2019

Section 5: Business Law

Institute of Bill of Rights Law at the William & Mary Law School

V. Business Law

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Moda Health Plan Inc. v. United States

Ruling Below: *Moda Health Plan Inc. v. United States*, 892 F.3d 1311 (Fed. Cir. 2018).

Overview: Congress refused to authorize $12 billion for the expected funding of the Affordable Care Act stabilization program aimed to encourage sales by health insurance companies. Department of Justice contend that the Affordable Care Act insurers are not entitled to $12 billion because Congress specifically barred funding for that purpose.

Issue: Whether Congress can evade its unambiguous statutory promise to pay health insurers for losses already incurred simply by enacting appropriations riders restricting the sources of funds available to satisfy the government's obligation.

Note: *Moda Health Plan Inc. v. United State*s is consolidated with *Maine Community Health Options v. United States*; and *Land of Lincoln Mutual Health Insurance Co. v. United States.*

MODA HEALTH PLAN, INC., *Plaintiff-Appellee*

v.

UNITED STATES, *Defendant- Appellant*

United States Court of Appeals, Federal Circuit

Decided on June 14, 2018

[Excerpt; some citations and footnotes omitted]

PROST, Chief Judge:

A health insurer contends that the government failed to satisfy the full amount of its payment obligation under a program designed to alleviate the risk of offering coverage to an expanded pool of individuals. The Court of Federal Claims entered judgment for the insurer on both statutory and contract grounds. The government appeals. We reverse.

BACKGROUND

This case concerns a three-year "risk corridors" program described in the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified at 42 U.S.C. §§ 18001 et seq.) ("ACA"), and implemented by regulations promulgated by the U.S. Department of Health and Human Services ("HHS"). The case also concerns the bills that appropriated funds to HHS and the Centers for Medicare & Medicaid Services ("CMS") within HHS for the fiscal years during which the program in question operated. We begin with the ACA.

I. The ACA

Among other reforms, the ACA established "health benefit exchanges"—virtual marketplaces in each state wherein individuals and small groups could purchase health coverage. The new exchanges offered centralized opportunities for insurers to compete for new customers. The ACA required that all plans offered in the exchanges satisfy certain criteria, including providing certain "essential" benefits.

Because insurers lacked reliable data to estimate the cost of providing care for the expanded pool of individuals seeking coverage via the new exchanges, insurers faced significant risk if they elected to offer plans in these exchanges. The ACA established three programs designed to mitigate that risk and discourage insurers from setting higher premiums to offset that risk: reinsurance, risk adjustment, and risk corridors. This case concerns the risk corridors program.

Section 1342 of the ACA directed the Secretary of HHS to establish a risk corridors program for calendar years 2014–2016. The full text of Section 1342 is reproduced below:

> (a) In general
>
> The Secretary shall establish and administer a program of risk corridors for calendar years 2014, 2015, and 2016 under which a qualified health plan offered in the individual or small group market shall participate in a payment adjustment system based on the ratio of the allowable costs of the plan to the plan's aggregate premiums. Such program shall be based on the program for regional participating provider organizations under part D of title XVIII of the Social Security Act.
>
> (b) Payment methodology
>
> (1) Payments out
>
> The Secretary shall provide under the program established under subsection (a) that if—
> (A) a participating plan's allowable costs for any plan year are more than 103 percent but not more than 108 percent of the target amount, the Secretary shall pay to the plan an amount equal to 50 percent of the target amount in excess of 103 percent of the target amount; and
>
> (B) a participating plan's allowable costs for any plan year are more than 108 percent of the target amount, the Secretary shall pay to the plan an amount equal to the sum of 2.5 percent of the target amount plus 80 percent of allowable costs in excess of 108 percent of the target amount.
>
> (2) Payments in
>
> The Secretary shall provide under the program established under subsection (a) that if—

(A) a participating plan's allowable costs for any plan year are less than 97 percent but not less than 92 percent of the target amount, the plan shall pay to the Secretary an amount equal to 50 percent of the excess of 97 percent of the target amount over the allowable costs; and

(B) a participating plan's allowable costs for any plan year are less than 92 percent of the target amount, the plan shall pay to the Secretary an amount equal to the sum of 2.5 percent of the target amount plus 80 percent of the excess of 92 percent of the target amount over the allowable costs.

(c) Definitions

In this section:

(1) Allowable costs

(A) In general

The amount of allowable costs of a plan for any year is an amount equal to the total costs (other than administrative costs) of the plan in providing benefits covered by the plan.

(B) Reduction for risk adjustment and reinsurance payments

Allowable costs shall [be] reduced by any risk adjustment and reinsurance payments received under section[s] 18061 and 18063 of this title.

(2) Target amount

The target amount of a plan for any year is an amount equal to the total premiums (including any premium subsidies under any governmental program), reduced by the administrative costs of the plan.

Briefly, section 1342 directed the Secretary of HHS to establish a program whereby participating plans whose costs of providing coverage exceeded the premiums received (as determined by a statutory formula) would be paid a share of their excess costs by the Secretary— "payments out." Conversely, participating plans whose premiums exceeded their costs (according to the same formula) would pay a share of their profits to the Secretary—"payments in." The risk corridors program "permit[ted] issuers to lower [premiums] by not adding a risk premium to account for perceived uncertainties in the 2014 through 2016 markets."

On March 20, 2010, just three days before Congress passed the ACA, the Congressional Budget Office ("CBO") published an estimate of the ACA's cost. The CBO Cost Estimate made no mention of the risk corridors program, though it scored the reinsurance and risk adjustment programs. Overall, CBO predicted the ACA would reduce the federal deficit by $143 billion over the 2010–2019 period it evaluated.

Preambulatory language in the ACA referred to CBO's overall scoring, noting that the "Act will reduce the Federal deficit between 2010 and 2019."

II. Implementing Regulations

In March 2012, HHS promulgated regulations establishing the risk corridors program as directed by section 1342. Those regulations defined terms such as "allowable costs," "administrative costs," "premiums earned," and "target amount," all of which would ultimately factor into the calculations of payments in and payments out required by the statutory formula.

The regulations also provided that insurers offering qualified health plans in the exchanges "will receive payment from HHS in the following amounts, under the following circumstances" and it recited the same formula set forth in the statute for payments out. The regulations similarly provided that insurers "must remit charges to HHS" according to the statutory formula for payments in.

In March 2013, after an informal rulemaking proceeding, HHS published parameters for payments under various ACA programs for the first year of the exchanges, 2014, including the risk corridors program. The parameters revised certain definitions and added others, incorporating a certain level of profits as part of the allowable administrative costs. The parameters also provided that an issuer of a plan in an exchange must submit all information required for calculating risk corridors payments by July 31 of the year following the benefit year. HHS also indicated that "the risk corridors program is not required to be budget neutral," so HHS would make full payments "as required under Section 1342 of the Affordable Care Act." This constituted the final word from HHS on the risk corridors program before the exchanges opened and the program began.

III. Transitional Policy

The ACA established several reforms for insurance plans—such as requiring a minimum level of coverage— scheduled to take effect on January 1, 2014. Non-compliant plans in effect prior to the passage of the ACA in 2010, however, received a statutory exemption from certain requirements. This meant that insurers expected the pool of participants in the exchanges to include both previously uninsured individuals as well as individuals whose previous coverage terminated because their respective plans did not comply with the ACA and did not qualify for the grandfathering exemption.

Individuals and small businesses enrolled in noncompliant plans not qualifying for the exemption received notice that their plans would be terminated. Many expressed concern that new coverage would be "more expensive than their current coverage, and thus they may be dissuaded from immediately transitioning to such coverage." In November 2013, after appellee Moda Health Plan, Inc. and other insurers had already set premiums for the exchanges for 2014, HHS announced a one-year transitional policy that allowed insurers to continue to offer plans that did not comply with certain of the ACA's reforms even for non-grandfathered plans. HHS directed state agencies to adopt the same policies.

This dampened ACA enrollment in states implementing the policy, especially by healthier individuals who elected to maintain their lower level of coverage, leaving insurers participating in the exchanges to bear greater risk than they accounted for in setting premiums.

HHS acknowledged that "this transitional policy was not anticipated by health insurance issuers when setting rates for 2014" but noted "the risk corridor program should help ameliorate unanticipated changes in premium revenue." HHS later extended the transitional period to last the duration of the risk corridor program.

After further informal rulemaking (begun soon after announcing the transitional policy), HHS informed insurers that it would adjust the operation of the risk corridors program for the 2014 benefit year to "offset losses that might occur under the transitional policy as a result of increased claims costs not accounted for when setting 2014 premiums." This included adjustments to HHS's formula for calculating the "allowable costs" and "target amount" involved in the statutory formula.

HHS projected that these new changes (together with changes to the reinsurance program) would "result in net payments that are budget neutral in 2014" and that it "intend[ed] to implement this program in a budget neutral manner" with adjustments over time with that goal in mind.

In April 2014, CMS, the division of HHS responsible for administering the risk corridors program, released guidance regarding "Risk Corridors and Budget Neutrality." It explained a new budget neutrality policy as follows:

> We anticipate that risk corridors collections will be sufficient to pay for all risk corridors payments. However, if risk corridors collections are insufficient to make risk corridors payments for a year, all risk corridors payments for that year will be reduced pro rata to the extent of any shortfall. Risk corridors collections received for the next year will first be used to pay off the payment reductions issuers experienced in the previous year in a proportional manner, up to the point where issuers are reimbursed in full for the previous year, and will then be used to fund current year payments. If, after the

> obligations for the previous year have been met, the total amount of collections available in the current year is insufficient to make payments in that year, the current year payments will be reduced pro rata to the extent of any shortfall. If any risk corridors funds remain after prior and current year payment obligations have been met, they will be held to offset potential insufficiencies in risk corridors collections in the next year.

As to any shortfall in the final year of payment, CMS stated it anticipated payments in would be sufficient, but that future guidance or rulemaking would address any persistent shortfalls.

IV. Appropriations

In February 2014, after HHS had proposed its adjustments to account for the transitional policy (but before HHS had finalized the adjustments), Congress asked the Government Accountability Office ("GAO") to determine what sources of funds could be used to make any payments in execution of the risk corridors program. GAO responded that it had identified two potential sources of funding in the appropriations for "Program Management" for CMS in FY 2014. That appropriation included a lump sum in excess of three billion dollars for carrying out certain responsibilities, including "other responsibilities" of CMS as well as "such sums as may be collected from authorized user fees."

GAO concluded that the "other responsibilities" language in the CMS Program Management appropriation for FY 2014 could encompass payments to health plans under the risk corridors program, and so the lump-sum appropriation "would have been available for making payments pursuant to section 1342(b)(1)." Further, GAO concluded that the payments in from the risk corridors program constituted "user fees," and so "any amounts collected in FY 2014 pursuant to section 1342(b)(2) would have been available . . . for making the payments pursuant to section 1342(b)(2)," though HHS had not planned to make any such collections or payments until FY 2015.

GAO clarified that appropriations acts "are considered nonpermanent legislation," so the language it analyzed regarding the lump-sum appropriation and user fees "would need to be included in the CMS PM appropriation for FY 2015" in order to be available to make any risk corridors payments in FY 2015.

In December 2014, Congress passed its appropriations to HHS for FY 2015 (during which the first benefit year covered by the risk corridors program would conclude). That legislation reenacted the user fee language that GAO had analyzed and provided a lump sum for CMS's Program Management account; however, the lump-sum appropriation included a rider providing:

> None of the funds made available by this Act from the Federal Hospital Insurance Trust Fund or the Federal Supplemental Medical Insurance Trust Fund, or transferred from other

> accounts funded by this Act to the 'Centers for Medicare and Medicaid Services—Program Management' account, may be used for payments under Section 1342(b)(1) of Public Law 111–148 (relating to risk corridors).

Representative Harold Rogers, then-Chairman of the House Committee on Appropriations, explained his view of the appropriations rider upon its inclusion in the appropriations bill for FY 2015:

> In 2014, HHS issued a regulation stating that the risk corridor program will be budget neutral, meaning that the federal government will never pay out more than it collects from issuers over the three year period risk corridors are in effect. The agreement includes new bill language to prevent CMS Program Management appropriation account from being used to support risk corridors payments.

Congress enacted identical riders in FY 2016 and FY 2017.

V. Subsequent Agency Action

In September 2015, CMS announced that the total amount of payments in fell short of the total amount requested in payments out. Specifically, it expected payments in of approximately $362 million but noted requests for payments out totaling $2.87 billion. Accordingly, CMS planned to issue prorated payments at a rate of 12.6 percent, with any shortfall to be made up by the payments in received following the 2015 benefit year.

A follow-up letter noted that HHS would "explore other sources of funding for risk corridors payments, subject to the availability of appropriations" in the event of a shortfall following the final year of the program.

A report from CMS shows that the total amount of payments in collected for the 2014–2016 benefit years fell short of the total amount of payments out calculated according to the agency's formula by more than $12 billion.

VI. Procedural History

Moda commenced this action in the Court of Federal Claims under the Tucker Act in July 2016. It seeks the balance between the prorated payments it received and the full amount of payments out according to section 1342. The Court of Federal Claims denied the government's motion to dismiss for lack of jurisdiction and for failure to state a claim and granted Moda's cross-motion for partial summary judgment as to liability.

Both sides stipulated that the government owed Moda $209,830,445.79 in accordance with the ruling on liability. The trial court entered judgment for Moda accordingly. Dozens of other insurers filed actions alleging similar claims, with mixed results from the Court of Federal Claims. The Court of Federal Claims had jurisdiction under the Tucker Act, 28 U.S.C. § 1491(a)(1).2 We have jurisdiction under 28 U.S.C. § 1295(a)(3).

DISCUSSION

Moda advances claims based on two theories. First, Moda contends that section 1342 itself obligates the government to pay insurers the full amount indicated by the statutory formula for payments out, notwithstanding the amount of payments in collected. Second, Moda contends that HHS made a contractual agreement to pay the full amount required by the statute in exchange for Moda's performance (by offering a compliant plan in an exchange), and the government breached that agreement by failing to pay the full amount according to the statutory formula for payments out.

We review the Court of Federal Claims' legal conclusion that the government was liable on both theories de novo.

I. Statutory Claim

Moda argues that section 1342 obligated the government to pay the full amount indicated by the statutory formula for payments out, not a pro rata sum of the payments in. The government responds that section 1342 itself contemplated operating the risk corridors program in a budget neutral manner (so the total amount of payments out due to insurers cannot exceed the amount of payments in). In the alternative, the government contends that appropriations riders on the fiscal years in which payments from the risk corridors program came due limited the government's obligation to the amount of payments in. Although we agree with Moda that section 1342 obligated the government to pay the full amount of risk corridors payments according to the formula it set forth, we hold that the riders on the relevant appropriations effected a suspension of that obligation for each of the relevant years.

We begin with the statute.

A. Statutory Interpretation

The government asserts that Congress designed section 1342 to be budget neutral, funded solely through payments in and that the statute carries no obligation to make payments at the full amount indicated by the statutory formula if payments in fell short.

Section 1342 is unambiguously mandatory. It provides that "[t]he Secretary shall establish and administer" a risk corridors program pursuant to which "[t]he Secretary shall provide" under the program that "the Secretary shall pay" an amount according to a statutory formula. Nothing in section 1342 indicates that the payment methodology is somehow limited by payments in. It simply sets forth a formula for calculating payment amounts based on a percentage of a "target amount" of allowable costs.

The government reasons that we must nevertheless interpret section 1342 to be budget neutral, because Congress relied on the CBO Cost Estimate that the ACA would decrease the federal deficit between 2010 and 2019, without evaluating the budgetary effect of the risk corridors program. Thus, according to the government, the ACA's passage rested on an understanding that the risk corridors program would be budget neutral.

Nothing in the CBO Cost Estimate indicates that it viewed the risk corridors program as budget neutral. Indeed, even if CBO had accurately predicted the $12.3 billion shortfall that now exists, CBO's overall estimate that the ACA would reduce the federal deficit would have remained true, since CBO had estimated a reduction of more than $100 billion.

The government's amicus suggests it is "inconceivable" that CBO would have declined to analyze the budgetary impact of the risk corridors program, given its obligation to prepare "an estimate of the costs which would be incurred in carrying out such bill." Not so. It is entirely plausible that CBO expected payments in would roughly equal payments out over the three year program, especially since CBO could not have predicted the costly impact of HHS's transitional policy, which had not been contemplated at that time. Without more, CBO's omission of the risk corridors program from its report can be viewed as nothing more than a bare failure to speak. Moreover, even if CBO interpreted the statute to require budget neutrality, that interpretation warrants no deference, especially in light of HHS's subsequent interpretation to the contrary. CBO's silence simply cannot displace the plain meaning of the text of section 1342.

The government also argues that section 1342 created no obligation to make payments out in excess of payments in because it provided no budgetary authority to the Secretary of HHS and identified no source of funds for any payment obligations beyond payments in. But it has long been the law that the government may incur a debt independent of an appropriation to satisfy that debt, at least in certain circumstances.

In *United States v. Langston*, Congress appropriated only five thousand dollars for the salary of a foreign minister, though a statute provided that the official's salary would be seven thousand five hundred dollars. The Supreme Court held that the statute fixing the official's salary could not be "abrogated or suspended by the subsequent enactments which merely appropriated a less amount" for the services rendered, absent "words that expressly, or by clear implication, modified or repealed the previous law." That is, the government's statutory obligation to pay persisted independent of the appropriation of funds to satisfy that obligation.

Our predecessor court noted long ago that "[a]n appropriation per se merely imposes limitations upon the Government's own agents; it is a definite amount of money intrusted to them for distribution; but its insufficiency does not pay the Government's debts, nor cancel its obligations, nor defeat the rights of other parties."

It is also of no moment that, as the government notes, HHS could not have made payments out to insurers in an amount totaling more than the amount of payments in without running afoul of the Anti-Deficiency Act. That Act provides that "[a]n officer or employee of the United States Government . . . may not . . . make or authorize an expenditure . . . exceeding an amount available in an appropriation . . . for the expenditure." But the Supreme Court has rejected the notion that the Anti-Deficiency Act's requirements somehow defeat the obligations of the government. The Anti-Deficiency Act simply constrains government officials.

For the same reason, it is immaterial that Congress provided that the risk corridors program established by section 1342 would be "based on the program" establishing risk corridors in Medicare Part D yet declined to provide "budget authority in advance of appropriations acts," as in the corresponding Medicare statute. Budget authority is not necessary to create an obligation of the government; it is a means by which an officer is afforded that authority.

Here, the obligation is created by the statute itself, not by the agency. The government cites no authority for its contention that a statutory obligation cannot exist absent budget authority. Such a rule would be inconsistent with *Langston*, where the obligation existed independent of any budget authority and independent of a sufficient appropriation to meet the obligation.

We conclude that the plain language of section 1342 created an obligation of the government to pay participants in the health benefit exchanges the full amount indicated by the statutory formula for payments out under the risk corridors program. We next consider whether, notwithstanding that statutory requirement, Congress has suspended or repealed that obligation.

B. The Effect of the Appropriations Riders

The government next argues the riders in the appropriations bills for FY 2015 and FY 2016 repealed or suspended its obligation to make payments out in an aggregate amount exceeding payments in. We agree.

Repeals by implication are generally disfavored, but "when Congress desires to suspend or repeal a statute in force, '[t]here can be no doubt that . . . it could accomplish its purpose by an amendment to an appropriation bill, or otherwise.'" Whether an appropriations bill impliedly suspends or repeals substantive law "depends on the intention of [C]ongress as expressed in the statutes." The central issue on Moda's statutory claim, therefore, is whether the appropriations riders adequately expressed Congress's intent to suspend payments on the risk corridors program beyond the sum of payments in. We conclude the answer is yes.

Moda contends, however, this issue is also controlled by *Langston*. There, as discussed above, the Supreme Court held that a bare failure to appropriate funds to meet a statutory obligation could not vitiate that obligation because it carried no implication of Congress's intent to amend or suspend the substantive law at issue.

Just three years before *Langston*, however, the Supreme Court held that a statute that had set the salaries of certain interpreters at a fixed sum "in full of all emoluments whatsoever" had been impliedly amended, where Congress appropriated funds less than the fixed sum set by statute, with a separate sum set aside for additional compensation at the discretion of the Secretary of the Interior. The Court held:

> This course of legislation . . . distinctly reveal[ed] a change in the policy of [C]ongress on the subject, namely that instead of establishing a salary for interpreters at a fixed amount, and cutting off all other emoluments and allowances, [C]ongress intended to reduce the salaries and place a fund at the disposal of the [S]ecretary of the [I]nterior, from which, at his discretion, additional emoluments and allowances might be given to the interpreters.

Thus, "for the time covered by those" appropriations bills, the intent of Congress was "plain on the face of the statute."

Langston expressly distinguished Mitchell because the appropriations bills in Mitchell implied "that [C]ongress intended to repeal the act" setting a fixed salary, with "additional pay" to be provided at the Secretary's discretion. By contrast, Congress had "merely appropriated a less amount" for Langston's salary.

The question before us, then, is whether the riders on the CMS Program Management appropriations supplied the clear implication of Congress's intent to impose a new payment methodology for the time covered by the appropriations bills in question, as in Mitchell, or if Congress merely appropriated a less amount for the risk corridors program, as in *Langston*.

The Supreme Court has noted *Langston* "expresses the limit in that direction." The jurisprudence in the century and a half since *Langston* has cemented that decision's place as an extreme example of a mere failure to appropriate. Our case falls clearly within the core of subsequent decisions wherein appropriations bills carried sufficient implication of repeal, amendment, or suspension of substantive law to effect that purpose, as in *Mitchell*.

In *United States v. Vulte*, the Supreme Court considered a series of enactments concerning bonuses for Marine Corps officers serving abroad. A 1902 act established a ten percent bonus for all such officers and appropriated funds accordingly. In 1906 and 1907, appropriations for the payment of that bonus carried a rider specifying that the funds could be used to pay officers serving "beyond the limits of the states comprising the Union of the territories of the United States contiguous thereto (except P[ue]rto Rico and Hawaii)." The appropriations for 1908 contained no such rider and stated the increase of pay for officers serving abroad "shall be as now provided by law."

An officer serving in Puerto Rico in 1908 sought compensation accounting for the ten percent bonus enacted in 1902. The Supreme Court rejected the government's position that the exception in the appropriations bills of 1906 and 1907 impliedly repealed the 1902 act, noting that the appropriations riders lacked any "words of prospective extension" indicating a permanent change in the law. Nevertheless, the Supreme Court acknowledged the appropriation riders did indicate Congress's intent to "temporarily suspend as to P[ue]rto Rico and Hawaii" the ten percent bonus in 1906 and 1907.

In *Dickerson*, the Supreme Court considered the effect of various appropriations riders on a reenlistment bonus authorized by Congress in 1922. After several years in force, an appropriations rider expressly suspended the bonus for the fiscal years ending in 1934–1937 . The text of the rider changed in the appropriations bill for the fiscal year ending in 1938. That bill omitted the express suspension, noting only that "no part of any appropriation contained in this or any other Act for the fiscal year ending June 30, 1938, shall be available for the payment" of, inter alia, the reenlistment bonus.

