cases, addressing works reporting court decisions, held that there can be no copyright in the opinions of the judges or in "whatever work they perform in their capacity as judges," *Banks*, 128 U.S. at 253, but that the reporter had a copyright interest in the explanatory materials that the reporter had created himself, *Callaghan*, 128 U.S. at 647.

Georgia urged the Court to read these precedents as limiting the government edicts doctrine to government edicts "having the force of law," such as state statutes, but not to works lacking the force of law, such as the annotations in the Official Code of Georgia Annotated. *See, e.g.*, Brief for Petitioner at (I), *Georgia v. Public.Resource.Org, Inc.*, 590 U.S. ___ (2020) (No. 18-1150), 2019 WL 4075096, at *I. Public.Resource.Org offered an alternative approach, arguing that the Court's precedents do not limit the government edicts doctrine to works that have binding legal effect; rather, the legal materials prepared by state court judges were not copyrightable—not because they had the force of law, but because they lacked an "author" for copyright purposes. Brief of Respondent at 27, *Georgia v. Public.Resource.Org, Inc.*, 590 U.S. ___ (2020) (No. 18-1150), 2019 WL 5188978, at *27.

The Court opted for Public.Resource.Org's "authorship" approach. According to Chief Justice Roberts, writing for the majority, the Court's "government edicts precedents reveal a straightforward rule based on the identity of the author." *Public.Resource.Org*, 2020 WL 1978707, at *5. "Because judges are vested with the authority to make and interpret the law, they cannot be the 'author' of the works they prepare 'in the discharge of their judicial duties.'" *Id.* at *6 (citing *Banks*, 128 U.S. at 253). Similarly, legislators cannot be "authors" of the works they prepare in their capacity as legislators. *Id.* This rule, however, does not apply to "works created by government officials (or private parties) who lack the authority to make or interpret the law, such as court reporters." *Id.* (citing *Banks*, 128 U.S. at 253; *Callaghan*, 128 U.S. at 647). This rule based on the identity of the author, the Court explained, "applies *regardless* of whether a given material carries the force of law," *id.* at *5 (emphasis added): "appl[ying] both to binding works (such as opinions) and to non-binding works (such as headnotes and syllabi)," *id.* at *6.

Thus, the Court concluded, "copyright does not vest in works that are (1) created by judges and legislators (2) in the course of their judicial and legislative duties." *Id.* at *6.

Justice Thomas, in dissent, joined by Justice Alito and by Justice Breyer, would have followed Georgia's "force of law" approach. The trio of cases, Justice Thomas wrote, establishes that "statutes and regulations cannot be copyrighted, but accompanying notes lacking legal force can be." *Id.* at *13.

Georgia's Annotations Are Not Subject To Copyright Protection

For its purposes, the Court identified the technical "author" of the annotations as Georgia's Code Revision Commission. The Commission was the technical author even though the work was prepared in

the first instance by a private company (Lexis) because Lexis did the work pursuant to a work-for-hire agreement providing that the Commission would be the sole "author" of the annotations. *Public.Resource.Org*, 2020 WL 1978707, at *7. The parties did not dispute this point. *Id.*; *see also id.* at *15 n.3 (Thomas, J., dissenting).

Then, applying its two-part "authorship" framework, the Court held that Georgia's annotations are not subject to copyright protection because (1) the technical author of the annotations, Georgia's Code Revision Commission, qualifies as a legislator for the purposes of the analysis because it functions as an arm of the Georgia Legislature; and (2) the annotations were created in the discharge of the Legislature's legislative duties. *Id.* at *7.

1. The Court first determined that, for the purpose of preparing and publishing the annotations, the Commission functions as an arm of the Georgia Legislature. *Id.* Citing a number of factors, the Court concluded that the Commission is an arm of the legislature because:

- The Commission is created by the legislature, for the legislature;
- The Commission consists largely of legislators;
- The Commission receives funding and staff designated by law for the legislative branch; and
- "Significantly," the legislature approves the Commission's annotations before they are "merged" with the statutory text and published in the official code alongside that text at the legislature's direction. *Id.*

Justice Thomas maintained that this "test for ascertaining the true nature of these commissions raises far more questions than it answers." *Id.* at *13. Although the majority lists a number of factors, Thomas noted, "it does not specify whether these factors are exhaustive or illustrative" nor does it "specify whether some factors weigh more heavily than others when deciding whether to deem an oversight body a legislative adjunct." *Id.*

Interestingly, although sovereign immunity is not mentioned anywhere in the Justices' opinions, the majority's test for determining whether the Commission functions as an arm of the Georgia Legislature resembles the fact-intensive, multifactor inquiry the Court performs when deciding whether a state instrumentality may invoke the State's immunity under the Eleventh Amendment. *See, e.g.*, *Hess v. Port Authority Trans–Hudson Corporation*, 513 U.S. 30, 47–51 (1994); *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401–02 (1979). In the arm-of-the-state context, the Court examines the relationship between the state and the entity in question and may look to the "nature of the entity created by state law" to determine whether it should "be treated as an arm of the State." *Regents of the Univ. of California v. Doe*, 519 U.S. 425, 429–30 (1997) (citing *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 280 (1977)); *see also Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 311–12 (1990) (Brennan, J., concurring) ("immunity applies . . . where the entity being sued is so intricately intertwined with the State that it can best be understood as an 'arm of the State'"). For example, in *Auer v. Robbins*, the Court considered whether the state (1) was responsible for the

appointment of the board's members, (2) was responsible for the board's financial liabilities, or (3) directed or controlled the board in any other respect. 519 U.S. 452, 456 n.1 (1997).