The appropriations bill for the fiscal year ending in 1939 repeated that language. Floor debates showed that Congress intended the new language to carry the same restriction expressed in the earlier appropriations bills.. The Supreme Court held that the appropriations bill for the fiscal year ending in 1939 evinced Congress's intent to suspend the reenlistment bonus in light of persuasive evidence to that effect.

Finally, in *Will*, the Supreme Court considered the effect of appropriations riders on a set of statutes establishing annual pay raises for certain officials, including federal judges. Over a span of four years, Congress passed appropriations acts with riders limiting the use of funds to pay the increases for federal judges, among others. The first such rider provided that "no part of the funds appropriated in this Act or any other Act shall be used to pay the salary of an individual in a position or office referred to in" the act providing for the pay raises for federal judges.

The dispute in *Will* concerned whether the effect of the appropriations riders ran afoul of the Compensation Clause of the Constitution. Before reaching that issue, however, the Supreme Court first rejected the judges' contention that the appropriations bills did "no more than halt funding for the salary increases." Acknowledging the general rule disfavoring repeals by implication and its "especial force" when the alleged repeal occurred in an appropriations bill, the Court held that in each of the four appropriations acts in question, "Congress intended to repeal or postpone previously authorized increases." This was true although the riders in years 1, 3, and 4 were "phrased in terms of limiting funds.". The Court's conclusion was bolstered by floor debates occurring in year 3 of the appropriations riders as well as language expressly suspending the pay raises in year 2, but it concluded the rider in year 1 indicated that same clear intent:

> These passages indicate[d] clearly that Congress intended to rescind these rates entirely, not simply to consign them to the fiscal limbo of an account due but not payable. The clear intent of Congress in each year

> was to stop for that year the application of the Adjustment Act.

Congress clearly indicated its intent here. It asked GAO what funding would be available to make risk corridors payments, and it cut off the sole source of funding identified beyond payments in. It did so in each of the three years of the program's existence. And the explanatory statement regarding the amendment containing the first rider of House Appropriations Chairman Rogers confirms that the appropriations language was added with the understanding that HHS's intent to operate the risk corridors program as a budget neutral program meant the government "will never pay out more than it collects from issuers over the three year period risk corridors are in effect." Plainly, Congress used language similar to the appropriations riders in *Vulte*, *Dickerson*, and *Will* (and quite clearer than the language in *Mitchell*) to temporarily cap the payments required by the statute at the amount of payments in for each of the applicable years— just as those decisions altered statutory payment methodologies.

What else could Congress have intended? It clearly did not intend to consign risk corridors payments "to the fiscal limbo of an account due but not payable."

Moda contends that notwithstanding the similarities between our case and the foregoing authority, Congress simply intended to limit the use of a single source of funding while leaving others available. Moda points out that the appropriations riders in Dickerson and Will foreclosed the use of funding provided by that appropriations act "or any other act," while the riders here omit that global restriction. But the Supreme Court never considered the impact of that language in Dickerson or Will, and it found effective suspensions-by-appropriations in *Mitchell* and *Vulte* even absent that language.

Moda suggests that restricting access to funds from "any other act" was necessary to foreclose HHS from using funds that remained available. It points to the CMS Program Management appropriation for FY 2014 (before the risk corridors program began and before any appropriations riders had been enacted) as well as the Judgment Fund, a standing appropriation for the purpose of paying certain judgments against the government. We address each in turn.

In response to a request of Congress, GAO concluded that the FY 2014 CMS Program Management fund "would have been available for risk-corridors payments." According to Moda, this means HHS could have used funds from the FY 2014 appropriation to make risk corridors payments for the 2015 benefit year (which concluded in FY 2015). Not so. GAO's opinion only addressed what funds from FY 2014 would have been available for risk corridors payments had any such payments been among the "other responsibilities" of CMS for that fiscal year. That appropriation expired in FY 2014. GAO specifically noted that "for funds to be available for this purpose in FY 2015, the CMS PM appropriation for FY 2015 must include language similar to the language included in the CMS PM appropriation for FY 2015." Of course, Congress enacted the rider for FY 2015 instead.

GAO's opinion was correct. Under section 1342, HHS could not have collected or owed payments out or payments in during FY 2014 because the statute required calculations based on allowable costs for a plan year and the program was to run for calendar years 2014, 2015, and 2016. Thus, HHS could not have been responsible for payments out until, at the earliest, the end of calendar year 2014, which occurred during FY 2015.

Likewise, the CMS Program Management appropriations in the continuing resolutions enacted at the end of calendar year 2014 (during FY 2015) expired in December 2014, when Congress enacted the FY 2015 appropriations act (and the first rider in question)—still before HHS could have even calculated the payments in and payments out under the risk corridors program.

Moda's reliance on the Judgment Fund is also misplaced. The Judgment Fund is a general appropriation of "[n]ecessary amounts" in order "to pay final judgments" and other amounts owed via litigation against the government, subject to several conditions. The Judgment Fund "does not create an all purpose fund for judicial disbursement." Rather, access to the Judgment Fund presupposes liability. Moda's contention that the government's liability persists because it could pay what it owed under the statutory scheme from the Judgment Fund reverses the inquiry. The question is what Congress intended, not what funds might be used if Congress did not intend to suspend payments in exceeding payments out.

As discussed above, Congress's intent to temporarily cap payments out at the amount of payments in was clear from the appropriations riders and their legislative history. It did not need to use Moda's proposed magic words, "or any other act," to foreclose resort to the Judgment Fund. We simply cannot infer, as Moda's position would require, that upon enacting the appropriations riders, Congress intended to preserve insurers' statutory entitlement to full risk corridors payments but to require insurers to pursue litigation to collect what they were entitled to. That theory cannot displace the plain implication of the language and legislative history of the appropriations riders.

Moda points out that Congress's intent regarding the appropriations riders must be understood with the context of other legislative efforts surrounding the ACA and the risk corridors program in particular. For example, Moda points to Congress's failed attempt to enact legislation requiring budget neutrality for the risk corridors program. But we need not and do not conclude that Congress achieved through appropriations riders what it failed to do with permanent legislation. Rather, we only hold that Congress enacted temporary measures capping risk corridor payments out at the amount of payments in, and it did so for each year the program was in effect. (We need not address, for example, what would have occurred if Congress had failed to include the rider in one of the acts appropriating funds for the fiscal years in which payments came due or if it had affirmatively appropriated funds through some other source.)

It is also irrelevant that the President signed the bills containing the appropriations riders, even as he threatened to veto any bill rolling back the ACA, as Moda points out. Again, we do not hold that the appropriations riders effected any permanent amendment. Moreover, Moda has offered no evidence that President Obama expressed any specific views of the implications of these appropriations riders before or after signing, much less evidence that could overcome the clear implication of the text of the riders and the surrounding legislative history.

Moda also contends that two decisions from our predecessor court, *New York Airways*, and *Gibney v. United States*, demonstrate that the appropriations riders here do not carry such strong implications. In *New York Airways*, our predecessor court held that Congress's failure to appropriate sufficient funds to pay for services at a rate set by a government agency did not defeat the obligation to pay the full amount. Floor debates indicated that "Congress was well-aware that the Government would be legally obligated to pay . . . even if the appropriations were deficient." The court noted that Congress viewed the obligation "as a contractual obligation enforceable in the courts which could be avoided only by changing the substantive law under which the Board set the rates, rather than by curtailing appropriations," and the agency made its similar view of the obligation clear to Congress.

Here, the risk corridors program is an incentive program, not a quid pro quo exchange for services rendered like that in *New York Airways*. Moreover, it is much clearer here that Congress understood the appropriations riders to suspend substantive law, inasmuch as the appropriations riders directly responded to GAO's identification of only two sources of funding for the program.

In *Gibney*, a statute provided that certain employees of the Immigration and Naturalization Service would be paid overtime at a particular rate. Two subsequent statutes extended a more stringent overtime rate to other federal employees, while expressly leaving the prior rate for INS in place. A rider in an appropriations bill provided that "none of the funds appropriated for the Immigration and Naturalization Service shall be used to pay compensation for overtime services other than as provided in" the latter two acts. INS agents who received overtime payments at the more stringent rate fixed in the latter acts sought payment at the earlier rate.

That rider, according to the *Gibney* court, constituted "a mere limitation on the expenditure of a particular fund and had no other effect," so it could not limit the overtime rate available to an INS agent. But the court's holding ultimately rested on a different point—that limiting overtime payments "as provided in" the new acts had no effect on the rate for INS agents, since the new acts expressly preserved their special overtime rate. The appropriations rider did "not even purport to affect the right of immigration inspectors to overtime pay as provided in the" earlier act. The interpretation of the appropriations riders in *Gibney* cannot be viewed in isolation of its alternative holding, and there is no safety valve built into the ACA to preserve the government's obligation notwithstanding Congress's suspension of it. Accordingly, *Gibney* is inapposite.

After oral argument in this case had occurred, Moda filed a citation of supplemental authority as permitted by Rule 28(j) of the Federal Rules of Appellate Procedure, indicating that HHS had released a proposed budget for FY 2019, including a proposal indicating an $11.5 billion outlay for risk corridors payments in FY 2018 (reflective of the effect of sequestration on the total $12.3 billion outstanding) and noting a "legislative proposal to fully fund the Risk Corridors Program."

According to Moda, this refutes the government's positions on its statutory claims. In particular, Moda states, "if the appropriation riders had substantively amended the ACA, the government would have no basis now to be proposing to appropriate funds to fulfill the entirety of its [risk corridor] obligations."

Moda again misunderstands the inquiry. The question is what intent was communicated by Congress's enactments in the appropriations bills for FY 2015–2017. It is irrelevant that a subsequent Administration proposed a budget that set aside funds to make purported outstanding risk corridors payments. Of course, Congress could conceivably reinstate an obligation to make full payments, even now after the program has concluded. But the proposed budget does not place that question before us.

The intent of Congress remains clear. After GAO identified only two sources of funding for the risk corridors program—payments in and the CMS Program Management fund—Congress cut off access to the only fund drawn from taxpayers. A statement discussing that enactment acknowledged "that the federal government will never pay out more than it collects from issuers over the three year period risk corridors are in effect." Congress could have meant nothing else but to cap the amount of payments out at the amount of payments in for each of the three years it enacted appropriations riders to that effect.

Moda contends that this result is inconsistent with the purpose of the risk corridors program. Perhaps. But it also seems that Congress expected the program to have minimal, if any, budget impact (even though we hold the text of section 1342 allowed for unbounded budget impact). Congress could not have predicted the shifting sands of the transitional policy implemented by HHS, which Moda blames for the higher costs it and other insurers bore through their participation in the exchanges. In response to that turn of events, Congress made the policy choice to cap payments out, and it remade that decision for each year of the program. We do not sit in judgment of that decision. We simply hold that the appropriations riders carried the clear implication of Congress's intent to prevent the use of taxpayer funds to support the risk corridors program.

Thus, Moda's statutory claim cannot stand.

II. Contract Claim

Moda also asserts an independent claim for breach of an implied-in-fact contract that purportedly promised payments of the full amount indicated by the statutory formula in exchange for participation in the exchanges.

The requirements for establishing a contract with the government are the same for express and implied contracts. They are (1) "mutuality of intent to contract," (2) "consideration," (3) "lack of ambiguity in offer and acceptance," and (4) "actual authority" of the government representative whose conduct is relied upon to bind the government.

Absent clear indication to the contrary, legislation and regulation cannot establish the government's intent to bind itself in a contract. We apply a "presumption that 'a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.'" This is because the legislature's function is to make laws establishing policy, not contracts, and policies "are inherently subject to revision and repeal."

Moda does not contend that the government manifested intent via the text of section 1342 alone. Indeed, the statute contains no promissory language from which we could find such intent. Instead, Moda alleges a contract arising "from the combination of [the statutory] text, HHS's implementing regulations, HHS's preamble statements before the ACA became operational, and the conduct of the parties, including relating to the transitional policy."

The centerpiece of Moda's contract theory (and the foundation for the trial court's decision in this case) is *Radium Mines, Inc. v. United States*. There, the Atomic Energy Commission issued regulations titled "Ten Year Guaranteed Minimum Price," in order "[t]o stimulate domestic production of uranium." The regulations established guaranteed minimum prices for uranium delivered to the commission, with specific conditions required for entitlement to the minimum price.

The court observed that the title of the regulation indicated that the government would "guarantee" the prices recited and that the regulation's "purpose was to induce persons to find and mine uranium," when, due to restrictions on private transactions in uranium, "no one could have prudently engaged in its production unless he was assured of a Government market." The court rejected the government's position that the regulations constituted a mere invitation to make an offer, holding instead that the regulation itself constituted "an offer, which ripened into a contract when it was accepted by the plaintiff's putting itself into a position to supply the ore or the refined uranium described in it."

Moda contends that here, the statute, its implementing regulations, and HHS's conduct all evinced the government's intent to induce insurers to offer plans in the exchanges without an additional premium accounting for the risk of the dearth of data about the expanded market, in reliance on the presence of a fairly comprehensive safety net. But the overall scheme of the risk corridors program lacks the trappings of a contractual arrangement that drove the result in *Radium Mines*. There, the government made a "guarantee," it invited uranium dealers to make an "offer," and it promised to "offer a form of contract" setting forth "terms" of acceptance. Not so here.

The risk corridors program is an incentive program designed to encourage the provision of affordable health care to third parties without a risk premium to account for the unreliability of data relating to participation of the exchanges—not the traditional quid pro quo contemplated in Radium Mines. Indeed, an insurer that included that risk premium, but nevertheless suffered losses for a benefit year as calculated by the statutory and regulatory formulas would still be entitled to seek risk corridors payments.

Additionally, the parties in Radium Mines, one of which was the government, never disputed that the government intended to form some contractual relationship at some time throughout the exchange. The only question there was whether the regulations themselves constituted an offer, or merely an invitation to make offers. *Radium Mines* is only precedent for what it decided.

Here, no statement by the government evinced an intention to form a contract. The statute, its regulations, and HHS's conduct all simply worked towards crafting an incentive program. These facts cannot overcome the "well-established presumption" that Congress and HHS never intended to form a contract by enacting the legislation and regulation at issue here.

Accordingly, Moda cannot state a contract claim.

* * *

Because we conclude that the government does not owe Moda anything in excess of its pro rata share of payments in, we need not address whether payments were due annually or only at the end of the three-year period covered by the risk corridors program.

CONCLUSION

Although section 1342 obligated the government to pay participants in the exchanges the full amount indicated by the formula for risk corridor payments, we hold that Congress suspended the government's obligation in each year of the program through clear intent manifested in appropriations riders. We also hold that the circumstances of this legislation and subsequent regulation did not create a contract promising the full amount of risk corridors payments. Accordingly, we hold that Moda has failed to state a viable claim for additional payments under the risk corridors program under either a statutory or contract theory.

REVERSED

COSTS
The parties shall bear their own costs.

NEWMAN, *Circuit Judge*, dissenting:

The United States and members of the health insurance industry, in connection with the program referred to as "Obamacare," agreed to a three-year plan that would mitigate the risk of providing low-cost insurance to previously uninsured and underinsured persons of unknown health risk. This risk-abatement plan is included in the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (ACA). As described by the Court of Federal Claims,1 the "risk corridors" provision accommodates the unpredictable risk of the extended healthcare programs. By this provision, the government will "'share in profits or losses resulting from inaccurate rate setting from 2014 to 2016.'" The risk corridors program was enacted as Section 1342 of the Affordable Care Act, and is codified in Section 18062 of Title 42. Subsection (a) is as follows:

> The Secretary shall establish and administer a program of risk corridors for calendar years 2014, 2015, and 2016 under which a qualified health plan offered in the individual or small group market shall participate in a payment adjustment system based on the ratio of the allowable costs of the plan to the plan's aggregate premiums. Such program shall be based on the program for regional participating provider organizations under part D of [the Medicare Act].

The statute contains a detailed formula for this risk corridors sharing of profits and losses. Healthcare insurers throughout the nation, including Moda Health Plan, accepted and fulfilled the new healthcare procedures, in collaboration with administration of the ACA by the Centers for Medicare and Medicaid Services (CMS) in the Department of Health and Human Services (HHS).

Many health insurers soon experienced losses, attributed at least in part to a governmental action called the "transitional policy." Reassurance was presented, and Moda (and others) continued to perform their obligations. Although the government continued to collect "payments in" from insurers who more accurately predicted risk, the government has declined to pay its required risk corridors amounts, by restricting the funds available for the "payments out."

The Court of Federal Claims held the government to its statutory and contractual obligations to Moda. My colleagues do not. I respectfully dissent.

The Court of Federal Claims interpreted the statute in accordance with its terms

The ACA provides the risk corridors formula, establishing that the insurer will make "payments in" to the government for the insurer's excess profits as calculated by the formula, and "payments out" from the government for the insurer's excess losses. The formula was enacted into statute:

> The Secretary shall provide under the program established under subsection (a) that if—

> (A) a participating plan's allowable costs for any plan year are more than 103 percent but not more than 108 percent of the target amount, the Secretary shall pay to the plan an amount equal to 50 percent of the target amount in excess of 103 percent of the target amount; and
>
> (B) a participating plan's allowable costs for any plan year are more than 108 percent of the target amount, the Secretary shall pay to the plan an amount equal to the sum of 2.5 percent of the target amount plus 80 percent of allowable costs in excess of 108 percent of the target amount.

In March 2012, HHS issued regulations for the risk corridors program, stating that Qualified Health Plans (QHPs) "will receive payment" or "must remit charges" depending on their gains or losses. In March 2013, HHS stated:

> The risk corridors program is not statutorily required to be budget neutral. Regardless of the balance of payments and receipts, HHS will remit payments as required under section 1342 of the Affordable Care Act.

Moda cites this reassurance, as Moda continued to offer and implement healthcare policies in accordance with the Affordable Care Act.

The "transitional policy" resulted in a change in the risk profile of participants in the Affordable Care Act. Moda states that "many individuals who had previously passed medical underwriting, and were considerably healthier than the uninsured population, maintained their existing insurance and did not enroll in QHPs,", thereby reducing the amount of premiums collected from healthier persons. HHS stated, in announcing the transitional policy, that "the risk corridor program should help ameliorate unanticipated changes in premium revenue."

The transitional policy was initially announced as applying only until October 1, 2014. However, it was renewed throughout the period here at issue.

The risk corridors obligations were not cancelled by the appropriations riders

In April 2014, HHS-CMS issued an "informal bulletin" stating, "We anticipate that risk corridors collections will be sufficient to pay for all risk corridors payments. However, if risk corridors collections are insufficient to make risk corridors payments for a year, all risk corridors payments for that year will be reduced pro rata to the extent of any shortfall." HHS also stated "that the Affordable Care Act requires the Secretary to make full payments to issuers," and that it was "recording those amounts that remain unpaid . . . [as an] obligation of the United States Government for which full payment is required."

The issue on this appeal is focused on the interpretation and application of the "rider" that was attached to the omnibus annual appropriations bills. This rider prohibits HHS from using its funds, including its bulk appropriation, to make risk corridors payments. My colleagues hold that this rider avoided or indefinitely postponed the government's risk corridors obligations. The Court of Federal Claims, receiving this argument from the United States, correctly discarded it.

Meanwhile, the risk corridors statute was not repealed or the payment regulations withdrawn, despite attempts in Congress. Moda continued to perform its obligations in accordance with its agreement with the CMS's administration of the Affordable Care Act.

A statute cannot be repealed or amended by inference

To change a statute, explicit legislative statement and action are required. Nor can governmental obligations be eliminated by simply restricting the funds that might be used to meet the obligation. The appropriation riders that prohibited the use of general HHS funds to pay the government's risk corridors obligations did not erase the obligations. The Court of Federal Claims correctly so held.

The mounting problems with the Affordable Care Act did not go unnoticed. In September 2014, the General Accountability Office (GAO) responded to an inquiry from Senator Jeff Sessions and Representative Fred Upton, and stated that "the CMS PM [Centers for Medicare Services-Program Management] appropriation for FY 2014 would have been available for making the payments pursuant to section 1342(b)(1)." The GAO also stated that "payments under the risk corridors program are properly characterized as user fees" and could be used to make payments out. This review also cited the available recourse to the general CMS assessment. However, in December 2014, the appropriations bill for that fiscal year contained a rider that prohibited HHS from using various funds, including the CMS PM funds, for risk corridors payments. The rider stated:

> None of the funds made available by this Act from the Federal Hospital Insurance Trust Fund or the Federal Supplemental Medical Insurance Trust Fund, or transferred from other accounts funded by this Act to the "Centers for Medicare and Medicaid Services-Program Management" account, may be used for payments under section 1342(b)(1) of [the ACA] (relating to risk corridors).

Similar riders were included in the omnibus appropriations bills for the ensuing years. As the Court of Federal Claims recited, by September 2016, after collecting all payments in for the 2015 year, it was clear that all payments in would be needed to cover 2014 losses, and that no payments out would be made for the 2015 plan year. Moda states: "The Government owed Moda $89,426,430 for 2014 and $133,951,163 for 2015, but only paid $14,254,303 for 2014 and nothing for 2015, leaving a $209,123,290 shortfall."

The panel majority ratifies an "indefinite suspension" of payment, stating that this was properly achieved by cutting off the funds for payment. The majority correctly states that "the government's statutory obligation to pay persisted independent of the appropriation of funds to satisfy that obligation." However, the majority then subverts its ruling, and holds that the government properly "indefinitely suspended" compliance with the statute.

In *United States v. Will*, the Court explained that "when Congress desires to suspend or repeal a statute in force, '[t]here can be no doubt that . . . it could accomplish its purpose by an amendment to an appropriation bill, or otherwise.'" However, this intent to suspend or repeal the statute must be expressed: "The whole question depends on the intention of Congress as expressed in the statutes."

"The cardinal rule is that repeals by implication are not favored." "The doctrine disfavoring repeals by implication 'applies with full vigor when . . . the subsequent legislation is an appropriations measure,'" as here. As the Court of Federal Claims observed:

> Repealing an obligation of the United States is a serious matter, and burying a repeal in a standard appropriations bill would provide clever legislators with an end-run around the substantive debates that a repeal might precipitate.

The classic case of *United States v. Langston*, speaks clearly, that the intent to repeal or modify legislation must be clearly stated, in "words that expressly or by clear implication modified or repealed the previous law." The Court explained that a statute should not be deemed abrogated or suspended unless a subsequent enactment contains words that "expressly, or by clear implication, modified or repealed the previous law."

My colleagues dispose of *Langston* as an "extreme example," stating that subsequent decisions are more useful since *Langston* is a "century and a half" old. Indeed it is, and has stood the test of a century and a half of logic, citation, and compliance. Nonetheless discarding *Langston*, the panel majority finds intent to change the government's obligations under the risk corridors statute. The majority concludes that "Congress clearly indicated its intent" to change the government's obligations, reciting two factors:

First, the majority concludes that the appropriations riders were a response to the GAO's guidance that there were two available sources of funding for the risk corridors program, and that Congress intended to remove the GAO-suggested source of funds from the HHS-CMS program management funds. My colleagues find that, by removing access to the HHS-CMS funds, Congress stated its clear intent to amend the statute and abrogate the payment obligation if the payments in were insufficient. However, they point to no statement in the legislative history suggesting that the rider was enacted in response to the GAO's report.

Next, my colleagues look to the remarks of Chairman Harold Rogers to discern intent. He stated:

> In 2014, HHS issued a regulation stating that the risk corridor program will be budget neutral, meaning that the federal government will never pay out more than it collects from issuers over the three year period risk corridors are in effect. The agreement includes new bill language to prevent CMS Program Management appropriation account from being used to support risk corridors payments.

Chairman Rogers is referring to the April 2014 "guidance," where HHS stated that they "anticipate that risk corridors collections will be sufficient to pay for all risk corridors payments." In that guidance, HHS was stating its understanding that "risk corridors collections [might be] insufficient to make risk corridors payments for a year."

In 2014, a bill to require budget neutrality in the operation of the risk corridors program was introduced. The proposed legislation sought to amend Section 1342(d) of the ACA to ensure budget neutrality of payments in and payments out. The bill stated:

> In implementing this section, the Secretary shall ensure that payments out and payments in under paragraphs (1) and (2) of subsection (b) are provided for in amounts that the Secretary determines are necessary to reduce to zero the cost . . . to the Federal Government of carrying out the program under this section.

The proposal, introduced by Senator Marco Rubio on April 7, 2014, was an effort to change the risk corridors program. The change was proposed, but not enacted, providing an indication of legislative intent.

We have been directed to no statement of abrogation or amendment of the statute, no disclaimer by the government of its statutory and contractual commitments. However, the government has not complied with these commitments—leading to this litigation.

The standard is high for intent to cancel or amend a statute. The standard is not met by the words of the riders. "[T]he intention of the legislature to repeal must be clear and manifest." "In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." Here, where there is no irreconcilable statute, repeal by implication is devoid of any support.

The panel majority does not suggest that intent to repeal can be found in the rider itself. Nor can intent be inferred from any evidence in the record. It is clear that Congress knew what intent would have looked like, because members of Congress tried, and failed, to achieve budget neutrality in the risk corridors program.

Instead, my colleagues hold that the statutory obligation was not repealed, but only "temporarily suspended." The unenacted text of the proposed "Bailout Act," reproduced supra, would have accomplished the result of budget neutrality that the majority finds was achieved by the riders. Congress' decision to forego this proposed repeal is highly probative of legislative intent.

Precedent does not deal favorably with repeal by implication—the other ground on which my colleagues rely. The panel majority relies heavily on *United States v. Vulte*. However, *Vulte* supports, rather than negates, the holding of the Court of Federal Claims. The facts are relevant: Lt. Vulte's pay as a lieutenant in the Marine Corps for service in Porto Rico was initially based on the Army's pay scale, and in 1902 Congress implemented a ten percent bonus for officers of his pay grade. In the appropriations acts for foreign service, for 1906 and 1907, Congress excluded officers serving in Porto Rico from receiving the bonus. In the act for 1908, the appropriations act continued the 10% bonus but did not mention an exclusion for service in Porto Rico. Lieutenant Vulte sought the bonus for 1908. The government argued that the 1906 and 1907 acts effectively repealed the 1902 bonus. The Court disagreed, and held that although the bonus was restricted for 1906 and 1907, the 1902 act was not repealed, and he was entitled to the 1908 bonus.

The panel majority concludes that *Vulte* established a rule of "effective suspensions-by-appropriations.". That is not a valid conclusion. The Court held that, by altering the bonus for 1906 and 1907, Congress cannot have intended to effectuate a permanent repeal of the 1902 statute. And *Vulte* did not retroactively strip the officers of pay for duties they had performed while subject to the higher pay. On the question of whether an annual appropriations rider can permanently abrogate a statute, the *Vulte* Court stated:

> 'Nor ought such an intention on the part of the legislature to be presumed, unless it is expressed in the most clear and positive terms, and where the language admits of no other reasonable interpretation.' This follows naturally from the nature of appropriation bills, and the presumption hence arising is fortified by the rules of the Senate and House of Representatives.

The panel majority's contrary position is not supported.

The panel majority also relies on *United States v. Mitchell*, to support the majority's ruling of "temporary suspension." Again, the case does not support the position taken by my colleagues. In *Mitchell* an appropriations act initially set the salaries of interpreters at $400 or $500. A subsequent appropriation, five years later, set "the appropriation for the annual pay of interpreters [at] $300 each, and a large sum was set apart for their additional compensation, to be distributed by the secretary of the interior at his discretion." The Court stated, "[t]he whole question depends on the intention of congress as expressed in the statutes,", and observed that the statute clearly stated the number of interpreters to be hired, the salary for those interpreters, and the appropriation of an additional discretionary fund to cover additional compensation.

The relevance of *Mitchell* is obscure, for the Court found the clear intent to change interpreters' pay for the subsequent years. There is no relation to the case at bar, where the majority holds that an appropriations rider can change the statutory obligation to compensate for past performance under an ongoing statute. However, *Mitchell* does reinforce the rule that repeal or suspension of a statute must be manifested by clearly stated intent to repeal or suspend. Also, like *Vulte*, the act that in *Mitchell* was "suspended" by a subsequent appropriation was itself an appropriation, not legislation incurring a statutory obligation. The appropriation rider in *Mitchell* simply modified an existing appropriation. In Moda's situation, however, the panel majority holds that the appropriation rider can suspend the authorizing legislation. No such intent can be found in the statute, as *Mitchell* requires and as the statute in that case provided.

The panel majority's theory is not supported by *Mitchell* and *Vulte*, for the statutes in both cases contain the clearly stated intent to modify existing appropriations. Moda's situation is more like that in *Langston*, where the Court stated:

> it is not probable that congress . . . should, at a subsequent date, make a permanent reduction of his salary, without indicating its purpose to do so, either by express words of repeal, or by such provisions as would compel the courts to say that harmony between the old and the new statute was impossible.

Similarly, it is not probable that Congress would abrogate its obligations under the risk corridors program, undermining a foundation of the Affordable Care Act, without stating its intention to do so. The appropriations riders did not state that the government would not and need not meet its statutory commitment.

Precedent supports the decision of the Court of Federal Claims

In *New York Airways, Inc. v. United States*, the Court of Claims held that the "mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by clear implication, the substantive law, does not in and of itself defeat a Government obligation created by statute.". The Civil Aeronautics Board had provided subsidies to helicopter carriers according to a statute whose appropriation provision stated:

> For payments to air carriers of so much of the compensation fixed and determined by the Civil Aeronautics Board under section 406 of the Federal Aviation Act of 1958 (49 U.S.C. § 1376), as is payable by the Board, including not to exceed $3,358,000 for subsidy for helicopter operations during the current fiscal year, $82,500,000, to remain available until expended.

However, the appropriation cap was not sufficient to cover the statutory obligation. The Court of Claims held that the insufficient appropriation did not abrogate the government's obligations to make payments. The court stated that "the failure of Congress or an agency to appropriate or make available sufficient funds does not repudiate the obligation; it merely bars the accounting agents of the Government from disbursing funds and forces the carrier to a recovery in the Court of Claims."

Precedent also illustrates the circumstances in which intent to repeal or suspend may validly be found. In *Dickerson*, Congress had in 1922 enacted a reenlistment bonus for members of the armed forces who reenlisted within three months. For each year between 1934 and 1937 an appropriations rider stated that the reenlistment bonus "is hereby suspended." For fiscal year 1938, the appropriations rider did not contain the same language, but stated that:

> no part of any appropriation contained in this or any other Act for the fiscal year ending June 30, 1939, shall be available for the payment' of any enlistment allowance for 'reenlistments made during the fiscal year ending June 30, 1939 . . . .'

The rider in *Dickerson* cut off funding from all sources, stating "no part of any appropriation contained in this or any other Act . . . shall be available." The Court held that the new language continued to suspend the bonus statute, for the words, and the accompanying Congressional Record, display the clear intent to discontinue the bonus payment. The Record stated: "We have not paid [the enlistment bonus] for 5 years, and the latter part of this amendment now before the House is a Senate amendment which discontinues for another year the payment of the reenlistment allowances." The Record and the statutory language left no doubt of congressional intent to continue the suspension of reenlistment bonuses. The panel majority recognizes that the Court in *Dickerson* found "persuasive evidence" of "Congress's intent to suspend the reenlistment bonus."

In *United States v. Will*, the Court considered statutes setting the salary of government officials including federal judges. In four consecutive years, appropriations statutes had held that these officials would not be entitled to the cost-of-living adjustments otherwise paid to government employees. The annual blocking statutes were in various terms. In one year, the statute stated that the cost-of-living increase "shall not take effect" for these officials. For two additional years, the appropriations statutes barred the use of funds appropriated "by this Act or any other Act," as in Dickerson. The fourth year's appropriation contained similar language, stating that "funds available for payments . . . shall not be used." In each year, the language stated the clear intent that federal funds not be used for these cost-of-living adjustments.

The panel majority finds support in *Will*, and states that "the Supreme Court never considered the impact of that language in *Dickerson* or *Will*." However, in *Dickerson* the Court twice repeated the "any other Act" language, in concluding that the language supported the intentional suspension. And in *Will*, the Court explicitly stated that the statutory language was "intended by Congress to block the increases the Adjustment Act otherwise would generate."

The Court found legislative intent clear in these cases. In contrast, the appropriations rider for risk corridors payments does not purport to change the government's statutory obligation, even as it withholds a source of funds for the statutory payment. My colleagues' ratification of some sort of permanent postponement denies the legislative commitment of the government and the contractual understanding between the insurer and HHSCMS.

The riders cannot have retroactive effect after inducing participation

The creation of the risk corridors program as an inducement to the insurance industry to participate in the Affordable Care Act, and their responses and performance, negate any after-the-fact implication of repudiation of the government's obligations.

The government argued before the Court of Federal Claims that its obligations to insurers did not come due until the conclusion of the three year risk corridors program, and that "HHS has until the end of 2017 to pay Moda the full amount of its owed risk corridors payments, and Moda's claims are not yet ripe because payment is not yet due." We have received no advice of payments made at the end of 2017 or thereafter.

The appropriations rider cannot have retroactive effect on obligations already incurred and performance already achieved. Retroactive effect is not available to "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result." Such clear intent is here absent.

Removal of Moda's right to risk corridors payments would "impair rights a party possessed when [it] acted," a "disfavored" application of statutes, for "a statute shall not be given retroactive effect unless such construction is required by explicit language or by necessary implication." Such premises are absent here.

Moda has recourse in the Judgment Fund

The Government does not argue that the Judgment Fund would not apply if judgment is entered against the United States, in accordance with Section 1491:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or

> unliquidated damages in cases not sounding in tort.

The Judgment Fund is established "to pay final judgments, awards, compromise settlements, and interest and costs specified in the judgments or otherwise authorized by law when . . . payment is not otherwise provided for . . . ."

The contract claim is also supported

The Court of Federal Claims also found that the risk corridors statute is binding contractually, for the insurers and the Medicare administrator entered into mutual commitments with respect to the conditions of performance of the Affordable Care Act. The Court of Federal Claims correctly concluded that an implied-in-fact contract existed between Moda and the government. I do not share my colleagues' conclusion that "Moda cannot state a contract claim."

CONCLUSION

The government's ability to benefit from participation of private enterprise depends on the government's reputation as a fair partner. By holding that the government can avoid its obligations after they have been incurred, by declining to appropriate funds to pay the bill and by dismissing the availability of judicial recourse, this court undermines the reliability of dealings with the government.

I respectfully dissent from the panel majority's holding that the government need not meet its statutory and contractual obligations established in the risk corridors program.

"U.S. Supreme Court to hear Moda Health's $24 Million ACA Appeal"

Portland Business Journal

Elizabeth Hayes

June 24, 2019

Moda Health, which lost its $249 million appeal against the federal government a year ago, will get another day in court — the U.S. Supreme Court.

The court agreed to to hear three cases filed by health insurers who claim they are owed more than $12 billion under the Affordable Care Act's risk corridors program.

Lawsuits from Moda, Maine Community Health Options and Land of Lincoln Mutual Health will be consolidated in the appeal.

"We are encouraged that the Supreme Court has agreed to hear our case," Moda President and CEO Robert Gootee said in a statement. "We remain confident that the court will ultimately hold the government to its promise to pay those companies, including Moda, who answered the government's call to provide access to affordable health care for the neediest of Americans."

The risk corridors program was created to encourage insurers to offer plans on the new health insurance marketplaces. The government would pay insurers that lost money during the first three years of the ACA's implementation, using funds from profitable insurers.

Moda suffered losses on its plan in 2014 and 2015 but saw little compensation from the program and nearly went into receivership, though it has since regained its financial footing. It is owed $249 million altogether.

Risk corridor funds came up $12 billion short of what was owed nationwide. Meanwhile, Republicans in Congress blasted the program as a bailout to the insurance industry and declined appropriate other funds to cover the gap. The government paid 12.6 percent of risk corridor claims for 2014 and nothing for 2015.

The U.S. Justice Department argued that since Congress required the program to be budget-neutral, it only owed to the extent that profitable insurers paid money in.

Moda and other insurers have argued the government pulled a bait and switch. The federal government, Moda has said, should not be allowed to walk away from its obligation to partially reimburse the company for financial losses incurred when it provided coverage to more than 100,000 Oregonians under the ACA.

Earlier this year, Delta Dental of California purchased a 49.5 percent stake in Moda for $152 million.

“Supreme Court to Consider Cases Accusing US of Shorting Health Insurers $12B in Promised Payments”

ABA Journal

Debra Cassens Weiss

June 24, 2019

The U.S. Supreme Court agreed Monday to decide whether Congress must fulfill a statutory promise to pay insurers who lost money by participating in the Affordable Care Act’s insurance marketplaces.

The court accepted and consolidated three cases brought by insurers who say they upheld their end of the bargain, and Congress must honor the statutory commitment to offset their losses.

The insurers say Congress promised to pay the money for three years to encourage insurers to participate in insurance marketplaces but later used appropriations riders to deny funds to pay the insurers. “The net effect was a bait-and-switch of staggering dimensions in which the government has paid insurers $12 billion less than what was promised,” says a cert petition (filed by two insurers, Moda Health Plan and Blue Cross and Blue Shield of North Carolina.

The two other cert petitions also used the bait-and-switch language.

The Affordable Care Act had authorized the payments as part of a “risk corridors” program intended to limit insurers’ gains and losses when they participated in the insurance marketplaces, report the Wall Street Journal the New York Times, Politico and the Washington Post (

Under the program, insurers whose premiums exceeded expenses in the first three years of the program would have to pay some of the profit to the federal government. Insurers whose claims exceeded premiums charged would get partial payment for their losses.

The cases are *Maine Community Health Options v. United States*, *Moda Health Plan v. United States* and *Land of Lincoln Mutual Health Insurance Co. v. United States*.

“Supreme Court to Hear Insurers’ Suit on Obamacare”

New York Times

Adam Liptak

June 24, 2019

The Supreme Court agreed on Monday to decide whether the federal government was entitled to break a promise to shield insurance companies from some of the risks they took in participating in the exchanges established by President Barack Obama’s health care law, the Affordable Care Act.

In their brief seeking Supreme Court review, two insurance companies said they had been the victims of “a bait-and-switch of staggering dimensions in which the government has paid insurers $12 billion less than what was promised.”

The health care law established so-called risk corridors meant to help insurance companies cope with the risks they took when they decided to participate in the law’s marketplaces without knowing who would sign up for coverage. Under the program, the federal government would limit insurance companies’ gains and losses on insurance sold in the marketplaces from 2014 through 2016.

If premiums exceeded a company’s medical expenses, the insurer would be required to pay some of its profit to the government. But if premiums fell short of medical expenses, the insurer would be entitled to payments from the government.

The law’s drafters hoped that payments into the program would offset payments out. As it turned out, losses substantially outpaced gains. Under the terms of the law, the government was required to make up much of the difference.

But Congress later enacted a series of appropriation riders that seemed to bar the promised payments. The insurance companies sued, but a divided three-judge panel of the United States Court of Appeals for the Federal Circuit ruled against them.

Chief Judge Sharon Prost, writing for the majority, acknowledged that the health care law “obligated the government to pay the full amount of risk corridors payments.” But she added that “the riders on the relevant appropriations effected a suspension of that obligation for each of the relevant years.”

In dissent, Judge Pauline Newman said the majority had undermined basic principles of fairness.

“The government’s ability to benefit from participation of private enterprise depends on the government’s reputation as a fair partner,” she wrote. “By holding that the government can avoid its obligations after they have been incurred, by declining to appropriate funds to pay the bill and by dismissing the availability of judicial recourse, this court undermines the reliability of dealings with the government."

In urging the Supreme Court to hear the case, two insurance companies said the appeals court's decision threatened to encourage the government to walk away from other inconvenient promises.

"By giving judicial approval to the government's egregious disregard for its unambiguous statutory and contractual commitments," the brief said, "the decision provides a road map for the government to promise boldly, renege obscurely, and avoid both financial and political accountability for depriving private parties of billions in reliance interests."

The court agreed to hear three cases on the issue: Maine Community Health Options v. United States, No. 18-1023; Moda Health Plan Inc. v. United States, No. 18-1028; and Land of Lincoln Mutual Health Insurance Co. v. United States, No. 18-1038. The three cases will be consolidated for a single hour of arguments and heard in the court's next term, which will begin in October.

"Insurer Wins First CSR Payment Decision; Updates on BHP and Risk Corridors Litigation"

Health Affairs

Katie Keith

September 6, 2018

While all eyes were on this week's oral arguments in *Texas v. United States*, there is no shortage of litigation over the Affordable Care Act (ACA) to keep tabs on. This post discusses what appears to be the first ruling on whether insurers are entitled to unpaid cost-sharing reduction (CSR) payments, following a decision by the Trump administration to end the payments in October 2017. The post also discusses the latest on litigation over unpaid risk corridor payments and a new payment methodology for the Basic Health Program (BHP) in Minnesota and New York.

First Court To Decide CSR Payment Case Rules For Insurer.

On September 4, 2018, Judge Elaine D. Kaplan of the Court of Federal Claims issued what is believed to be the first ruling on whether insurers are entitled to unpaid cost-sharing reduction (CSR) payments. The decision to end those payments was partially the result of litigation brought by the House of Representatives in 2014 that was settled earlier this year. In that lawsuit (*House v. Azar*), a district court judge held that the payment of CSRs without an explicit appropriation from Congress violated the appropriations clause of the Constitution.

Here, Judge Kaplan concluded that insurers are, in fact, entitled to unpaid CSRs even in the absence of an explicit appropriation. This lawsuit was brought by the Montana Health CO-OP but a number of insurers have filed lawsuits against the Department of Health and Human Services (HHS) for failing to reimburse marketplace insurers for 2017 and, in some cases, beyond. This includes at least one class action lawsuit. Similar to arguments made below in risk corridors litigation, insurers argued that the government's failure to make CSR payments violates Section 1402 of the ACA and an implied-in-fact contract between HHS and insurers.

Judge Kaplan concluded that Section 1402 does indeed obligate the federal government to make CSR payments and that Congress's failure to explicitly appropriate funds for the payments did not relieve the government of that obligation. As she put it, "the statutory language clearly and unambiguously imposes an obligation on the Secretary of HHS to make payments to health insurers that have implemented cost-sharing reductions on their covered plans as required by the ACA."

The judge reached this conclusion in part by citing *Moda Health Plan*, a risk corridors case that was recently decided by a three-judge panel of the Federal Circuit (which is discussed in more detail below). In *Moda*, the Federal Circuit concluded that a similar statute obligated the government to make risk corridors payments to insurers.

Judge Kaplan also rejected the idea that silver loading impacts the analysis of whether Section 1402 requires the federal government to make CSR payments. She concluded that there is no evidence that the ACA itself or Congress intended the CSR obligation in Section 1402 to be offset by increased premium tax credits due to silver loading.

Judge Kaplan granted Montana Health CO-OP's request for summary judgment and denied the Department of Justice's (DOJ's) request to dismiss the case. She ruled only on the statutory claim (that the government violated Section 1402 of the ACA by failing to make CSR payments) and did not reach the question of whether the government breached an implied-in-fact contract with marketplace insurers. The government will presumably appeal the decision.

In the meantime, other litigation over unpaid CSRs continues. Some cases had been stayed temporarily but are now proceeding, with additional filings expected soon. This includes lawsuits filed by Blue Cross and Blue Shield of Vermont, Maine Community Health Options, LA Care Health Plan,and Sanford Health Plan, and a class action lawsuit led by Common Ground Healthcare Cooperative (where a response from DOJ is expected in mid-September).

Risk Corridors: Insurers Await Federal Circuit Decision

In mid-June, a three-judge panel of the Court of Appeals for the Federal Circuit issued opinions in *Moda Health Plan v. United States and Land of Lincoln Mutual Health Insurance Co. v. United States*. By a 2-1 majority in both cases, the panel concluded that the government does not have to pay health insurers that offered qualified health plans the full amount owed to them in risk corridors payments. The panel's decision overturned a lower court decision (in the Court of Federal Claims) in favor of Moda Health Plan.

The majority concluded that HHS was obligated under Section 1342 of the ACA to make risk corridor payments pursuant to a statutory formula. This obligation, however, was later limited by Congress through appropriations riders. The appropriations riders rendered the risk corridors program "budget neutral," meaning the federal government could only pay out the amount of money that it took in, leaving billions in outstanding risk corridor claims.

In late July, Moda Health Plan and Land of Lincoln filed petitions to have their cases reheard *en banc* by a full panel of all judges on the Federal Circuit. *En banc* review is discretionary; it is rare and is typically reserved to maintain precedent or for legal questions of "exceptional importance." Both briefs argue that the Federal Circuit opinion conflicts with existing Supreme Court precedent and that the full panel should step in to decide the question of whether an appropriations rider can amend the government's financial obligations under a federal statute.

At the same time, Blue Cross and Blue Shield of North Carolina and Maine Community Health Options—the next two insurers whose risk corridors cases were pending before the Federal Circuit—asked the court to rule in favor of the federal government in their cases. The court granted these requests, and both insurers filed their own petitions for *en banc* review.

On August 31, the Department of Justice (DOJ) asked the Federal Circuit not to grant the four insurers' request for *en banc* review. DOJ argues that the three-judge Federal Circuit panel correctly applied Supreme Court precedent and there is no need for the full panel of judges to review the case. (DOJ also again takes issue with the court's conclusion that Section 1342 of the ACA obligates the government to make risk corridors payments in the first place, even in the absence of an explicit appropriation. This conclusion has implications for CSR litigation discussed above).

A number of other stakeholders filed amicus briefs throughout August, all urging the Federal Circuit to rehear the case(s) *en banc*. Briefs were filed by America's Health Insurance Plans, the Blue Cross Blue Shield Association, the Association for Community Affiliated Plans and the Alliance of Community Health Plans, the National Association of Insurance Commissioners, state attorneys general representing 17 states and the District of Columbia, economists and professors, and other insurers.