2. The Court next concluded that the Commission created the annotations in the discharge of its legislative duties. *Public.Resource.Org*, 2020 WL 1978707, at *7. Although the legislature does not enact the annotations into law through bicameralism and presentment, the annotations provide commentary and resources that the legislature has deemed relevant to understanding its laws and fall within the work legislators perform in their capacity as legislators. *Id.*

Justice Ginsburg, with whom Justice Breyer also joined, disagreed. Justice Ginsburg would have held the annotations copyrightable because, in her view, the Commission did *not* create them in its legislative capacity for three reasons. *Id.* at *19. First, because the annotations comment on statutes already enacted, annotating begins only after lawmaking ends. *Id.* Second, the annotations do not state the legislature's perception of what a law conveys; rather, they summarize the views of *others* on a given statute. *Id.* at *20. Third, the annotations serve as a reference to the public, not the legislature—they do not aid the legislature, for example, in determining whether to amend existing law. *Id.*

The Broader Implications Of The Majority And Dissenting Opinions

Given the infrequency with which the government edicts doctrine appears in copyright litigation, the Court's decision may be most remarkable for the unusual lineups that it produced in the majority and dissenting opinions. Analyzing the reasons for those divisions may reveal clues about the individual Justices' judicial philosophies.

In writing for the Court, Chief Justice Roberts expressed concern with creating the appearance of "first-class" and "economy-class" access to public laws, which could reflect his institutional responsibilities as Chief Justice of the United States (which include presiding over the Judicial Conference and chairing the Board of the Federal Judicial Center). The Chief Justice observed that the "animating principle" behind the common-law limit on copyright protection "is that no one can own the law." *Public.Resource.Org*, 2020 WL 1978707, at *6. "Every citizen," the Chief Justice continued, "is presumed to know the law, and it needs no argument to show that all should have free access to its contents." *Id.* (citing *Nash v. Lathrop*, 142 Mass. 29, 35 (1886)) (internal quotation marks and alterations omitted). The Chief Justice asked readers to "[i]magine a Georgia citizen interested in learning his legal rights and duties." *Id.* at *10. If he or she were limited to the "economy-class version of the Georgia Code," he or she would have no idea that the Georgia Supreme Court has held important aspects of certain laws unconstitutional. *Id.* By comparison, the Chief Justice noted that "first-class readers with access to the annotations will be assured that these laws are, in crucial respects, unenforceable relics." *Id.* He added that the decision follows a "clear path forward that avoids these concerns." *Id.* at *11.

In contrast, Justice Thomas, joined by Justice Alito, expressed a discomfort with judicial policymaking and "meddling." *Id.* at *18. For Justice Thomas, "[a]n unwillingness to examine the root of a precedent has led to the sprouting of many noxious weeds that distort the meaning of the Constitution and statutes alike." *Id.* at *14. Only after disputing the majority's extension of the Court's 19th century precedents

did Justice Thomas address the "text of the Copyright Act," concluding that it "supports" the dissenters' reading of the precedents.

The bright-line nature of the majority's "straightforward" authorship rule may help to explain why Justices Gorsuch and Kavanaugh joined with Chief Justice Roberts in this holding. As the dissent warned, however, that the rule could be challenging to apply in practice. To determine whether a state body is part of a legislature and discharging its official duties, courts must survey state law to identify factors that either point toward or away such a conclusion. *See id.* at *7–8. As Justice Thomas noted in his dissent, the courts apparently have discretion to decide what factors are relevant. *Id.* at *13. The result may be a patchwork of copyright protection for states' annotated codes, depending on the particulars of each state's statutory scheme.

Conclusion

As result of the Court's decision, state legislatures and publishers trying to enforce copyrights in legal annotations may face increasing scrutiny based on whether their publications were issued by a legislative body discharging an official function. As a result, we may see more state legislatures taking action to restructure the way they create their code annotations and rethink whom they enlist to create them. For example, more publishers may compile annotations independently of the legislature (as some states already do). This, as Justice Thomas predicts, could result in an increase in the cost of annotations and further exacerbate the divide between "first-class" and "economy-class" access to public laws that Chief Justice Roberts worked to avoid. Finally, if Congress is dissatisfied with the government edicts doctrine, Congress may respond to the Court's invitation to change the meaning of "author." Of course, predicting whether and on what schedule Congress may act is always difficult, and particularly so under current circumstances.

More broadly, the Court's decision hints at philosophical disputes over the role of precedent and judicial policymaking, statutory construction, and even immunity and governmental function analysis. It will be interesting to see how the Justices use this decision in future cases implicating those issues.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding developments at the Supreme Court. Please feel free to contact the Gibson Dunn lawyer with whom you usually work, or the following authors:

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