From here, the Federal Circuit will choose whether to hear the case *en banc* or not. If not, the insurers could appeal to the Supreme Court. If the Supreme Court declines to hear the case, the Federal Circuit's ruling would stand, meaning insurers would not recover more than $12 billion in outstanding risk corridors payments.

HHS Takes Another Step To Resolve Basic Health Program Litigation In Minnesota And New York

On August 24, HHS posted a new final administrative order regarding a revised payment methodology for the BHP for 2018. The BHP allows states to offer a more affordable alternative to marketplace coverage to certain uninsured individuals with incomes between 133 and 200 percent of the federal poverty level.

The final administrative order takes yet another step towards resolving a lawsuit brought by Minnesota and New York—the only states that have opted to establish a BHP—for over $1 billion in annual funding after HHS stopped making CSR payments. New York and Minnesota sued after HHS informed them that their BHP payments would no longer include the "CSR component" beginning in 2018. They argued that this reversal in HHS's position was both substantively and procedurally unlawful and asked that HHS be required to adopt a new methodology through the notice-and-comment rulemaking process.

The states and federal government have worked diligently to settle the case, requesting multiple extensions from the court to negotiate. These negotiations resulted in a stipulation in May that required HHS to 1) make supplemental BHP payments of about $151.9 million to New York and about $17.3 million to Minnesota; and 2) revise its 2018 BHP payment methodology while providing states with the opportunity to comment on the proposed methodology.

Pursuant to the stipulation, HHS issued a draft administrative order and provided states with the opportunity to provide comments. These comments (which are included in the final order) were submitted in early August. HHS considered these comments and finalized its administrative order without substantive changes. Although the stipulation specified that the administrative order should be published in the Federal Register, HHS does not appear to have done so and quietly posted the order on its website.

Both New York and Minnesota urged HHS to approve an alternative rate for the premium tax credit (PTC) component of the BHP payment that reflects silver loading. This would reflect what BHP enrollees would have been paid in PTC subsidies if there had been silver loading to account for the loss of CSR subsidies. This would have resulted in higher PTCs and, thus, a higher PTC component of BHP payments (to make up for the lost CSR component).

To address this, the final order adds a "premium adjustment factor" to calculate the PTC portion of the BHP payment rate for 2018. The premium adjustment factor for 2018 is 18.8 percent and will result in additional BHP funding of about $422 million to New York and about $46 million to Minnesota. Put another way, this means that HHS will assume that premiums in Minnesota and New York would have been 18.8 percent higher in 2018 due to nonpayment of CSRs if those states had not offered the BHP.

HHS arrived at an adjustment of 18.8 percent after surveying a subset of states and qualified health plan insurers to understand how these insurers adapted to CSR nonpayment. Of the 1,233 qualified health plans offered in 2018, about 26 percent (318 plans in a total of 26 states) responded. After excluding 13 plans from New York from the sample, the nationwide median adjustment was 20 percent. HHS used this to settle on an 18.8 percent premium adjustment factor for Minnesota and New York.

HHS justified its decision to adopt a premium adjustment factor and examine the effects of silver loading in other states by pointing to a part of Section 1331 of the ACA. Section 1331 directs HHS to "take into consideration the experience of other states with respect to participation in an Exchange and such [PTCs] and [CSRs] provided to residents of the other states."

Despite the new methodology for 2018, HHS makes clear that it has not yet committed to a methodology for 2019 or beyond.

“Moda takes a hit in Court of Appeals Decision”

State of Reform

Tom Holt

June 19, 2018

Moda Health’s chances of recovering $214 million in ACA exchange market risk adjustment funds dropped precipitously last week. The U.S. Court of Appeals for the Federal Circuit reversed a lower court decision and held that the federal government did not have to make risk corridor payments in an adverse decision in *Moda Health Plan, Inc. v. the United States*. Despite daunting legal arguments and political opposition, Moda is determined to appeal. With such high-dollar stakes, neither the feds nor Moda seems likely to surrender.

Moda is battling a Trump Administration that refuses to defend the ACA and a conservative Congressional GOP that could retain a House or Senate majority. Finally, the Supreme Court in its landmark ACA decision tossed core policy questions back to the political branches, which gives us little reason to believe it would jeopardize political capital on questions over risk corridor technicalities.

The core legal issues involve the 2014-16 ACA “risk corridors” that were supposed to smooth financial risk among carriers who either profited or lost in the exchange market. Winners were to pay, and losers were to receive payouts determined by a pro-rated, market-share formula. However, in practice, the winnings were paltry and le434 very little money available for pay outs. Congress, concerned that the Obama administration would use general HHS appropriations to fund risk adjustment payments, found a populist issue in “insurer bailouts” and passed riders to forbid the use of general funds in FY2015 and FY2016 appropriations.

Here are the arguments:

Moda argues that the plain language of the ACA *requires* HHS to disburse full payments by statutory formula. The government does not dispute that it would owe additional payments had the pay-ins been su434icient, but argues that in the absence of such funds, it owes nothing additional.

Moda argues that the cumulative e434ect of ACA risk corridor provisions, HHS administrative rules, and the agency’s written sub-regulatory guidance constitute a “contract” with carriers who entered the ACA exchange market to make risk adjustment payments. The government contends they do not constitute a contract.

Moda contends that the restrictive appropriations riders only precluded payment from HHS funds but did not limit the use of the federal government’s legal judgment funds. The government disagrees.

Though Federal Circuit Appeals Court’s decision sometimes wandered into the misty woods of “legislative intent,” it focused its reasoning on the text of the ACA and the appropriations riders signed into law by President Obama without formal objection.

Moda prevailed on only one of its three arguments: The court held that the ACA plainly requires full risk corridor payouts by formula. However, citing other instances in which actual programmatic agreements were in play, the court ruled there was no risk corridor “contract,” but merely an “incentive” to sell health insurance on exchanges. Citing a century of precedent, the court also ruled that the appropriations riders suspended the risk corridor payment program – and that it was within Congress’ power to do so.

Moda intends to appeal; it could do so by requesting rehearing *en banc* (a full panel of the court), or petitioning to the Supreme Court. A *en banc* hearing not only is the next best venue but also could be the last. The legal issues presented are not high constitutional principles, but they could meet the lesser appellate threshold that “the proceeding involves a question of exceptional importance.” There is no split of appellate circuits on the issues at hand, and the Supreme Court accepts few split- less cases. One similar case out of Nevada could make its way to the famously active Ninth Circuit and produce a Supreme Court-inviting split. Similar remaining active cases all reside in the U.S. Court of Claims, which is now bound by this *Moda* precedent.

In the meantime, Moda appears to have inched back from its precarious financial position through careful strategy and suburb execution. According to public filings with the Oregon Division of Financial Regulation, Moda’s blended fully insured medical loss ratio dropped to 90% for 2017, down from a heartbeat-skipping 100% in 2015. The filings do not take into account other, likely profitable, lines of business about which Moda is not required to report specific results.

Moda quite reasonably will continue to fight for its full payments from HHS. Its best hope may be that the case drags on into 2019, past the Congressional mid-terms and perhaps long enough to yield a political, rather than a legal, settlement.

“Insurers Prepare to Appeal Risk Corridor Case to the Supreme Court”

Fierce Healthcare

Evan Sweeney

November 6, 2018

A federal appeals court has denied a bid from several insurers to rehear a lawsuit seeking to recoup risk corridor payments, setting the stage for a potential battle at the Supreme Court.

Over the summer, the United States Court of Appeals for the Federal Circuit ruled that the Department of Health and Human Services (HHS) was not required to make risk corridor payments to insurers.

That overturned a 2017 decision by the U.S. Court of Federal Claims that said HHS failed to fulfill its promise to make the payments designed to protect insurers from extreme gains or losses on the Affordable Care Act exchanges.

Moda Health Plans, Land of Lincoln, Maine Community Health Options and Blue Cross Blue Shield of North Carolina petitioned the federal circuit court to rehear the case in front of the entire panel of judges.

On Tuesday, 9 of the 11 judges rejected (PDF) that request. Moda Health Plans, one of the insurers leading the litigation against HHS, plans to appeal the decision to the Supreme Court.

“Obviously we are disappointed by today’s decision,” Robert Gootee, President & CEO, Moda, Inc. said in a statement to FierceHealthcare. “We continue to believe, as the trial court did, that the government’s obligation to us is clearly stated in the law. We will seek review by the Supreme Court.”

Stephen McBrady, an attorney with Crowell & Moring who represents Maine Community Health Options, said the insurer also intends to appeal.

“Maine Community Health Options is a non-profit health plan that went into the exchanges and performed exactly as the Affordable Care Act required, providing healthcare coverage to thousands of previously uninsured and underinsured Maine citizens,” he said in an emailed statement. “The health plan filed its risk corridors law suit in order to enforce the government’s obligation to perform as the government was required under the ACA. Today’s ruling is disappointing, but Maine Community Health Options intends to appeal to the Supreme Court.”

Following the Federal Circuit Court’s June decision, University of Michigan law professor Nicholas Bagley wrote in the Incidental Economist that the case is “not an implausible candidate for review… but the Court might be gun-shy about wading into another case about the ACA.”

Notably, two judges on the federal circuit—Pauline Newman and Evan Wallach—dissented, calling the case a "question of the integrity of government" with a financial impact on insurers across the country.

"Our system of public-private partnership depends on trust in the government as a fair partner," Newman wrote. "And when conflicting interests arise, assurance of fair dealing is a judicial responsibility."

As of last year, the government's unpaid risk corridor tab had swelled to $12.3 billion. That brought dozens of lawsuits from insurers like Moda, Humana and Molina Healthcare, which claimed they were owed hundreds of millions in payments.

Allen v. Cooper

Ruling Below: *Allen v. Cooper*, 895 F.3d 337 (4th Cir. 2018).

Overview: A videographer alleged that North Carolina violated his copyright by publishing his video footage and still photograph of the wreckage. Circuit Court concluded that Congress did not validly abrogate the State's Eleventh Amendment immunity with the enactment of the Copyright Remedy Clarification Act.

Issue: Whether Congress validly abrogated state sovereign immunity via the Copyright Remedy Clarification Act in providing remedies for authors of original expression whose federal copyrights are infringed by states.

Frederick ALLEN, *Plaintiffs-Appellees*

v.

Roy A. COOPER, III, *Defendants-Cross-Appellees*

United States Court of Appeals, Fourth Circuit

Decided on July 10, 2018

[Excerpt; some citations and footnotes omitted]

NIEMEYER, Circuit Judge:

Frederick Allen, a videographer, and Nautilus Productions, LLC, Allen's video production company, commenced this action, which, at its core, alleges that North Carolina, its agencies, and its officials (collectively, "North Carolina") violated Allen's copyrights by publishing video footage and a still photograph that Allen took of the 18th–century wreck of a pirate ship that sank off the North Carolina coast. Allen and Nautilus obtained the rights to create the footage and photograph through a permit issued by North Carolina to the ship's salvors, and Allen subsequently registered his work with the U.S. Copyright Office. Allen and Nautilus also seek to declare unconstitutional a 2015 state law— N.C. Gen. Stat. § 121–25(b) (providing that photographs and video recordings of shipwrecks in the custody of North Carolina are public records)—which Allen and Nautilus claim was enacted in bad faith to provide the State with a defense to their federal copyright infringement action.

North Carolina filed a motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), asserting sovereign immunity under the Eleventh Amendment, qualified immunity, and legislative immunity. North Carolina's claim of sovereign immunity prompted Allen and Nautilus to argue (1) that in a 2013 Settlement Agreement, North Carolina waived sovereign immunity; (2) that in any event the federal Copyright Remedy Clarification Act of 1990 had abrogated the State's sovereign immunity; and (3) that as to their claims for injunctive relief, *Ex parte Young* provided an exception to sovereign immunity for ongoing violations of federal law.

The district court rejected North Carolina's claims of immunity, and North Carolina filed this interlocutory appeal. Allen and Nautilus filed a cross-appeal. For the reasons that follow, we reverse and remand with instructions to dismiss *with prejudice* the claims against the state officials in their individual capacities and to dismiss *without prejudice* the remaining claims.

I

In 1717, the pirate Edward Teach, better known as Blackbeard, captured a French merchant vessel and renamed her *Queen Anne's Revenge* . Teach armed the *Revenge* with 40 cannons and made her his flagship. But the following year, the *Revenge* ran aground about a mile off the coast of Beaufort, North Carolina, and Teach abandoned her. Under state law, the ship and its artifacts later became the property of North Carolina and subject to its "exclusive dominion and control."

More than two-and-a-half centuries later, on November 21, 1996, Intersal, Inc., a private research and salvage firm operating under a permit issued by North Carolina, discovered the wreck of the *Revenge* , and on September 1, 1998, Intersal, along with Maritime Research Institute, Inc., an affiliated entity, entered into a 15–year salvage agreement with the North Carolina Department of Natural and Cultural Resources ("the Department"). Under the agreement, Intersal and Maritime Research acknowledged North Carolina's ownership of the shipwreck and the ship's artifacts, and North Carolina acknowledged Intersal's and Maritime Research's salvage rights, agreeing that Intersal and Maritime Research could retain a designated portion of the financial proceeds arising from the sale of media relating to the *Revenge* and replicas of its artifacts.

As relevant to this case, the agreement provided that:

> Except as provided in paragraph 20 and this paragraph, Intersal shall have the exclusive right to make and market all commercial narrative (written, film, CD Rom, and/or video) accounts of project related activities undertaken by the Parties.

The agreement, however, made an exception for the creation of a "non commercial educational video and/or film documentary" and provided that the parties would cooperate in making such an educational documentary. And Paragraph 20 provided:

> The Department shall have the right to authorize access to, and publish accounts and other research documents relating to, the artifacts, site area, and project operations for

> non commercial educational or historical purposes. Nothing in this document shall infringe to any extent the public's right to access public records in accordance with Chapters 121 and 132 of the General Statutes of North Carolina.

The agreement also provided:

> [Maritime Research], Intersal and the Department agree to make available for duplication by each other, or, when appropriate, to provide the Department with, relevant field maps, notes, drawings, photographic records and other such technical, scientific and historical documentation created or collected by [Maritime Research], Intersal or the Department pursuant to the study of the site and the recovery of materials therefrom. These materials shall become public records curated by the Department.

Following execution of this salvage agreement, Intersal retained Nautilus, Allen's production company, to document the salvage of the *Revenge*, and under that arrangement, Allen accumulated, as he alleged in the complain, "a substantial archive of video and still images showing the underwater shipwreck and the efforts of teams of divers and archaeologists to recover various artifacts from [it]."
Allen registered 13 copyrights in these materials with the U.S. Copyright Office, each copyright covering a year's worth of footage.

In 2013, Allen and Nautilus took the position that the Department's publication of Allen's work on the Internet without his consent infringed Allen's copyrights, and this prompted a dispute leading ultimately to a settlement agreement dated October 15, 2013, to which the Department, Intersal, Nautilus, and Allen were parties. In that agreement, none of the parties admitted to any wrongdoing but agreed to the clarification of preexisting arrangements so that the salvage operation could continue.

The 2013 Settlement Agreement divided Allen and Nautilus's video and photographic documentation, treating some of the footage as "commercial documentaries" and some as "non-commercial media," for purposes of clarifying the parties' respective rights. With respect to "commercial documentaries," the 2013 Settlement Agreement provided:

> Intersal, through Nautilus, has documented approximately fifteen (15) years of underwater and other activities related to the QAR [*Queen Anne's Revenge*] project. For purposes of this Commercial Documentaries section, Intersal represents to [the Department] that Nautilus Productions shall remain Intersal's designee. Intersal shall have the exclusive right to produce a documentary film about the [*Revenge*] project for licensing and sale. Intersal may partner with [the Department] if it chooses to do so.... If [the Department] and Intersal do not partner to make a documentary,

> the Intersal documentary script shall be reviewed by [the Department] for historical accuracy prior to final release by Intersal or its agents. Intersal agrees to allow [the Department] to use its completed documentary, free of charge, in its museums and exhibits for educational purposes.

With respect to "non-commercial media," the Agreement provided in relevant part:

> All non-commercial digital media, regardless of producing entity, shall bear a time code stamp, and watermark (or bug) of Nautilus and/or [the Department], as well as a link to [the Department], Intersal, and Nautilus websites, to be clearly and visibly displayed at the bottom of any web page on which the digital media is being displayed.
>
> [The Department] agrees to display non-commercial digital media only on [the Department's] website.

As to Nautilus's archival footage, the Agreement provided that archival footage and photographs that did not "bear a time code stamp and a Nautilus Productions watermark (or bug)" would be returned to Nautilus. But it also provided that the Department could "retain, for research purposes, archival footage, still photographs, and other media that contain a time code stamp and watermark [or bug], and as to such media [the Department] [would] provide Nautilus with a current, accurate list."

Finally, the 2013 Settlement Agreement addressed the video footage and still photographs as public records, providing:

> Nothing in this Agreement shall prevent [the Department] from making records available to the public pursuant to North Carolina General Statutes Chapters 121and 132, or any other applicable State or federal law or rule related to the inspection of public records.
>
> During the recovery phase of the [*Revenge*] project, [the Department] and Intersal agree to make available to each other records created or collected in relation to the [*Revenge*] project. The entity requesting copies bears the cost of reproduction. Within one (1) year after the completion of the recovery phase, Intersal shall allow [the Department] to accession duplicate or original records that were created or collected by Intersal during the project and that are related to the site, or the recovery or conservation of the [*Revenge*] materials. Such records shall include relevant field maps, notes, drawings, photographic records, and other technical, scientific and historical documentation created or collected by [the Department] or Intersal pursuant to the study of the site and the recovery of materials therefrom. These materials shall become public records curated by [the Department]. All digital media provided by Intersal under the terms

of this paragraph shall include a time code stamp and watermarks (or bugs).

Following execution of the 2013 Settlement Agreement, as Allen and Nautilus alleged in their complaint, the Department "resumed infringing [Allen's] copyrights" by "publish[ing] ... and/or display[ing]" various "works" on the Internet. The complaint identified six "infringing works" along with their Internet addresses. Five of those works were videos about the *Revenge* shipwreck that were posted on the Department's YouTube channel, and the remaining "infringing work" was a newsletter about North Carolina's maritime museums, which contained an article about the *Revenge* with one of Allen's still photographs. Accordingly, Allen and Nautilus sent North Carolina a "Takedown Notice," and North Carolina maintained that it complied before the hearing on its motion to dismiss filed in the district court. It provided the district court with documentary evidence confirming that fact, and at oral argument on this appeal, counsel for Allen and Nautilus also confirmed that the six alleged infringements had ceased.

Allen and Nautilus commenced this action in December 2015, naming as defendants the State of North Carolina, the Department, the Governor, and six officials in the Department, among others. Except for the Governor, who was sued only in his official capacity, each of the individual defendants was sued in both his or her official and individual capacities. The complaint, as amended, contained five counts. In Count I, Allen and Nautilus alleged that in 2015, the defendants enacted N.C. Gen. Stat. § 121–25(b) (making shipwreck videos and photographs in North Carolina's custody public records) in bad faith to "create a defense" to the copyright infringement claim asserted in Count II. They sought a declaratory judgment that § 121–25(b) was unenforceable because it was preempted by federal copyright law and was otherwise unconstitutional under the Takings Clause and Due Process Clause of the Constitution. In Count II, Allen and Nautilus claimed copyright infringement under 17 U.S.C. § 501(a) – (b). In Count III, they alleged that the defendants "acted under color of state law to enact § 121–25(b) and to threaten plaintiffs ... with enforcement thereof," in violation of 42 U.S.C. § 1983. Finally, in Counts IV and V, they alleged state law claims for unfair trade practices and civil conspiracy. For relief, Allen and Nautilus sought, in addition to the declaratory judgment sought in Count I, an order enjoining copyright infringement and enforcement of § 121–25(b), as well as compensatory, statutory, treble, and punitive damages. North Carolina filed a motion to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), maintaining that the institutional defendants and individual defendants in their official capacities were shielded from suit in federal court by sovereign immunity under the Eleventh Amendment and that the officials sued in their individual capacities were entitled to qualified and legislative immunity. Allen and Nautilus responded to the claim of sovereign immunity, arguing (1) that North Carolina waived sovereign immunity in the 2013 Settlement Agreement; (2) that North

Carolina's sovereign immunity was also abrogated by the federal Copyright Remedy Clarification Act of 1990, 17 U.S.C. § 511; (3) and that, in any event, injunctive relief was available under *Ex parte Young* , 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). They also argued that the individual officials could not invoke qualified immunity because reasonable officials under the circumstances alleged would have known that they were violating Allen's rights under federal copyright law, and that they could not invoke legislative immunity because none of the officials had performed any legislative functions.

Following a hearing, the district court, by order dated March 23, 2017, denied North Carolina's motion to dismiss as to Counts I and II, concluding that its Eleventh Amendment immunity for those counts was validly abrogated by the Copyright Remedy Clarification Act; that the state officials sued in their individual capacities were not entitled to qualified immunity; and that a determination of those officials' legislative immunity would be "premature" at that time. It granted the motion as to the remaining counts on the basis of sovereign immunity.

From the district court's interlocutory order, North Carolina filed this appeal, challenging the district court's denial of immunity in all forms. Allen and Nautilus cross-appealed, challenging several of the district court's specific conclusions regarding sovereign immunity.

II

Invoking the Eleventh Amendment, North Carolina and its officials acting in their official capacities claim that they are immune from suit in federal court and they contend that the immunity applies regardless of the form of relief sought by the plaintiffs.

Allen and Nautilus disagree, arguing that North Carolina waived sovereign immunity when it signed the 2013 Settlement Agreement; that the State's sovereign immunity was abrogated by the federal Copyright Remedy Clarification Act; and that, in any event, *Ex parte Young* provides them with an exception for the injunctive relief they request as to ongoing violations of federal law. We address these arguments in order.

A

The 2013 Settlement Agreement, on which Allen and Nautilus rely to argue that North Carolina waived its sovereign immunity, provides in relevant part:

> In the event [North Carolina], Intersal, or [Allen and] Nautilus breaches this Agreement, [North Carolina], Intersal, or [Allen and] Nautilus may avail themselves of all remedies provided by law or equity.

Allen and Nautilus maintain that by agreeing to the availability of *all* remedies, North Carolina agreed that the remedies being sought in this action may be obtained from it, thereby effecting a waiver of sovereign immunity from suit in federal court.

We cannot, however, read this provision as a waiver of North Carolina's Eleventh Amendment immunity. First, Eleventh Amendment immunity protects the States, their agencies, and officials from suit *in federal court* . Yet, the subject provision in the 2013 Settlement Agreement makes no reference to federal court, state court or, for that matter, any court. Moreover, the provision states only that each party may pursue available remedies *as provided by* law or equity. Consequently, legal or equitable limitations on those remedies must also apply. And one of those limitations is that a State, its agencies, and its officials acting in their official capacities cannot be sued *in federal court* without their consent. We readily conclude that the provision falls far short of the clear statement that is required to effect a waiver of Eleventh Amendment immunity. As the Supreme Court has made clear, a State must *expressly* consent to suit *in federal court* to waive its immunity under the Eleventh Amendment.

B

Allen and Nautilus also contend that Congress validly abrogated North Carolina's Eleventh Amendment immunity with the enactment of the Copyright Remedy Clarification Act. That Act provides:

> Any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity, shall not be immune, under the Eleventh Amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person ... for a violation of any of the exclusive rights of a copyright owner provided by [federal copyright law].

It is well established that any abrogation of a State's Eleventh Amendment immunity requires both a clear statement of congressional intent—which, to be sure, § 511 provides—and a valid exercise of congressional power. Thus, the question presented here reduces to whether Congress validly exercised its constitutional power when enacting the Copyright Remedy Clarification Act.

Allen and Nautilus contend first that Congress validly enacted the Copyright Remedy Clarification Act because it properly invoked Article I's Patent and Copyright Clause, which authorizes Congress to "secur[e] for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." But, as North Carolina correctly notes, that ground for enactment of an abrogation is foreclosed by *Seminole Tribe* and its progeny, which make clear that Congress cannot rely on its Article I powers to abrogate Eleventh Amendment immunity.

Allen and Nautilus argue, however, that those cases were impliedly overruled by the Supreme Court's more recent decision in *Central Virginia Community College v. Katz* , which relied on Article I's Bankruptcy Clause to hold that a proceeding initiated by a bankruptcy trustee to set aside preferential transfers by a debtor to a state agency was not barred by sovereign immunity. The *Katz* holding, however, was made in a completely distinguishable context that was unique to the Bankruptcy Clause, and the Court limited its holding to that Clause. Indeed, the Court made clear that its holding in *Katz* was not intended to overrule *Seminole Tribe* and its progeny, stating that it was not disturbing the broader jurisprudence regarding Congress's power to abrogate Eleventh Amendment immunity. In short, even after *Katz* , it remains clear that Congress cannot rely on the enumerated power in Article I over copyright to compel a State to litigate copyright cases in a federal court.

Allen and Nautilus contend that, in any event, Congress validly enacted the Copyright Remedy Clarification Act under the authority granted to it in § 5 of the Fourteenth Amendment, which affords Congress the "power to enforce, by appropriate legislation," the Amendment's substantive guarantees. As they maintain, it is settled that Congress can abrogate sovereign immunity "through a valid exercise of its §5 power, because the Eleventh Amendment and the principle of state sovereignty that it embodies "are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment," North Carolina argues, however, that Congress did not validly exercise its § 5 power in enacting the Copyright Remedy Clarification Act because (1) it did not, as required, purport to rely on its § 5 authority, and (2) it did not, as also required, tailor the Act to an identified, widespread pattern of conduct made unconstitutional by the Fourteenth Amendment.

In construing the scope of § 5 power, the Supreme Court has been careful to strike a considered balance between upholding the dignity of States as sovereign entities, on the one hand, and safeguarding individual rights protected by the Fourteenth Amendment, on the other. It has accordingly explained that Congress has plenary authority to abrogate sovereign immunity for claims arising from state conduct that amounts to an *actual violation* of the Fourteenth Amendment's substantive guarantees. The Court has also interpreted § 5 as permitting Congress to abrogate sovereign immunity for "a somewhat broader swath of [state] conduct, including that which is not itself forbidden by the [Fourteenth] Amendment." Yet again, however, in light of the competing equities at stake, it has circumscribed Congress's authority to do so in two respects. Congress must both (1) make clear that it is relying on § 5 of the Fourteenth Amendment as the source of its authority and (2) ensure that any abrogation of immunity is "congruen[t] and proportional[ ]" to the Fourteenth Amendment injury to be prevented or remedied.

In this case, we conclude that in enacting the Copyright Remedy Clarification Act, Congress satisfied neither requirement.

First, it is readily apparent that in enacting the Copyright Remedy Clarification Act, Congress relied on the Copyright Clause in Article I of the Constitution, rather than § 5 of the Fourteenth Amendment. This invocation of Article I authority was expressly and repeatedly stated in the Act's legislative history. Neither the text of the statute nor its legislative history indicates any invocation of authority conferred by § 5 of the Fourteenth Amendment. And without such an invocation, the Act cannot effect a valid abrogation under § 5.

This was made clear in *Florida Prepaid*, where the Supreme Court addressed the constitutionality of the Patent Remedy Act, which abrogated the States' immunity from suit in federal court for patent infringement. After noting that the legislative history indicated that Congress relied on the Commerce Clause, the Patent Clause, and § 5 of the Fourteenth Amendment, the Court stated that the Commerce and Patent Clauses could not sustain the Act in light of *Seminole Tribe*. *Florida Prepaid*. Similarly, the Court rejected the plaintiff's alternative argument that the Act could be justified under the Fifth Amendment's Just Compensation Clause:

> There is no suggestion in the language of the statute itself, or in the House or Senate Reports of the bill which became the statute, that Congress had in mind the Just Compensation Clause.... Since Congress was so explicit about invoking its authority under Article I and its authority to prevent a State from depriving a person of property without due process of law under the Fourteenth Amendment, we think this omission precludes consideration of the Just Compensation Clause as a basis for the Patent Remedy Act.

Here, the legislative history of the Copyright Remedy Clarification Act shows that Congress relied on its Article I power over copyrights and not on § 5 of the Fourteenth Amendment, similarly "preclud[ing] consideration" of § 5 as a proper basis for the Act's abrogation of States' Eleventh Amendment immunity.

Allen argues that the Supreme Court's decisions in *EEOC v. Wyoming*, and *Kimel v. Florida Board of Regents*, undermine any need to invoke *expressly* the Fourteenth Amendment. In *EEOC* , the Court noted that when exercising § 5 power, there is no need to "recite the words 'section 5' or 'Fourteenth Amendment.'" But that quotation does not help Allen and Nautilus because the Court also explained that, regardless of whether the terms " § 5" or "Fourteenth Amendment" are used, it must "be able to discern some legislative purpose or factual predicate that supports the exercise of [§ 5] power." More importantly, *EEOC* was not a case about the abrogation of Eleventh Amendment immunity, and the *EEOC* Court never addressed whether the legislation before it—the Age Discrimination in Employment Act—was a valid exercise of Congress's power under § 5.

Similarly, *Kimel* provides Allen and Nautilus with little support. The *Kimel* Court concluded that the Age Discrimination in Employment Act's abrogation of sovereign immunity was invalid because it was not a congruent and proportional response to unconstitutional age discrimination by the States. They argue that, because the Court reached that conclusion despite the absence of any congressional invocation of the Fourteenth Amendment by Congress, no such invocation should be required here. The *Kimel* Court, however, did not even mention the omission on which Allen and Nautilus rely. And more to the point, no case since *Florida Prepaid* has disavowed the Supreme Court's instruction that an abrogation of sovereign immunity cannot be sustained by a source of constitutional authority that Congress never invoked.

Not only did Congress not invoke its authority under § 5, it also did not, as required, limit the scope of the Copyright Remedy Clarification Act to enforcement of rights protected by the Fourteenth Amendment. Rather, in abrogating sovereign immunity, Congress used language that sweeps so broadly that the Act cannot be deemed a congruent and proportional response to the Fourteenth Amendment injury with which it was confronted.

Our conclusion is required by *Florida Prepaid*, where the circumstances were analogous to those before us. The Supreme Court there concluded that the Patent Remedy Act did not appropriately enforce the Fourteenth Amendment because there was no "congruence and proportionality between the [Fourteenth Amendment] injury to be prevented or remedied and the means adopted to that end." While the Court acknowledged that patents are a "species of property" and that patent infringement by States could therefore implicate the Fourteenth Amendment's prohibition against deprivations of property without due process, it explained that a due process violation would not result merely from a State's infringement of a patent. Rather, the infringement would both have to go unremedied and have to be done intentionally or at least recklessly.

Citing at length to the legislative record of the Patent Remedy Act, the *Florida Prepaid* Court then determined that Congress was not faced with sufficient evidence of *unconstitutional* patent infringement to justify abrogation. It observed that there were fewer than 10 patent infringement suits against States in the century preceding the enactment of the Patent Remedy Act; that most state infringement was apparently accidental; and that while state remedies for governmental infringement were disuniform and rather tenuous, the evidence before Congress did not prove such remedies to be constitutionally inadequate. In the Court's view, this evidence "suggest[ed] that the Patent Remedy Act does not respond to a history of 'widespread and persisting deprivation of constitutional rights' of the sort Congress has faced in enacting proper prophylactic § 5 legislation."

The Court then compared that evidence to the Patent Remedy Act's sweeping abrogation provisions, which made the States liable for patent infringement to the same extent as private parties, and concluded that the provisions were " 'so out of proportion to a supposed remedial or preventive object that [they] [could not] be understood as responsive to, or designed to prevent, unconstitutional behavior.'" In particular, the Court observed that Congress had done "nothing to limit the coverage of the [Patent

Remedy] Act to cases involving arguable constitutional violations," such as where a State authorized infringement as a matter of official policy or otherwise intentionally infringed patents without providing any remedy. Nor had Congress included durational limits or abrogated immunity only for States presenting the greatest incidence of infringement. The absence of such tailoring, juxtaposed with the limited evidence of unconstitutional patent infringement, "ma[de] it clear" that the Patent Remedy Act did not appropriately enforce the Fourteenth Amendment.

In this case, a similar legislative record and an equally broad enactment likewise leads to the conclusion that the Copyright Remedy Clarification Act's abrogation of sovereign immunity cannot be sustained under § 5. While we may presume that a copyright, like a patent, is a "species of property" that could be deprived without due process in violation of the Fourteenth Amendment, not every infringement violates the Constitution, as the *Florida Prepaid* Court explained. To be sure, the legislative record of the Copyright Remedy Clarification Act did include some evidence of copyright infringement by States that presumably violated the Fourteenth Amendment's Due Process Clause. The record of such infringement, however, was materially similar to that in *Florida Prepaid* .

As Allen and Nautilus note, most of the evidence was compiled in a 1988 report prepared at Congress's request by Ralph Oman, who was then the United States Register of Copyrights. In preparing the report, the Copyright Office solicited public comments regarding the issue of state immunity from copyright claims and received several dozen responses from various industry groups, among others, expressing grave concerns about the prospect of such immunity. But, the Oman Report reveals that only five of the commenters "document[ed] actual problems ... in attempting to enforce their [copyright] claims against state government infringers." And the commenters' responses described at most seven incidents in which States invoked sovereign immunity to avoid liability for copyright infringement. Only two of those incidents recounted in the Register's Report—where States invoked sovereign immunity and continued to display copyrighted films to prison inmates for free even after the copyright holders notified them of the infringement—were described with sufficient detail to show clearly the requisite willfulness of state officials to amount to a due process violation. Besides these incidents in the Oman Report, Congress learned of just a few other comparable incidents of unremedied State infringement from hearing testimony. In total, even assuming that all of the incidents of unremedied infringement were intentional, the record before Congress contained at most a dozen incidents of copyright infringement by States that could be said to have violated the Fourteenth Amendment.

This evidence plainly falls short of establishing the "widespread and persisting deprivation of constitutional rights" that is required to warrant prophylactic legislation under § 5. Indeed, the evidence here appears little different in quality or quantity than the historical evidence underlying the Patent Remedy Act, which was found insufficient in *Florida Prepaid* . Critically, in each case, Congress did not identify an extant pattern of infringement giving rise to violations of the Fourteenth Amendment across a significant number of States. At most, the record of the Copyright Remedy Clarification Act, like that of the Patent Remedy Act, indicated that there was *a potential* for greater constitutional violations in the future and that Congress simply "acted to head off this speculative harm."

Acting against this backdrop of limited evidence, Congress enacted the Copyright Remedy Clarification Act to make States broadly, immediately, and indefinitely accountable for copyright infringement to the same extent as private parties, imposing sweeping liability for *all violations* of federal copyright law, whether the violation implicates the Fourteenth Amendment or not. Congress thus declined to narrow whatsoever the Act's reach, instead abrogating immunity indiscriminately in a manner that was wholly incongruous with the sparse record of unconstitutional conduct before it. This failure to adopt any limitation along the lines discussed in *Florida Prepaid* cannot be reconciled with the requirement that legislation enacted under § 5 be "tailor[ed] ... to remedying or preventing [unconstitutional] conduct."

Accordingly, we conclude that the Copyright Remedy Clarification Act's wholesale abrogation of sovereign immunity for claims of copyright infringement is grossly disproportionate to the relevant injury under the Fourteenth Amendment, and therefore the abrogation cannot be sustained as an enactment that "appropriate[ly]" "enforce[s]" that Amendment.

In concluding otherwise, the district court sought to distinguish the record in *Florida Prepaid* by relying primarily on the "many examples of copyright infringements by States" in the Copyright Remedy Clarification Act's legislative history. In so relying, however, the court failed to consider whether any of those examples involved intentional and unremedied infringement, as *Florida Prepaid* clearly instructs. Also, as an alternative basis for holding that the Copyright Remedy Clarification Act had validly abrogated North Carolina's immunity, the district court relied on "the amount of suits filed against allegedly infringing states in recent years." That reliance, however, did not comport with the Supreme Court's determination that *Congress* must identify a pattern of unconstitutional conduct *before* it abrogates Eleventh Amendment immunity.

In concluding that the Copyright Remedy Clarification Act does not validly abrogate Eleventh Amendment immunity, we join the numerous other courts to have considered this issue since *Florida Prepaid*, all of which have held the Act invalid.

C

Finally, Allen and Nautilus contend that, at the very least, their claims against the state officials for injunctive and declaratory relief may proceed under the exception to Eleventh

Amendment immunity recognized in *Ex parte Young*. The parties argued the issue before the district court, but the court, in light of its ruling on the Copyright Remedy Clarification Act, did not address it. Because we reverse the district court on abrogation, we address the *Ex parte Young* exception and conclude that the exception does not apply in this case.

Under *Ex parte Young* , private citizens may sue state officials in their official capacities in federal court to obtain prospective relief from ongoing violations of federal law. This exception to Eleventh Amendment immunity "is designed to preserve the constitutional structure established by the Supremacy Clause" and rests on the notion, often referred to as "a fiction," that a state officer who acts unconstitutionally is "stripped of his official or representative character and [thus] subjected in his person to the consequences of his individual conduct." To invoke the exception, the plaintiff must identify and seek prospective equitable relief from an *ongoing* violation of federal law.

Allen and Nautilus maintain that they have alleged two ongoing violations from which they seek prospective relief: (1) North Carolina's continuing infringement of Allen's copyrights and (2) its continuing enforcement of an unconstitutional statute, namely, N.C. Gen. Stat. § 121–25(b), which designates images of shipwrecks in the State's custody as public records.

As to the alleged ongoing copyright infringement, Allen and Nautilus identified in their complaint six specific "infringing works" that are "now publicly viewable" at six locations on the Internet, specifying the Internet address for each. North Carolina, however, maintains that shortly before the November 2016 hearing on its motion to dismiss, it removed those allegedly infringing materials from the Internet and provided exhibits to the district court to confirm that it had done so. While Allen and Nautilus acknowledged at oral argument that the six alleged violations had ceased, they argue that the complaint nonetheless alleged generally instances of ongoing Internet infringement beside those six violations, referring to a paragraph that alleged, in a conclusory fashion, that displays of copyrighted materials were continuing "at least at th[ose] locations." But such a general and threadbare catchall, suggesting *the possibility* of other infringing displays, does not plausibly allege the existence of an ongoing violation of federal law. In the same vein, Allen and Nautilus argue that because they alleged a history of infringements both before and after the 2013 Settlement Agreement, there is "no reasonable prospect that infringements will cease unless they are enjoined." This argument, however, which relies on the asserted possibility that North Carolina will resume infringing Allen's copyrights, conflates the *Ex parte Young* exception with the doctrine of mootness. Even assuming that North Carolina has failed to provide reasonable assurances that it will avoid infringing Allen's copyrights in the future, as would foreclose the voluntary-cessation exception to mootness, it remains Allen's burden in the context of sovereign immunity to establish an *ongoing* violation of federal law to qualify for relief under *Ex parte Young*. Because the only ongoing infringement that Allen and Nautilus plausibly alleged has concededly ended, they cannot employ the *Ex parte Young* exception to address their fear of future infringements.

Allen and Nautilus also identify as an ongoing violation North Carolina's purported continuing "enforcement" of § 121–25(b) to provide a defense against their claims of copyright infringement. This allegation, however, also cannot support application of the *Ex parte Young* exception because when a plaintiff sues "to enjoin the enforcement of an act alleged to be unconstitutional," the exception applies "only where a party defendant in [such] a suit ... has '*some connection with the enforcement of the Act*.'" As we explained in *Hutto*, the "requirement that there be a relationship between the state officials sought to be enjoined and the enforcement of the state statute prevents parties from circumventing a State's Eleventh Amendment immunity." We thus noted "that a governor cannot be enjoined by virtue of his general duty to enforce the laws," nor can an "attorney general ... be enjoined where he has no specific statutory authority to enforce the statute at issue." By contrast, however, we have held that a State's circuit court clerk had the requisite connection to the enforcement of the State's marriage laws to be enjoined from enforcing them because the clerk was charged with the particular responsibilities for granting and denying applications for marriage licenses.

In this case, Allen and Nautilus sued the State, the Governor, the Department, and several Department officials, alleging at most that several of the officials supported enactment of § 121–25(b) and providing no further explanation regarding any connection between the officials and the challenged enactment. Indeed, Allen and Nautilus have not even shown that § 121–25(b) can be enforced against a private party. In any event, in view of the officials' roles, it is apparent that none of them would or could have any role in enforcing the statute, as required.

Accordingly, we conclude that *Ex parte Young* does not provide Allen and Nautilus with an exception to the Eleventh Amendment immunity claimed by North Carolina.

III

The North Carolina officials who were sued in their individual capacity for monetary damages contend that the district court erred in denying them qualified immunity and legislative immunity from suit. In doing so, the district court explained that these defendants were not protected by qualified immunity because "the law of [copyright] infringement is clearly established." The court also denied them legislative immunity because it was "premature" to resolve that issue. As we explain, however, we also reverse on these issues.

Qualified immunity "shields officials from civil liability so long as their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' The inquiry as to whether the law is "clearly established" is a demanding one:

> A clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he [or she] is doing violates that right. In other words, existing precedent must have placed the statutory or constitutional question beyond debate.
>
> * * *
>
> The Supreme Court has repeatedly told courts ... not to define clearly established law at a high level of generality. Thus, we consider whether a right is clearly established in light of the specific context of the case, not as a broad general proposition.

In this case, Allen and Nautilus obtained their rights to take videos and photographs of the *Revenge* shipwreck from Intersal, who in turn obtained the rights from the Department. And any rights that Allen and Nautilus have to those videos and photographs are circumscribed by the provisions of the 2013 Settlement Agreement with the Department. In that Agreement, Intersal asserted—and the Department, Allen, and Nautilus agreed—that Intersal had documented "fifteen (15) years of underwater and other activities related to the [*Queen Anne's Revenge*] project" and that it had the right to produce and retain an interest in a commercial documentary film about those activities. The Agreement provided that the Department could "use [the] completed documentary, free of charge, in museums and exhibits for educational purposes." And the Agreement provided, with respect to non-commercial digital media, that such media should bear "a time code stamp and watermark" of "Nautilus and/or [the Department]" and that the Department would display them only on the Department's website. The Agreement also provided that the Department could retain the archival footage with a time stamp and watermark "for research purposes," although it would return to Nautilus any footage and photographs that did not bear a time code stamp and watermark. Moreover, it provided that "[d]uring the recovery phase of the [*Revenge*] project, [the Department] and Intersal [would] *make available to each other records*created or collected in relation to the [*Revenge*] project," (emphasis added), defining "records" to include "field maps, notes, drawings, photographic records, and other technical, scientific and historical documentation created or collected by [the Department] or Intersal pursuant to the study of the site and the recovery of materials therefrom." These materials were designated "public records" to be "*curated* by [the Department]." (Emphasis added).

Notably, the 2013 Settlement Agreement stated that "[n]othing in [the] Agreement shall prevent [the Department] from making records available to the public pursuant to North Carolina General Statutes Chapters 121 and 132, or any other applicable State or federal law or rule related to the inspection of public records." At that time—*i.e.* , in 2013, before § 121–25(b) was enacted— N.C. Gen. Stat. § 132–1 provided that "all ...

photographs [and] films ... made or received pursuant to law ... in connection with the transaction of public business by any agency of North Carolina" are "public records," and that it is "the policy of [the] State that the people may obtain copies of ... public records ... free or at minimal cost unless otherwise specifically provided by law."

Based on these provisions of the 2013 Settlement Agreement and the then applicable public records law, it is far from clear whether the Department was prohibited from displaying Allen's copyrighted materials in the manner alleged in the complaint. This is especially so in view of the Department's role in the salvage project to preserve for the public the site and artifacts and to document their salvage in furtherance of research and the education of the public.

Of course, we need not resolve whether North Carolina's display of the video footage and the still photograph violated the Copyright Act to resolve the issue of qualified immunity. What we do conclude is that reasonable officials in the position of the North Carolina officials would not have understood *beyond debate* that their publication of the material violated Allen's rights under the Copyright Act. The issue is indeed debatable. Accordingly, we conclude that Allen and Nautilus's copyright claims against the North Carolina officials in their individual capacities are precluded by qualified immunity.

We also conclude that legislative immunity shields the North Carolina officials in their individual capacities for their alleged involvement in the enactment of § 121–25(b).

The district court did not expressly resolve whether the individual officers were entitled to legislative immunity, concluding instead that such a ruling would be "premature." But its *deferral* in ruling amounted to a *denial* of the immunity because the immunity protects officials "not only from the consequences of litigation's results, but also from *the burden of defending* themselves" in court. Thus, the very purpose of the immunity is thwarted when an official must expend "time and energy ... to defend against a lawsuit" arising from his legislative acts. Accordingly, the North Carolina officials can appropriately appeal the district court's deferral in ruling on legislative immunity.

Legislative immunity entitles public officials to absolute immunity for their performance of legislative functions. And it attaches whenever state officials—including those outside the legislative branch—engage in any conduct within the "sphere of legitimate legislative activity." Determining whether official conduct is shielded by legislative immunity "turns on the nature of the act," without regard to the "motive or intent" of the official performing it.

In this case, the North Carolina officials were sued in their individual capacities for "conspir[ing] to convert [Allen's] copyrighted works into public documents" through the enactment of § 121–25(b). But the only actual conduct alleged in furtherance of the conspiracy—that the officers "wrote, caused to be introduced, lobbied for passage of, and obtained passage" of § 121–25(b) — is quintessentially legislative in nature and falls squarely within the scope of legislative immunity. Allen and Nautilus's only argument to the contrary is that the complaint alleges that the officers sought enactment of § 121–25(b) with *impure motives* , seeking to benefit an affiliated nonprofit entity and to remove the threat of legal liability. As noted, however, motive is irrelevant to the issue.

* * *

For the foregoing reasons, we reverse each of the district court's rulings on immunity and remand with instructions that the district court dismiss without prejudice Allen and Nautilus's claims against North Carolina, the Department, and the public officials acting in their official capacities and to dismiss with prejudice the remaining claims against the officials in their individual capacities.

REVERSED AND **REMANDED** WITH INSTRUCTIONS

“High Court To Tackle Pirate Ship Copyright Fight”

Law360

Bill Donahue

June 3, 2019

The U.S. Supreme Court agreed Monday to hear a case over whether a videographer can sue the state of North Carolina for using his copyrighted footage of a pirate shipwreck, giving the justices a chance to revive an obscure federal law that has repeatedly been ruled unconstitutional by lower courts.

The justices granted certiorari to Frederick Allen, who wants the high court to overturn a ruling from last year last year that declared unconstitutional the Copyright Remedy Clarification Act, which allows copyright owners to sue states for infringement.

The ruling, which said Congress didn’t have the authority to revoke the sovereign immunity granted to states under the Eleventh Amendment, was the latest by a federal appeals court to strike down the 1990 amendment to the Copyright Act.

Allen, who sued North Carolina for using his footage of a famed local shipwreck, said those rulings were “misreadings” of precedent and an overreach by one branch of government onto another.

As is customary, the high court did not explain why it took the case. A spokeswoman for the North Carolina's Department of Justice said the agency "looks forward to continuing to defend the state in this case."

Allen and his Nautilus Productions sued in 2015 after North Carolina refused to stop using his footage of the Queen Anne’s Revenge — the flagship of the famed pirate Blackbeard that ran aground in North Carolina.

Theoretically, the Copyright Remedy Clarification Act gave him the right to do so. The Eleventh Amendment gives states and state officials broad sovereign immunity from being sued in federal court, but the CRCA, passed in 1990, aimed to “abrogate” that immunity to allow infringement cases against states.

The problem? The CRCA has been struck down repeatedly by courts that say Congress lacked the authority to pass a statute trumping the Eleventh Amendment the way the law aimed to. The U.S. Department of Justice no longer defends the statute in court.

Last summer, the Fourth Circuit rejected Allen’s arguments that Congress could derive authority for CRCA in either the Constitution’s intellectual property clause or the 14th Amendment, which allows Congress to protect property rights from states' abuses.

In January, Allen asked the U.S. Supreme Court to overturn that decision. He said the high court, and not a series of lower courts, should be the final arbiter of the law's constitutionality.

"What should occasion this court's review is the federal judiciary's relatively unexamined disregard of a law enacted by Congress as a co-equal branch, and the distension of vital principles that should properly define and limit each branch's respective powers," Allen wrote.

"This court generally grants review where, as here, a federal court refuses to enforce a federal statute on constitutional grounds," he added.

In a statement on Monday, Allen said that he and his team were "obviously gratified."

"The Constitution of the United States of America expressly empowers Congress to grant copyright holders 'the exclusive right to their respective writings and discoveries'," Allen wrote. "We look forward to making our case to the Supreme Court as to why it was within Congress's constitutional authority to hold states liable for their acts of copyright infringement."

Allen and Nautilus are represented by Derek L. Shaffer, Christopher Landau, Kathleen Lanigan, Todd Anten, Lisa M. Geary and Joanna E. Menillo of Quinn Emanuel Urquhart & Sullivan LLP; Susan Freya Olive and David Loar McKenzie of Olive & Olive PA; and G. Jona Poe Jr. of Poe Law Firm PLLC.

North Carolina Gov. Roy Cooper III and various other defendants named in the lawsuit are represented by attorneys from the state's Department of Justice.

The case is Allen v. Cooper, case number 18-877, at the Supreme Court of the United States.

“SCOTUS To Decide Whether States Can Be Sued For Copyright Infringement In Case Involving Backbeard’s Ship”

Above The Law

Krista L. Cox

June 20, 2019

Somehow, within a month, I find myself writing two different columns involving copyright… and pirates. Not copyright “piracy,” but actual pirates. As in, eye patches, parrots, and swashbuckler pirates.

SCOTUS has agreed to hear a case — the facts of which involve a famous pirate ship — to determine whether a state can be sued for damages in a copyright case. Congress enacted the Copyright Remedy Clarification Act of 1990 (CRCA), which set out to abrogate a state’s Eleventh Amendment sovereign immunity in copyright cases and allow individuals to sue states for infringement. While SCOTUS has not ruled on the constitutionality of CRCA, developments between 1997 and the present have led to the widespread belief that states are indeed immune from copyright infringement case.

Before getting into the details of CRCA and the case SCOTUS will hear next term, let’s clear up a couple of things about what state sovereign immunity does — and does not — do in the intellectual property context. A state cannot be sued for *damages* in intellectual property cases. However, a state (and its officials acting in their official capacity) *can* be sued for injunctive relief or declaratory judgments. It’s not like a state can just get off scot-free for infringement; litigation is still expensive and they can be enjoined from further infringement. States are not completely immune from litigation. Additionally, contrary to what some critics of sovereign immunity claim, states generally don’t go around infringing intellectual property. While there may be good-faith, mistaken beliefs that a particular use is fair use, states and their subdivisions typically act in a responsible fashion with every intention of adhering to the law. It’s a little silly to suggest that a state will start screening *Avengers: Endgame* and rely on state sovereign immunity to avoid liability.

In *Allen v. Cooper*, the justices will consider whether Congress validly exercised its power in abrogating state sovereign immunity in copyright cases through enactment of the CRCA. The case involves the discovery of the infamous pirate Blackbeard’s ship, Queen Anne’s Revenge, off the coast of North Carolina. Allen filmed the shipwreck then claimed that North Carolina violated copyright by displaying the footage on the internet without authorization. North Carolina, in response, asserted that CRCA was unconstitutional. The Fourth Circuit agreed that CRCA was not a valid exercise of Congressional authority.

The Supreme Court's decision to accept cert is a bit surprising since it seems to be well-understood that CRCA was not a valid exercise of Congressional authority and that states retain sovereign immunity in copyright cases. There are no circuit splits. Additionally, while SCOTUS has not determined whether CRCA is constitutional, it decided two very similar cases involving trademarks and copyright in 1997. Both cases, resulting in two separate decisions, involved the same litigants: Florida Prepaid Post-Secondary Education Expense Board and the College Savings Bank. These cases considered the Trademark Remedy Clarification Act of 1992 and the Patent and Plant Variety Protection Remedy Clarification Act of 1992. In both cases, SCOTUS ruled in 5-4 decisions that states are immune from suits in federal courts for violations of patent and trademark law (Justices Breyer, Ginsburg, Souter, and Stevens dissented in the pair of cases). In order for Congress to validly abrogate sovereign immunity, SCOTUS ruled, "Congress would need to identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct." The Court looked at the legislative history of the statutes, which revealed relatively few instances of intention infringement of patents and trademark. Because the record did not demonstrate widespread deprivation of patents and trademark, Congressional action to abrogate sovereign immunity was not proportional and therefore invalid.

Following the *Florida Prepaid* cases in the copyright context, the Fifth Circuit found in *Chavez v. Arte Publico Press* that state universities (here, the University of Houston) have sovereign immunity under the Eleventh Amendment and CRCA represents an improper exercise of Congressional power. Here, the Fifth Circuit — relying heavily on the *Florida Prepaid* cases — found that for Congress to abrogate state sovereign immunity under the Fourteenth Amendment, there must be "congruence and proportionality between the injury to be prevented/remedied and the means adopted to that end." The Fifth Circuit determined that the legislative history did not identify any pattern of constitutional violations or infringements by states nor any pattern of unremedied copyright infringement by states. Indeed, the legislative history of infringement by states is even more scant for CRCA than it was in the trademark in patent contexts. Additionally, the court noted that the legislative history of CRCA included only two allusions to state remedies, demonstrating that there was a failure to include information to state remedies for unlawful takings of private property by state governments or other possible remedies — such as breach of contract — that Congress did not consider when enacting CRCA. Additionally, CRCA fails because for Congress to determine that under the due process clause deprivation is actionable, it must be an intentional act; negligent acts causing unintended injury are an insufficient nexus. The CRCA failed to confine its reach to intentional acts.

While some may suggest that SCOTUS has taken the case to overturn the general understanding that states retain sovereign immunity in copyright cases, the Court's recent decision in *Franchise Tax Board of California v. Hyatt* could provide an indication that it strongly supports sovereign immunity. There, in a 5-4 decision, SCOTUS upheld state sovereign immunity in cases brought in other state courts.

Ultimately, we will have to wait until next term to see how sovereign immunity fares.

“Supreme Court to Rule Whether Congress Appropriately Abrogated State Sovereign Immunity for Copyright Claims in Allen v. Cooper”

IP Watchdog

Steve Brachmann

June 18, 2019

As we anxiously await a final decision from the U.S. Supreme Court in *Iancu v. Brunetti*, and decisions on pending petitions for *certiorari* in several other IP cases, the Court agreed to hear *Allen v. Cooper* on June 3. The case asks whether Congress acted appropriately in relying upon its powers under Article I of the U.S. Constitution to abrogate state sovereign immunity against federal copyright claims by passing the Copyright Remedy Clarification Act (CRCA) or if, as the Fourth Circuit held, Congress improperly abrogated state sovereign immunity by passing that law.

Queen Anne’s Revenge **Salvage Project Leads to Copyright Claims**

The underlying case involves copyrighted video footage and one photograph created by videographer Frederick Allen and his production company Nautilus Productions during a project to salvage the *Queen Anne’s Revenge*, a ship commandeered in 1717 by the famous pirate Edward Teach, also known as “Blackbeard,” which was abandoned in 1718 after it ran aground off the coast of Beaufort, North Carolina. After private research and salvage firm Intersal entered into an agreement to salvage the ship in 1998, Intersal retained Nautilus to document the salvage project. Allen subsequently obtained 13 federally registered copyrights, each covering one year of footage from the salvage project.

After the North Carolina Department of Natural and Cultural Resources, the state agency that signed the salvage agreement with Intersal, published Allen’s documentation of the salvage work on the Internet, Allen maintained that this infringed upon his copyrights in the work. In October 2013, Allen, Nautilus, Intersal and North Carolina entered into a settlement agreement that clarified Allen’s respective rights to the video footage, some of which was determined to be “commercial documentaries” and other work that was “non-commercial media.” Allen contended that North Carolina continued its infringement after the settlement agreement by displaying videos on a YouTube channel and using a still photograph in a newsletter on maritime museums.

Allen Petitions Supreme Court After Fourth Circuit Finds CRCA Unconstitutional

In December 2015, Allen and Nautilus filed an infringement lawsuit in the Eastern

District of North Carolina against the state's cultural resources department as well as the state's governor and six department officials. North Carolina moved to dismiss the claims under Federal Rule of Civil Procedure 12(b)(6), asserting Eleventh Amendment sovereign immunity as a defense to the claims made against the state and individual defendants. The district court denied North Carolina's motions, finding that Eleventh Amendment sovereign immunity was validly abrogated by Congress through the CRCA.

North Carolina appealed from the district court's denial of the state's immunity defense and the case went to the Fourth Circuit. Last July, a Fourth Circuit panel reversed the district court's denial of the sovereign immunity defense and remanded to the district court with instructions to dismiss all claims. On appeal, Allen and Nautilus had contended that the CRCA, which codified that states and state officials aren't immune from copyright infringement suits in federal court, was properly invoked by Congress under the legislative body's authority granted by Section 5 of the Fourteenth Amendment. However, the Fourth Circuit found that it was "readily apparent" that Congress relied upon the Constitution's Intellectual Property Clause in enacting this law and not its authority under the Fourteenth Amendment. Citing to the Supreme Court's 1999 decision in *College Savings Bank v. Florida Prepaid Post-Secondary Education Expense Board,* a case involving a similar law abrogating state sovereign immunity in patent infringement suits, the Fourth Circuit found that such an abrogation wasn't valid absent Congress' invocation of its Fourteenth Amendment authority. The Copyright Remedy Clarification Act extends liability to states for all copyright violations, not just violations that implicate the Fourteenth Amendment, so the abrogation of state sovereign immunity under this law was "grossly disproportionate to the relevant injury under the Fourteenth Amendment."

Allen and Nautilus filed their petition to the Supreme Court this January to challenge the Fourth Circuit's holding that the CRCA didn't validly abrogate state sovereign immunity. In the petition, Allen argued that the Fourth Circuit's invalidation of federal statute warranted SCOTUS review. Allen also argued that the Supreme Court should weigh in on the constitutional authority held by Congress to abrogate state sovereign immunity from copyright suits. Citing to *Florida Prepaid*, the petition noted that Congress' Article I power to abrogate state sovereign immunity wasn't even argued to the Court in that case. Further, if the Supreme Court were to render the CRCA "a dead letter by default" by not reviewing the Fourth Circuit's decision, the issue of copyright infringement by states would continue unabated. Allen's petition cites to statistics identifying 154 infringement suits filed against states between 2000 and 2017, adding that actual instances of infringement "are vastly understated relative to actual incidence." The CRCA provides adequate remedy for copyright holders given that injunctive relief doesn't compensate creators for past infringement and is expensive to obtain.

Supreme Court Likely to Undo CRCA and Uphold State Sovereign Immunity

The CRCA could be open to more challenge at the Supreme Court because it's not limited to injunctive relief, according to Brian Esler, Partner at Miller Nash Graham & Dunn. "Giving a private citizen the right to sue a state for damages is less likely to be held to be a valid exercise of congressional power," he said. "It's not to say that Congress can't, but there's a higher level of scrutiny then as opposed to allowing only injunctive relief."

In a July 2017 blog post on this case, Esler noted it was interesting that the copyrighted material at issue was about the *Queen Anne's Revenge* given that the first British copyright law, from which U.S. copyright law is in part derived, was the Statute of Anne. This was the first law providing for the regulation of copyrights through the government and the courts rather than private parties. Esler, who taught British IP law in the early 2000s at the University of Hertfordshire, said that the Statute of Anne was very much in the Framers' minds when they wrote the Intellectual Property Clause into Article I of the U.S. Constitution.

Esler said that the Supreme Court's recent decision in *Franchise Tax Board of California v. Hyatt*, issued in May, provides a clue as to how the nation's highest court will decide the state sovereign immunity issue in this case. In *Franchise Tax Board*, the Supreme Court issued a 5-4 decision (authored by Justice Clarence Thomas) holding that states retain their sovereign immunity from private suits brought to courts in other states. "The Supreme Court majority in that case said that the Eleventh Amendment was actually broader than what its text suggests," Esler said. He believed that *Franchise Tax Board* could be a strong indicator that the Supreme Court might seek to extend state sovereign immunity in *Allen* consistent with the Court's decision in *Florida Prepaid*.

While SCOTUS upheld congressional abrogation of state sovereign immunity in *Central Virginia Community College v. Katz* (2006), and the bankruptcy provision in that case also derived from Article I of the Constitution, Esler noted that the Court held that the purpose of the Bankruptcy Clause was to maintain uniformity in U.S. bankruptcy law. "I don't think you can say the same about the Intellectual Property Clause," Esler said. "Although it certainly gave power to Congress to legislate in that area, it doesn't demand uniformity." Moreover, Justice Thomas authored the dissent in *Central Virginia* and now seems to have a majority for his expansive reading of state sovereign immunity under the Eleventh Amendment.

“Yo Ho No: Lack of Express Language Scuttles Claim of Sovereign Immunity Waiver”

The National Law Review

Rebecca Harker Duttry

August 29, 2018

The US Court of Appeals for the Fourth Circuit confirmed, consistent with rulings in other courts, that the Copyright Remedy Clarification Act does not validly abrogate 11th Amendment immunity, and that 11th Amendment immunity may only be waived if a state expressly consents to suit in federal court.*Allen v. Cooper*, Case Nos. 17-1522, -1602 (4th Cir. July 10, 2018) (Niemeyer, J).

Allen, a videographer, along with Nautilus, his video production company, obtained the rights to create footage and photograph Blackbeard’s pirate ship off the coast of North Carolina through a permit issued by North Carolina to the salvors of the ship. The permit gave the salvors the exclusive right to make and market all commercial narrative accounts of project-related activities undertaken by the salvors, but specifically provided that the agreement did not infringe the public’s right to access public records, including field maps, notes, drawings, photographic records and other relevant materials created or collected pursuant to the study of the site and recovery of materials therefrom. After capturing substantial video footage and still images showing the underwater shipwreck and the efforts of teams of divers to recover artifacts from the wreck, Allen registered these works with the US Copyright Office.

Subsequently, the North Carolina Department of Natural and Cultural Resources published some of Allen’s work on the internet without his consent, leading to a copyright infringement dispute that the parties settled pursuant to a settlement agreement. After entering into the settlement agreement, Allen and Nautilus alleged that the Department resumed publishing and/or displaying various videos about the shipwreck on the Department’s YouTube channel and published one of Allen’s still photographs in a newsletter, in violation of the parties’ agreement.

Allen and Nautilus then brought suit alleging violation of Allen’s copyrights. North Carolina filed a motion to dismiss under Rules 12(b)(1) and 12(b)(6) asserting sovereign immunity under the 11th Amendment. In response, Allen and Nautilus made three main arguments:

- North Carolina waived sovereign immunity in the settlement agreement.

- The federal Copyright Remedy Clarification Act of 1990 abrogated the State's sovereign immunity.
- *Ex parte Young* provided an exception to sovereign immunity for ongoing violations of federal law.

After the district court rejected North Carolina's claims of immunity, North Carolina filed an interlocutory appeal, and Allen and Nautilus filed a cross-appeal.

The 11th Amendment immunity protects states, their agencies and their officials from suit in federal court. In order to waive immunity under the 11th Amendment, a state must *expressly* consent to suit *in federal court*. The Fourth Circuit found that the settlement agreement between the Department and Allen fell short of the clear statement required to effect a waiver of 11th Amendment immunity. The agreement provided in relevant part:

In the event [North Carolina], Intersal [salvors], or [Allen and] Nautilus breaches this Agreement, [North Carolina], Intersal, or [Allen and] Nautilus may avail themselves of all remedies provided by law or equity.

This statement makes no reference to federal court (or any court) and states only that each party may pursue available remedies *as provided by* law or equity. Thus, the Fourth Circuit found that legal or equitable limitations on those remedies—including 11th Amendment immunity—must also apply under the agreement and, as a result, the agreement did not constitute a waiver of 11th Amendment immunity.

The Fourth Circuit further found that the Copyright Remedy Clarification Act does not abrogate a state's 11th Amendment immunity. The Act provides in relevant part:

Any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State acting in his or her official capacity, shall not be immune, under the Eleventh Amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person . . . for a violation of any of the exclusive rights of a copyright owner provided by [federal copyright law].

The Fourth Circuit reaffirmed that Congress cannot rely on its enumerated power in Article I's Patent and Copyright Clause, which authorizes Congress to "secur[e] for limited Times to Authors and Inventors the exclusive right to their respective Writings and Discoveries," to abrogate 11th Amendment immunity. The Court, relying on *Florida Prepaid v. College Savings Bank* (S.Ct. 1999), found that the language in the Act sweeps so broadly that it cannot be deemed a congruent and proportional response to the 14th Amendment injury with which it was confronted. Therefore, the Court concluded that the Copyright Remedy Clarification Act cannot validly abrogate the 11th Amendment.

Lastly, the Fourth Circuit found that *Ex parte Young*, which allows private citizens to sue state officials in their official capacities in federal court to obtain prospective relief from ongoing violations of federal law, does not apply in this case because North Carolina removed the allegedly infringing materials from the internet and there was no ongoing copyright infringement. The argument by Allen and Nautilus that there was the *possibility* of other infringing displays did not plausibly allege the existence of an ongoing violation of federal law, and thus *Ex parte Young* did not provide an exception to the 11th Amendment immunity claimed by North Carolina.

The Fourth Circuit reversed and remanded the matter to the district court with instructions to dismiss, with prejudice, the claims against state officials in their individual capacities, and to dismiss, without prejudice, the remaining claims.

"The State Can Plunder Your Copyright: *Allen v. Cooper*"

IP Law Trends

Brian Esler

July 17, 2018

In 1710, during the reign of Queen Anne, Great Britain's Parliament enacted the statute that gave rise to copyright as we know it—the Statute of Anne—which was the first statute to declare that the subject matter of copyright would be regulated by the government and the courts, rather than agreements between private parties. Seven years later, the English pirate Blackbeard captured a French merchant vessel, renamed her the *Queen Anne's Revenge*, and soon after ran her aground off the coast of North Carolina. As demonstrated by the recent Fourth Circuit decision in *Allen v. Cooper*, Blackbeard's choice of the ship's name proved prophetic.

In that case, the Fourth Circuit was tasked with deciding whether the company that recently discovered and salvaged the wreck of the *Queen Anne's Revenge* off the coast of North Carolina could sue North Carolina and various of its state officials for copyright infringement when North Carolina posted some YouTube videos and pictures of the salvage operation that contained what were admittedly the plaintiff's copyrighted videos and images. The plaintiffs even had two contracts with North Carolina in which North Carolina had agreed that the plaintiffs would have the "exclusive right" to produce and profit from videos about their salvage project (although North Carolina did require the plaintiffs to make their raw footage and photographs available to North Carolina, reserved the right to use them for educational purposes, and warned the plaintiffs that any materials provided would become public records). Had the plaintiffs been suing a private actor, the case for infringement (and damages or injunctive relief) would have been straightforward. But as was true in Queen Anne's reign, and is still true now, the sovereign is immune from suit except in limited circumstances, which sovereign immunity (at least for states) is enshrined in the Eleventh Amendment to the United States Constitution.

But Article I of the Constitution also gives Congress the authority to "secur[e] for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries" (i.e., to grant copyrights). And pursuant to that Constitutional authority, Congress enacted the Copyright Remedy Clarification Act in 1990, which provides that States and state officers "shall not be immune, under the Eleventh Amendment of the Constitution of the United States or under other doctrine of sovereign immunity, from suit in Federal court by any person . . . for a violation of any of the exclusive rights of a copyright owner provided by [federal law]."

So plaintiffs should have had the wind at their backs in suing the State and its officers for copyright infringement.

The Fourth Circuit scuttled that notion, and found that Congress itself was the outlaw in passing a statute purporting to abrogate the State's sovereign immunity because "Congress cannot rely on the enumerated power in Article I over copyright to compel a State to litigate copyright cases in a federal court." In doing so, the Fourth Circuit joined a growing list of federal courts that have held the Copyright Remedy Clarification Act to be unconstitutional.

So to review: (1) copyright claims can only be brought in federal court, (2) states cannot be sued without their consent in federal court, so (3) plaintiff's copyright claims are dismissed. As we have noted here before with respect to trade secrets, it can be dangerous for any rights holder to deal with the government as it would a private party. As Mel Brooks sagely noted, "It's good to be the King!"

Georgia v. Public.Resource.Org Inc.

Ruling Below: *Code Revision Comm'n v. Public Resource. Org Inc*, 906 F.3d 1229 (11th Cir. 2018)

Overview: The Circuit Court held that the Official Code of Georgia Annotate (OCGA) were sufficiently law-like to be properly regarded as a sovereign work and therefore were not copyrightable.

Issue: Whether the government edicts doctrine extends to—and thus renders uncopyrightable—works that lack the force of law, such as the annotations in the Official Code of Georgia Annotated.

CODE REVISIONS COMMISSION, for the Benefit of and on behalf of General Assembly of Georgia, State of GEORGIA, ***Plaintiffs—Appellees***

v.

PUBLIC.RESOURCE.ORG, INC., ***Defendant—Appellant***

United States Court of Appeals, Eleventh Circuit

Decided on October 19, 2018

[Excerpt; some citations and footnotes omitted]

MARCUS, Circuit Judge:

Today, we are presented with the question of whether the annotations contained in the Official Code of Georgia Annotated (OCGA), authored by the Georgia General Assembly and made an inextricable part of the official codification of Georgia's laws, may be copyrighted by the State of Georgia. Answering this question means confronting profound and difficult issues about the nature of law in our society and the rights of citizens to have unfettered access to the legal edicts that govern their lives. After a thorough review of the law, and an examination of the annotations, we conclude that no valid copyright interest can be asserted in any part of the OCGA.

From the earliest day of the Republic, under federal copyright law, copyright interests have vested in the author of the work. Authorship, therefore, is central to many questions that arise under the Copyright Act, 17 U.S.C. § 101 et seq. This case is no exception. In most states the "official" code is comprised of statutory text alone, and all agree that a state's codification cannot be copyrighted because the authorship is ultimately attributable to the People. Conversely, all agree that annotations created by a private party generally can be copyrighted because the annotations are an original work created by a private publisher. But the annotations in the OCGA are not exactly like either of these two types of works. Rather, they fall somewhere in between -- their legal effect and ultimate authorship more indeterminate. To resolve this question, then, we reason by analogy, and drill down on the core attributes that make the OCGA annotations what they are -- namely an exercise of sovereign power.

The general rule that legislative codifications are uncopyrightable derives from an understanding of the nature of law and the basic idea that the People, as the reservoir of all sovereignty, are the source of our law. For purposes of the Copyright Act, this means that the People are the constructive authors of those official legal promulgations of government that represent an exercise of sovereign authority. And because they are the authors, the People are the owners of these works, meaning that the works are intrinsically public domain material and, therefore, uncopyrightable.

That the law itself, whether it takes the form of a legislative enactment or of a judicial opinion, is subject to the rule is clear and not contested. This is because these works represent the quintessential exercise of sovereign power. When a legislature enacts a law, or a court writes an opinion rendering an official interpretation of the law in a case or controversy, they are undisputedly speaking on behalf of the People, who are properly regarded as the author of the work. The task we face today is whether we should similarly treat Georgia's entire official code, which expressly merges its statutes and their official annotations, as the sovereign expression of the People by their legislature, as public domain material.

To navigate the ambiguities surrounding how to characterize this work, we resort to first principles. Because our ultimate inquiry is whether a work is authored by the People, meaning whether it represents an articulation of the sovereign will, our analysis is guided by a consideration of those characteristics that are the hallmarks of law. In particular, we rely on the identity of the public officials who created the work, the authoritativeness of the work, and the process by which the work was created. These are critical markers. Where all three point in the direction that a work was made in the exercise of sovereign power -- which is to say where the official who created the work is entrusted with delegated sovereign authority, where the work carries authoritative weight, and where the work was created through the procedural channels in which sovereign power ordinarily flows -- it follows that the work would be attributable to the constructive authorship of the People, and therefore uncopyrightable.

The question is a close one -- and important considerations of public policy are at stake on either side -- but, at the end of the day, we conclude that the annotations in the OCGA are sufficiently law-like so as to be properly regarded as a sovereign work. Like the statutory text itself, the annotations are created by the duly constituted legislative authority of the State of Georgia. Moreover, the annotations clearly have authoritative weight in explicating and establishing the meaning and effect of Georgia's laws. Furthermore, the procedures by which the annotations were incorporated bear the hallmarks of legislative process, namely bicameralism and presentment. In short, the annotations are legislative works created by Georgia's legislators in the exercise of their legislative authority.

As a consequence, we conclude that the People are the ultimate authors of the annotations. As a work of the People the annotations are inherently public domain material and therefore uncopyrightable. Because we conclude that no copyright can be held in the annotations, we have no occasion to address the parties' other arguments regarding originality and fair use.

I.

A.

The Official Code of Georgia Annotated (OCGA or the Code) is an annotated compilation of Georgia statutes that has been published annually since 1982. The statutory text contained in the OCGA has been "enacted and [has] the effect of statutes enacted by the General Assembly of Georgia." As the Code itself explains, the statutory text in the OCGA is the official published version of Georgia's laws, and when the Georgia General Assembly enacts a new law, the bill typically reads "An Act… To amend… the Official Code of Georgia Annotated."

Appearing alongside the statutory text are various annotations, consisting of history lines, repeal lines, cross references, commentaries, case notations, editor's notes, excerpts from law review articles, summaries of opinions of the Attorney General of Georgia, summaries of advisory opinions of the State Bar, and other research references. The Code itself makes clear that these annotations are a part of the official Code, stating that the statutory portions of the Code "shall be merged with annotations… and [are] published by authority of the state …and when so published [are to] be known and may be cited as the 'Official Code of Georgia Annotated.'"

Despite the fact that they are part of the official Code, Georgia law says that the annotations themselves do not have the force of law in the way that the statutory portions of the Code do. One provision of the Code explains that:

Unless otherwise provided in this Code, the descriptive headings or catchlines immediately preceding or within the text of the individual Code sections of this Code, except the Code section numbers included in the headings or catchlines immediately preceding the text of the Code sections, and title and chapter analyses do not constitute part of the law and shall in no manner limit or expand the construction of any Code section. All historical citations, title and chapter analyses, and notes set out in this Code are given for the purpose of convenient reference and do not constitute part of the law.

Laws passed during each session of the Georgia General Assembly that reenact the OCGA as the state's official code similarly provide that the annotations "contained in the Official Code of Georgia Annotated are not enacted as statutes by the provisions of this Act."

The annotations were initially prepared by Mathew Bender & Co., Inc., an operating division of the LexisNexis Group, (Lexis), pursuant to an agreement it entered into with the State of Georgia. Under the terms of the agreement, Lexis is responsible for the ongoing publication and maintenance of the Code, and all editorial, publication, and distribution costs. In exchange, Lexis was given the exclusive right of publication by Georgia. But, notably, Georgia holds the copyright in the annotations in its own name. The publication agreement also specifies what types of annotations should appear alongside the statutory text, and provides detailed and specific directions as to how Lexis is to generate and arrange this content. The agreement also provides that the Code Revision Commission (the "Commission") supervises the work of Lexis and has final editorial control over the contents of the OCGA. The Commission is a body established by the Georgia General Assembly in 1977 that was originally tasked with undertaking the recodification of all of Georgia's laws, a project that had not been done since 1933. The Commission is comprised of Georgia officials, including the Lieutenant Governor, four members of the Georgia Senate, the Speaker of the Georgia House of Representatives, four additional members of the Georgia House of Representatives, and five members appointed by the president of the State Bar of Georgia. Following its successful recodification of Georgia law and the publication of the OCGA in 1982, the Commission is now responsible for updating the OCGA and supervising Lexis's editing and publication of the OCGA.

In addition to providing instructions to Lexis about how the annotations should be created, compiled, and arranged, the publication agreement establishes a number of other conditions governing the relationship between Lexis and the State of Georgia. First, the agreement requires that Lexis create a free, unannotated, online version of the Code for use by the general public. Second, the agreement limits the price that Lexis can charge for the OCGA. While other commercial annotations of the Georgia Code can cost as much as $2,570, the price of the OCGA is currently $404. Third, it grants Lexis the exclusive right to produce and sell print, CD-ROM, and online versions of the OCGA. Finally, it provides that the Commission shall receive royalties on the sale of CD-ROM and online versions of the OCGA, but shall not receive royalties from the sale of print volumes.

The publication agreement also provides that "[a]ll the contents of the Code… shall be copyrighted in the name of the State of Georgia… [and] [t]he copyrights shall cover all copyrightable parts of the Code." The Commission asserts a copyright in all portions of the OCGA except for the statutory text, which it recognizes cannot be copyrighted. Despite the copyright and the exclusive publishing rights granted to Lexis, the State of Georgia makes the CD-ROM version of the OCGA available to the general public at over 60 state and county-operated facilities throughout Georgia, such as libraries and universities. In addition, state agencies are granted the right to print and distribute or sell to the public portions of the OCGA that they are responsible for administering.

B.

Public.Resource.Org (PRO) is a non-profit organization with a mission of improving public access to government records and primary legal materials. Thus for example, PRO has been responsible for the free, online publication of all U.S. Supreme Court opinions and every post-1950 U.S. Court of Appeals opinion. PRO has also been responsible for the online publication of various state statutory codes.

In 2013 PRO purchased all 186 volumes of the print version of the OCGA and its supplements, scanned them, and uploaded them to its website to be freely accessible to the public. It also placed digital copies of the OCGA onto USB drives and mailed them to various Georgia legislators. Additionally, PRO distributed copies of the OCGA to other organizations and on other websites in order to facilitate its further dissemination by other parties.

On multiple occasions the Commission sent letters to PRO demanding that it cease and desist from publishing the OCGA on the grounds that publication infringes on the State of Georgia's copyright in the work. PRO refused to comply, arguing that there was no valid copyright in the OCGA because the law cannot be copyrighted. The Commission, acting on behalf of the Georgia General Assembly and the State of Georgia, sued PRO on July 21, 2015 in the United District Court for the Northern District of Georgia. The complaint sought injunctive relief against PRO's "widespread and unauthorized copying and distribution of the copyrighted annotations in the Official Code of Georgia Annotated through the distribution of thumb drives containing copies of the O.C.G.A. and the posting of the O.C.G.A. on various websites." On September 14, 2015, PRO filed its answer to the complaint, acknowledging its widespread publication of the OCGA, but denying that the State of Georgia holds an enforceable copyright in the Code. PRO also asserted the defense of fair use. Finally, PRO counterclaimed seeking a declaratory judgment that "the State of Georgia has no valid copyright in any portion of the O.C.G.A. because the O.C.G.A. is in the public domain."

Following briefing and argument, the district court granted the Commission's motion for partial summary judgment and denied PRO's motion. The court concluded that because the annotations in the OCGA lack the force of law, they are not public domain material. Also, it rejected PRO's other challenges to the validity of Georgia's copyright as well as its fair use defense. Soon thereafter, the district court entered a permanent injunction against PRO enjoining it "from all unauthorized use, including through reproduction, display, distribution, or creation of derivative works, of the Official Code of Georgia Annotated (O.C.G.A.)." The injunction also ordered PRO to "remove all versions of the O.C.G.A. from its website," and to cease any fundraising activities connected with PRO's publication of the OCGA.

This timely appeal ensued.

II

We review the grant of summary judgment de novo, applying the same legal standards which bound the district court. In doing so, we consider "the evidence and all factual inferences therefrom in the light most favorable to the party opposing the motion." Summary judgment is proper only where there is no genuine issue of material fact. A genuine issue of material fact exists where the dispute is "over facts that might affect the outcome of the suit under the governing law" and where the "evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. We also review a district court's decision to grant equitable relief for abuse of discretion, considering questions of law de novo and findings of fact for clear error.

In order to establish a prima facie case of copyright infringement, "a plaintiff must show that (1) it owns a valid copyright in the [work] and (2) defendants copied protected elements from the [work]." A valid copyright registration "constitute[s] prima facie evidence of the validity of the copyright." 17 U.S.C. § 410 (c). Once the plaintiff has produced a valid copyright registration, the burden shifts to the defendant to establish that the copyright is invalid. There is no dispute that the State of Georgia has a registered copyright in the OCGA annotations. Nor do the parties contest that PRO copied the OCGA in its entirety. Thus, at the heart of this case is the question whether Georgia's copyright in the OCGA is valid; on this issue PRO carries the burden of proof.

A.

The Constitution grants Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Congress has exercised this power by passing the Copyright Act. 17 U.S.C. § 101 et seq. Under the Copyright Act:

Copyright protection subsists… in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

As this provision makes clear, "authorship" is central to the statutory scheme. Only "original works of authorship" are eligible for copyright protection. What's more, authorship generally determines who has a possessory interest in a work. "Copyright in a work… vests initially in the author or authors of the work." Indeed, authorship allows a person to claim copyright protection regardless of whether the work has been registered with the United States Copyright Office. As we have explained, "[c]opyright inheres in authorship and exists whether or not it is ever registered." In consequence, to ascertain who holds a copyright in a work, we ordinarily must ascertain the identity of the author.

The meaning of authorship takes on special significance in cases like this where we consider the copyrightability of a government edict. A long line of authority, stretching back more than 180 years, establishes that, with respect to certain governmental works, the term "author" should be construed to mean "the People," so that the general public is treated as the owner of the work. This means that a work subject to the rule is inherently public domain material and thus not eligible for copyright protection. The foundations of the case law establishing this doctrine are far from clear. Few courts have fully explained the basis for this idea and the Supreme Court last addressed the question in 1888. Thus, before explaining why we construe the "author" of the OCGA to mean "the People," it's worth examining the principal cases in some detail in order to understand the considerations that guided them.

The Supreme Court first addressed whether a government edict can be copyrighted in *Wheaton v. Peters*. The Court unanimously held that "no reporter has or can have any copyright in the written opinions delivered by this Court; and that the judges thereof cannot confer on any reporter any such right." The Court was interpreting the Copyright Act of 1790, but it did not explain the foundations for the rule that "the law" was

The Court revisited the question in *Banks v. Manchester*, and held that the opinions of state court judges, just like Supreme Court opinions, were not copyrightable. In Banks the Court considered an infringement suit filed by a publishing firm that had published official reports containing the decisions of the Supreme Court of Ohio against a defendant who had published the same material in the American Law Journal. An Ohio statute provided for the appointment of an official reporter for the Supreme Court of Ohio, and tasked him with compiling the decisions and other materials authored by the judges and securing "for the benefit of the state" a copyright on the compilations. The Ohio statute also required the Secretary of State to contract with a publisher, who would be given the exclusive right to publish the reports compiled by the official court reporter "so far as the state can confer [such right]." The plaintiff publishing firm in *Banks* was the chosen publisher, and, in suing, was attempting to enforce a copyright interest in the work of the Ohio judges assigned to it by the State of Ohio.

The Court found the copyright invalid. It emphasized that under then-extant copyright law only "authors" could obtain a copyright in their work. The Court determined that the reporter who had created the compilations did not qualify as the author of the opinions or the other materials written by the judges since he had not created the works. Moreover, the Supreme Court explained that "[i]n no proper sense can the judge who, in his judicial capacity, prepares the opinion or decision, the statement of the case, and the syllabus, or head-note, be regarded as their author." Thus, the Court rested its decision on a construction of the statutory term "author" that excluded both the judges and the reporter from qualifying as authors of the material in question, which in turn meant that neither the judges nor the reporter could have conveyed a valid copyright interest to the publishing firm bringing suit.

The Court offered a number of reasons for holding that the judges could not be considered the "authors" of their work. In the first place judges "receive from the public treasury a stated annual salary, fixed by law," and therefore can "have no pecuniary interest or proprietorship, as against the public at large, in the fruits of their judicial labors." Furthermore, although the Court said that it was only construing the statutory meaning of the term "author," it also acknowledged that, fundamentally, "[t]he question is one of public policy." In articulating this public policy interest, the Court explained that "[t]he whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all, whether it is a declaration of unwritten law, or an interpretation of a constitution or a statute." *Banks* expressly relied on a ruling of the Massachusetts Supreme Judicial Court in *Nash v. Lathrop*, which had similarly observed that "it needs no argument to show that justice requires that all should have free access to the opinions, and that it is against sound public policy to prevent this, or to suppress and keep from the earliest knowledge of the public the statutes, or the decisions and opinions of the justices."

The next, and to date last time the Supreme Court considered the rule that government edicts cannot be copyrighted came less than a month after the Court had decided *Banks*, in *Callaghan v. Myers*. There, a publisher of a set of reports containing the opinions of the Supreme Court of Illinois, known as the Illinois Reports, brought suit for copyright infringement against a rival publisher that had copied and published the reports. The original publisher had obtained a proprietary interest in the reports from a salaried official of the State of Illinois whose duties, defined by statute, consisted of compiling the Illinois Reports; organizing the cases; writing annotations such as headnotes and syllabi to appear alongside the opinions in the reports; and providing a certain number of copies of the final product to the Secretary of State of Illinois. Having fulfilled his statutory duties, the reporter sold whatever proprietary interest he had in the Illinois Reports to the publishing firm. When the firm sued for copyright infringement, the alleged infringer attempted to defend, claiming that the reports were public property because they had been created by a state employed reporter who could himself have no proprietary interest in the work since he created the reports as part of his public duties and therefore was not their "author."

The Court began its analysis by reinforcing the basic rule announced in *Banks* that "there can be no copyright in the opinions of the judges, or in the work done by them in their official capacity as judges." Nevertheless it rejected the claim that the copyright in the Illinois Reports was invalid. It explained that the underlying rationale of *Banks* did not apply, observing that "there is no ground of public policy on which a reporter who prepares a volume of law reports, of the character of those in this case, can… be debarred from obtaining a copyright for the volume which will cover the matter which is the result of his intellectual labor." The Court further suggested that, since the court reporter was a "sworn public officer, appointed by the authority of the government… [and] paid a fixed salary for his labors," the state government might have taken any proprietary interest in his work for itself, but the fact that it had not done so suggested that there was "a tacit assent by the government to his exercising such privilege" on his own. The Court thus reasoned that federal copyright law as explicated in *Banks* did not prevent the reporter from holding a valid copyright in the work and that the state had not reserved the copyright to itself. As a result, the copyright the reporter obtained and conveyed to the publishing firm was valid. The compilation of judicial decisions and other explanatory material like headnotes, tables, and indices, was different from *Banks* in two ways: first, the reporter, who had been appointed by the Illinois Supreme Court, and not the judges, had written the material accompanying the opinion; and, second, the reporter, and not the State of Illinois, claimed to hold the copyright.

The Supreme Court has not examined the doctrine since it decided *Callaghan* in 1888. However, since *Banks* and *Callaghan* the lower courts have further explored the nature and application of the rule. Thus, for example, the Sixth Circuit, in an opinion authored by Justice Harlan, applied the rule to state statutes. The Fifth Circuit has extended the rule to encompass regulatory materials. However, other courts have declined to extend the rule in other, related contexts.

It is also worth observing that Congress has partially codified the rule announced in *Banks*. Specifically, the 1909 version of the Copyright Act provided that "no copyright shall subsist in the original text of any work which is in the public domain… or in any publication of the United States Government, or any reprint, in whole or in part, thereof." This prohibition persists under current copyright law, enacted in 1976, which, in turn, provides that "[c]opyright protection under this title is not available for any work of the United States Government." This partial codification of Banks for works created by the federal government leaves unmodified the rule as it applies to works created by the states. As the Copyright Office's 1961 Register's Report stated, even though Congress enacted a prohibition that only applies to the federal government, "the judicially established rule [] still prevent[s] copyright in the text of state laws, municipal ordinances, court decisions, and similar official documents."

Although case precedent and congressional enactments have long established the rule that government works are not copyrightable, the foundations of the rule are generally implicit and unstated. Since the Court in *Banks* was not especially clear about the legal source of the rule it had announced and since the issue has not been raised before in our Court, we start with a relatively clean canvas. What is clear, however, is that the rule enunciated in *Banks* was grounded on the Court's interpretation of the term "author" in the Copyright Act of 1790, that works created by courts in the performance of their official duties did not belong to the judges, and that public policy compelled the conclusion that these works were in the public domain and uncopyrightable.

Thus, we understand the rule in *Banks* to derive from first principles about the nature of law in our democracy. Under democratic rule, the People are sovereign, they govern themselves through their legislative and judicial representatives, and they are ultimately the source of our law. Under this arrangement, lawmakers and judges are draftsmen of the law, exercising delegated authority, and acting as servants of the People, and whatever they produce the People are the true authors. When the legislative or judicial chords are plucked it is in fact the People's voice that is heard. Not surprisingly, then, for purposes of copyright law, this means that the People, as the constructive authors are also the owners of the law. And in this way, any work of which the People are the constructive authors is intrinsically public domain material and is freely accessible to all so that no valid copyright can ever be held in it.

The concept of popular sovereignty is deeply rooted in our politics, our law, and our history. The seminal statement of America's political creed boldly proclaims that "[g]overnments . . . deriv[e] their just powers from the consent of the governed." During the ratification debates that followed the Revolution, James Madison similarly began with the foundational idea that the People were sovereign, and that under the proposed form of government "the public voice" was "pronounced by the representatives of the people." Still again, in the midst of the Civil War, President Lincoln etched an indelible description of this form of government in the national memory, describing ours as a "government of the people, by the people, for the people."

In fact, the United States Reports are filled with invocations of the sovereignty of the People. As Chief Justice Marshall expressed the fundamental idea many years ago: "[t]he government proceeds directly from the people; is 'ordained and established,' in the name of the people… [and] is emphatically and truly, a government of the people. In form, and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."

While *Banks* is not explicit in grounding its holding in this conception of sovereignty, other federal courts have ruled that government works are intrinsically public domain material precisely because the People are sovereign and are therefore the authors and owners of the law. Thus, for example, in *Banks & Bros. v. W. Pub. Co.*, the court justified the rule on the grounds that "[e]ach citizen is a ruler,— a law-maker,— and as such has the right of access to the laws he joins in making and to any official interpretation thereof. If the right of property enters into the question, he is a part owner, and as such cannot be deprived of equal access by his co-owners."

In the same vein, and more recently, several courts have applied the rule announced in *Banks* and understood the rule to rest on foundational principles about the nature of law in a democratic society. Thus, in *Veeck*, the Fifth Circuit, sitting en banc, confronted the question of whether a model building code, once adopted by two municipalities, lost its copyright protection In concluding that the work was uncopyrightable, the court asserted as a basic principle that the law is in "the public domain and thus not amenable to copyright," and that cases like *Wheaton* and *Banks* evince a "broad understanding of what constitutes 'the law'" so as to make judicial opinions in addition to statutes ineligible for copyright protection. On this basis, the court held that, "[a]s governing law," the municipal building codes also could not be copyrighted.

The court went on to explain that its holding rested on a deeper principle, a "metaphorical concept of citizen authorship." As the court reasoned, "[l]awmaking bodies in this country enact rules and regulations only with the consent of the governed. The very process of lawmaking demands and incorporates contributions by 'the people,' in an infinite variety of individual and organizational capacities… In performing their function, the lawmakers represent the public will, and the public are the final 'authors' of the law." The court discerned that there are strong public policy interests in giving the public unfettered access to the law. "[P]ublic ownership of the law means precisely that 'the law' is in the 'public domain' for whatever use the citizens choose to make of it. Citizens may reproduce copies of the law for many purposes, not only to guide their actions but to influence future legislation, educate their neighborhood association, or simply to amuse." Thus, the "metaphorical concept of citizen authorship together with the need for citizens to have free access to the laws are the ultimate holding of *Banks*."

The First Circuit has also emphasized popular sovereignty as being foundational to its understanding of the rule announced in *Banks*. In *Building. Officials & Code Administrators v. Code Technology, Inc.*, the court considered, on an interlocutory appeal challenging the issue of a preliminary injunction, a copyright infringement suit brought by the private sector author of a model building code against a publisher of the Massachusetts building code, which the Massachusetts legislature had based in large measure on the model code. The court ruled that the inclusion of the otherwise copyrightable model building code in the official Massachusetts building code likely rendered those materials, just like the rest of the materials in the Massachusetts building code, "freely available for copying by anyone."

After reviewing case precedent going as far back as *Wheaton*, a panel of the First Circuit asserted that "[t]he law thus seems clear that judicial opinions and statutes are in the public domain and are not subject to copyright." The court reasoned that this principle extends to regulatory codes as much as it does to statutes and judicial opinions. While acknowledging that cases like *Banks* and *Wheaton* seemed to rest in part on the identity of the creators of the works in question, namely salaried public officials performing official duties, it explained that a more fundamental principle was at work. In particular, "citizens are the authors of the law, and therefore its owners, regardless of who actually drafts the provisions, because the law derives its authority from the consent of the public, expressed through the democratic process." The reason why judges and legislators cannot copyright works they create, was not because they are working for the government rather than for themselves, but rather because of a "metaphorical concept of citizen authorship," which means that, once it adopts a text as law, the body politic becomes the author of the work in question, leaving the original drafter with no proprietary interest. The court reasoned that this was true even where the original creator of the work was a private sector actor.

III.

The ultimate inquiry posed by the rule in *Banks* is thus whether a work is attributable to the constructive authorship of the People, which is to say whether it was created by an agent of the People in the direct exercise of sovereign authority. Statutes and judicial opinions are the most obvious examples of what falls within the ambit of the rule.

This does not mean that statutes, judicial opinions, and other texts that carry the clear force of law are the only works that may be subject to the rule. For one thing, relying, as the district court did, on a bright line distinction between edicts that have the force of law and those that do not to apply the *Banks* rule simply does not work in some cases. This is one of them. It is clear to us that there exists a zone of indeterminacy at the frontier between edicts that carry the force of law and those that do not. In this small band of cases a government work may not be characterized as law, and yet still be so sufficiently law-like as to implicate the core policy interests undergirding *Banks*.

Statutory texts are the kinds of works most obviously subject to the rule announced in *Banks*. Because statutes are the prototypical works to which the rule applies, we rely on the statutory example as the lodestar for our inquiry. Whether or not a work is subject to the rule is dependent on whether the work is the law, or sufficiently like the law, so as to be deemed the product of the direct exercise of sovereign authority, and therefore attributable to the constructive authorship of the People. Basing the inquiry on whether a work is similar enough to the law so as to be attributable to the People, of course, does little to diminish the difficulty of applying the Banks rule in the unique circumstances presented here. But it does point us toward the right way of structuring our analysis.

Put simply, there are certain things that make the law what it is. The law is written by particular public officials who are entrusted with the exercise of legislative power; the law is, by nature, authoritative; and the law is created through certain, prescribed processes, the deviation from which would deprive it of legal effect. Each of these attributes is a hallmark of law. These characteristics distinguish written works that carry the force of law from all other works. Since we are concerned here with whether a work is attributable to the constructive authorship of the People, these factors guide our inquiry into whether a work is law or sufficiently law-like so as to be subject to the rule in *Banks*.

An analysis of these factors yields the conclusion that the annotations in the OCGA, while not having the force of law, are part and parcel of the law. They are so enmeshed with Georgia's law as to be inextricable. The annotations are themselves law-like insofar as we examine who made them, how they were made, and the role they play in the legislative and jurisprudential spheres of Georgia's public life. In consequence, they too represent a work, like the statutes themselves, that is constructively authored by the People. They are therefore uncopyrightable.

A.

First, and of critical importance to our analysis is that the Georgia General Assembly is the driving force behind their creation. The Code Revision Commission exerts authoritative influence over the creation of the annotations and the Commission indisputably is an arm of the General Assembly. Thus, just as the uncopyrightable works in *Banks* were created by the Ohio Supreme Court, the annotations are, in a powerful sense, a work created by the Georgia state legislature.

While it is true that the annotations were initially prepared by a private party, in this case Lexis, it is also the case that Lexis drafts the annotations pursuant to highly detailed instructions contained in the contract it entered into with the Code Revision Commission. In particular, the publication agreement not only lists the types of materials that Lexis must include in the OCGA, but also provides punctiliously specific instructions on how these materials are to be prepared. Thus, by way of example, in addition to instructing Lexis to include annotations summarizing court decisions that are relevant to various statutory provisions in the OCGA, the publication contract tells Lexis which court decisions to include. Moreover, the contract specifies the content of these summaries, instructing Lexis to include discussion of those portions of judicial opinions that involve "direct constructions" of a statute, including "constructions concerning constitutionality, purpose, intent, and the meaning of words and phrases as well as illustrations as to what a particular provision applies and to what a particular provision does not apply." Leaving even less to Lexis's independent judgment, the contract also instructs Lexis what not to include in the judicial summaries, Lexis's editors to "avoid long factual annotations where they do not bear directly upon the statute involved." Further, the agreement tells Lexis the order in which the various case annotations are to be arranged.

The annotations containing summaries of judicial opinions are not the only ones for which the publication contract provides highly specific directions. The agreement also requires Lexis to include research references in the annotations, and names the specific reference sources that must be included. Similarly, the contract directs Lexis to include annotations dealing with legislative history and specifies just how far back into a statutory provision's history the annotations may go.

In addition to providing detailed instructions that guide the creation of the OCGA annotations, the Commission acts in a supervisory capacity as well, monitoring Lexis's work throughout the process. The contract says that the annotations are prepared under the "direct supervision" of the Commission. The contract spells out in some detail what this supervision means. In addition to including the research references listed in the publication agreement, Lexis is required to "include any new [references]… as required by the Commission." Sections of the agreement dealing with other annotations similarly allow the Commission to direct the inclusion of new material. Indeed, the very first section of the agreement states that the OCGA shall include, in addition to the various, specified annotations, "other material related to or included in such Code at the direction of the Commission."

Finally, the publication agreement describes in detail how the Commission is to give its final assent to the annotations. First, as for each type of annotation, the agreement affirms the Commission's role in approving Lexis's work. Thus, with respect to the summaries of judicial opinions, the agreement provides that "the form of the annotations shall be subject to the approval of the Commission." The agreement contains similar provisions with respect to the other annotations. More generally, the agreement provides that the "ultimate right of editorial control over all material contained in the Code shall be in the Commission, and in the event of any disagreement between the Commission and the Publisher over the material to be included, the decision of the Commission shall control." A separate provision of the agreement similarly provides that in the event of any disagreement "the Commission shall prevail." Moreover, the agreement requires that the Commission have an opportunity to conduct pre-publication review of all subsequent supplements, replacement volumes, and other updates to the OCGA.

In short, the Commission exercises direct, authoritative control over the creation of the OCGA annotations at every stage of their preparation. The Commission provides initial instructions to Lexis, directly supervises Lexis's work throughout the preparation process, and must give its final editorial assent to the annotations before they can become part of the OCGA. In this way, the Commission undeniably controls the creation of the OCGA annotations.

The Commission's intimate involvement in the creation of the annotations is of great significance. This is because a close examination of the nature of the Commission confirms that it is for all intents and purposes an arm of the Georgia General Assembly. As we've noted, the Commission is composed of fifteen members, nine of whom are sitting members of the Georgia General Assembly, along with the Lieutenant Governor of the State. Further, funding for the Commission comes directly from appropriations "provided for the legislative branch of state government." In addition, Georgia law provides that "[t]he Office of Legislative Counsel shall serve as staff for the commission." This is notable because, under Georgia law, the Office of Legislative Counsel is tasked with providing various advisory and legal services "for the legislative branch of government" and is therefore properly seen as an adjunct to the General Assembly. Thus, not only is the Commission funded by legislative branch appropriations, but its staff is drawn from an office that is itself an agency of the Georgia General Assembly.

Further confirming the Commission's deep connection to the Georgia General Assembly, the Georgia Supreme Court has held that the Commission's work is properly characterized as "legislative" in nature, and that it is therefore proper for the Commission to be largely composed of officials from the legislative branch. Thus, in light of how it is funded and staffed, and since its work is legislative in nature, it is abundantly clear that the Commission is a creation and an agent of the Georgia General Assembly.

Indeed, the connection between the Commission and the elected legislators who make up the General Assembly is so close that the Commission may be properly regarded as one in the same with the legislators for our purposes. As the Supreme Court has explained in another context, "it is literally impossible, in view of the complexities of the modern legislative process… for [legislators] to perform their legislative tasks without the help of aides and assistants…the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos." In consequence, the Court has held that legislative immunity "applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself." "The test for applicability of this derivative legislative immunity is whether the legislator, counsel or aide was engaged within a legitimate sphere of legislative activity."

The basic intuition underlying cases applying the Speech and Debate Clause seems to us equally instructive in identifying which entity in the Georgia state government is the creative force behind the OCGA annotations. While the Commission's staff and six of its fifteen members are not Georgia legislators, the Commission is plainly an adjunct of the General Assembly. As we have detailed, its staff, funding, and responsibilities all fall under the legislative umbrella. The Commission is therefore, in a real sense, the "alter ego" of the General Assembly, meaning that the creative force behind the annotations are Georgia's elected legislators. Acting through the Commission, the legislators closely supervise and direct the production of the annotations.

Moreover, and of even greater importance to our analysis, the OCGA annotations, once completed, are subject to the approval not only of the Commission, but also to the approval of the Georgia General Assembly. The General Assembly actually votes (and must vote) to make the OCGA the official codification of Georgia's laws and, in doing so, also votes to incorporate the annotations as part of the OCGA. In other words, the OCGA annotations are not only authored at the direction and under the close supervision of the Georgia General Assembly, but they also obtain their peculiar status as official annotations because they are adopted annually by the General Assembly.

That Georgia's legislators are in a very real way the creators of the annotations is a powerful indication that the annotations are subject to the *Banks* rule. To begin, it is apparent that the rule established by *Banks* that government edicts cannot be copyrighted, as applied to the works of state governments, is more limited than the statutory prohibition on copyright protection for works of the federal government. As we have explained, § 105 states that "[c]opyright protection… is not available for any work of the United States Government," and § 101 defines a "work of the United States Government" as "a work prepared by an officer or employee of the United States Government as part of that person's official duties." Thus, under this prohibition, the work of any federal employee, made in his capacity as a government employee, is uncopyrightable. By contrast, the rule in *Banks* is more circumscribed, applying to a limited subclass of government works. Thus, some works made by state employees, that would be subject to § 105 if made by a federal employee, are nevertheless copyrightable under *Banks*.

The reasoning of *Banks* points to why the rule it has announced is applicable to a more limited class of public officials than those governed by § 105's prohibition. The Court in *Banks* explained, "[i]n no proper sense can the judge who, in his judicial capacity, prepares the opinion or decision, the statement of the case, and the syllabus, or head-note, be regarded as their author or their proprietor…Judges, as is well understood, receive from the public treasury a stated annual salary, fixed by law, and can themselves have no pecuniary interest or proprietorship, as against the public at large, in the fruits of their judicial labors… The whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all." Thus, like § 105, the Banks decision emphasizes the fact that judges are producing works in their capacity as employees, but it also goes further than § 105 and emphasizes that judges are unique among government employees. In addition to receiving "from the public treasury a stated annual salary," judges are empowered to create "authentic exposition[s] and interpretation[s] of the law, which[] bind[] every citizen."

As a result, the mere fact that a work was created by a state-paid employee in his capacity as an employee is not enough to trigger the rule in Banks. Something more is needed. Specifically, the government official must be entrusted with unique powers beyond those possessed by the typical government employee, such as the power to pronounce official interpretations of the law.

In short, it is clear that the rule in *Banks* is not concerned, as § 105 is, with the works of all government employees, but rather only with the works of certain government employees, which is to say government employees who are possessed of particular powers, namely the ability to promulgate official, binding edicts. This distinction between the rules is no doubt attributable to the difference in their underlying rationales. Section 105's prohibition is justified on the grounds that the public paid for the work and is therefore entitled to access it, and because wide dissemination of federal government materials strengthens democratic discourse.

On the other hand, the rule in *Banks* derives more directly from the concept of popular sovereignty. As a result, while § 105 is concerned with any work created by a federal employee, since all government works are paid for by the taxpayer and, as a policy matter, are potentially useful to conscientious and informed citizens, the rule in *Banks* is concerned with works created by a select group of government employees, because only certain public officials are empowered with the direct exercise of the sovereign power.

This explains why the state-paid court reporter acting pursuant to his statutory duties in *Callaghan* did not run afoul of the rule in *Banks* and could hold a valid copyright in his work even though the work he created likely would fall within § 105's prohibition if he had been a federal employee. Though paid by the state, and acting pursuant to his official duties, the court reporter was tasked with essentially administrative and clerical responsibilities, to wit compiling and summarizing judicial decisions, rather than the promulgation of binding legal edicts. There was therefore "no ground of public policy" standing in the way of his works' copyrightability.

In contrast, the judges in *Banks*, when considered in their relationship to the sovereignty of the People, fulfill a different function than the court reporter in *Callaghan.* Legislators and judges, unlike other government workers, are peculiarly entrusted with the exercise of sovereign power to write or officially interpret the law. Since the power to make law rests ultimately and exclusively with the People, the primary, official duty of lawmakers and judges is therefore to act as agents of the People. While government workers like the reporter in *Callaghan* might also be said to be engaged in conducting the People's business, their relation to the exercise of sovereign power is more attenuated. As a result, if a government work is created by a public official who is so empowered, it is substantially more likely that the work is constructively authored by the people.

In light of these considerations, that the Georgia General Assembly is the driving force behind and ultimately adopts the OCGA annotations is significant. Like the Ohio Supreme Court in *Banks*, the Georgia General Assembly is not simply composed of ordinary government employees but rather of public officials whose official duties peculiarly include the direct exercise of sovereign power. Of the many government workers employed by the state of Georgia, the creators of the OCGA annotations are unique insofar as they are entrusted by the sovereign with legislative power.

This is not to say that every work produced by a legislative body is automatically uncopyrightable. As we detail below, still more is necessary to demonstrate that the OCGA annotations are the kind of work that is attributable to the constructive authorship of the People. However, because the OCGA annotations were created by public officials entrusted with sovereign, legislative authority, just like the opinions in *Banks* were created by justices on the Ohio Supreme Court entrusted with sovereign, judicial authority, this weighs in favor of a determination that the OCGA annotations belong in the public domain.

B.

We are also persuaded because, while not carrying the force of law in the way that the statutory portions of the OCGA do, the annotations are "law-like" in the sense that they are "authoritative" sources on the meaning of Georgia statutes. Having been merged by the General Assembly with the statutory text into a single, unified edict, stamped with the state's imprimatur, and created and embraced by the same body that wrote the text that they explicate, the annotations have been suffused with powerful indicia of legal significance that is impossible to ignore. The annotations cast an undeniable, official shadow over how Georgia laws are interpreted and understood. Indeed, Georgia's courts have cited to the annotations as authoritative sources on statutory meaning and legislative intent. The annotations' authoritativeness makes them closely analogous to the types of works that ordinarily represent an exercise of sovereign authority. The nature of the work, like the identity of its creator, therefore impels us further toward the conclusion that these annotations are attributable to the constructive authorship of the People.

The nature of the OCGA annotations is spelled out in some detail by Georgia's General Assembly. While disclaiming any legal effect in the annotations, the Georgia law providing for the creation of the OCGA also states that the "statutory portion of such codification shall be merged with annotations, captions, catchlines, history lines, editorial notes, cross-references, indices, title and chapter analyses, and other materials." This language is telling. In various dictionaries, the word "merge" is defined as meaning to combine or unite, often in such a way that the constituent elements of the merger lose their distinct identity or characteristics and become one. The *Random House Dictionary of the English Language* defines "merge" as "to lose or cause to lose identity by uniting or blending" and "to combine or unite into a single unit." Similarly, *Webster's Third New International Dictionary* defines "merge" as "to become combined into one" and to "lose identity by absorption or intermingling." And the *Oxford English Dictionary* variously defines "merge" as "to be absorbed and disappear, to lose character or identity by absorption into something else; to join or blend," and "to combine to form a single entity." The use of the word "merge" thus carries with it strong connotations of unification or combination of disparate elements into a single whole in which the previously distinct attributes of each element become intermingled and shared.

The question then becomes, what is the nature of the new thing created when the Georgia General Assembly explicitly chose to merge the annotations with statutory text? Here too Georgia law supplies an answer. In particular, Georgia law provides that the merged text "shall be published by authority of the state … and when so published shall be known and may be cited as the 'Official Code of Georgia Annotated.'" Thus, the product of the merger is an official state publication, labelled and cited as the authoritative embodiment of the laws of the State of Georgia.

It of course remains true that portions of the OCGA clearly carry the force of law while O.C.G.A. § 1-1-7 disclaims any legal effect in the annotations. Yet the significance of the legislature's decision to "merge" these two things into a single edict remains. The Georgia legislature was not required to merge the annotations with the statutes in order to create the OCGA, which it then stamped with the imprimatur of the State. But the bicameral legislature chose to do so. By combining these two components into a unified whole, their attributes have been intermingled and their distinct character altered. While this does not mean that the annotations, by virtue of appearing alongside statutory text, are suddenly possessed of binding legal effect, it does mean that their combination with the statutory text imbues them with an official, legislative quality.

The statutory text, having been merged with these legislatively authored expositions on the meaning of Georgia law, must be read in pari materia with them. The annotations' combination with the statutes means that any understanding of the statutory text arrived at without reference to the annotations is axiomatically incomplete. Because Georgia law tells us that the official codification of Georgia statutes contains not only statutory text but also annotations that have been combined and unified with the statutory text into a single edict, a full understanding of the laws of Georgia necessarily includes an understanding of the contents of the annotations. In this way, the annotations are clearly laden with legal significance.

Their significance is strengthened further by the legislature's decision to label the unified whole "Official." The OCGA is not simply one of a number of competing annotated codifications of Georgia laws. It does not stand on equal footing with West's annotated Georgia code. Rather, it is the *official* codification of Georgia laws, stamped with the imprimatur of the state. This status necessarily causes the annotations to cast a long shadow over how the statutory portions of the OCGA are understood. Because these are the *official* comments to the Code, they are to be read as authoritative in a way that annotations ordinarily are not.

Indeed, demonstrating the importance of the state's decision to stamp the OCGA with its imprimatur, the very first annotation in the very first section of the OCGA favorably cites to a court case that warns that "[a]ttorneys who cite unofficial publication of 1981 Code do so at their peril." Similarly, the importance the Georgia legislature attached to its branding of the Code as "Official" is further demonstrated by its enactment of a law allowing the publisher of the "official Code… to use the state emblem on the cover of the publication," whereas all other private parties are prohibited from using the state emblem in any context. Thus, while stamping the annotations with the state's imprimatur and labelling it official does not suddenly elevate the annotations to the status of binding law, it too enhances their already potent cachet in a way that is undeniable and also impossible to ignore.

Moreover, as we have already noted, the annotations are not simply adopted by the legislature as an official reference work, but also, in a very meaningful sense, are written by the General Assembly -- a fact that further accentuates their legal significance. The annotations are not merely expositions on the meaning of statutes, but rather are official comments authored by the same body that also wrote the statutes. Thus, it would be only natural for the citizens of Georgia to consider the annotations as containing special insight into the meaning of the statutory text, and to therefore confer upon the annotations a special status.

Our view is reinforced by an examination of how the annotations have been treated by Georgia's courts. In particular, the state courts frequently have characterized OCGA comments as conclusive statements about statutory meaning and legislative intent.

The nature and authoritativeness of the work, like the identity of the author, are material in determining whether the work is attributable to the constructive authorship of the People. After all, the decision in Banks not only emphasized the identity of the creator of the work but also the nature of the work, reasoning that the work was uncopyrightable precisely because it was an "authentic exposition and interpretation of the law [] binding [on] every citizen."

Many other courts applying the rule in *Banks*, or a rule like it, have emphasized that the law, as an authoritative work that governs people's lives, is uncopyrightable.

By way of contrast, a judge might create a work in his capacity as an employee of the government that bears little relation to his role as an official expositor of the law. A speech delivered by a judge, depending on the circumstances of the address, may or may not count as a work created by a government employee. But such a work assuredly does not count as a work made in the exercise of the sovereign power to make or interpret the law. A judicial speech is assigned no authoritative weight -- it binds no one and has no official effect on the law or on how it is understood. Only those works that derive from the legitimate exercise of sovereign power, such as official interpretations of the law and the law itself, are assigned authoritative weight.

Put another way, whether or not a work is assigned the authoritative weight associated with law is deeply intertwined with the question of whether the work was made by the agents of the People in the legitimate exercise of delegated, sovereign power. As Hamilton explained during the ratification debates, "[n]o legislative act [] contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid." As a result, the authoritativeness of a work is probative on the question of whether a work is created in an exercise of sovereign power, and is also probative on the question of whether a work falls within the scope of the rule in *Banks*. Thus, in addition to whether the work was prepared by a judicial or legislative body, an examination of the nature of the work, which is another way of asking whether it carries authoritative weight, may indicate whether the work is uncopyrightable.

These annotations carry authoritative weight and therefore make it more likely that the work is attributable to the constructive authorship of the People. Quite simply, they are much closer to resembling the judicially authored materials found in *Banks* than other works produced by state employees, such as the materials produced by the Court reporter in *Callaghan*.

C.

The final factor we consider is the process by which the annotations were created. While the process by which the annotations were made into an official edict of the State of Georgia is not identical to the process by which the statutory provisions were made into binding law, they are very closely related. As a result, like the identity of the work's creator and the nature of the work, the process also weighs in favor of the conclusion that the work is uncopyrightable.

Both parties acknowledge that the Georgia General Assembly does not individually enact each separate annotation as part of the ordinary legislative process. In this respect the annotations are different than the statutory portions of the OCGA. The statutory portions of the Code are introduced as bills in the Georgia legislature, generally pass through the committee process where legislators can directly influence the text of the bill, are voted on by both Houses, and are signed by the Governor.

The enacted laws of a session of the legislature are then "published in Georgia Laws as a collection of session laws, representing all of the acts and resolutions passed during that particular legislative session." Later, the laws are incorporated into the OCGA. Each year, the Georgia legislature then votes to "reenact the statutory portion of [the] Code as amended, in furtherance of the work of the Code Revision Commission," thereby voting on the statutory text in the form in which it has been incorporated into the OCGA.

Further, under Georgia law, it is the responsibility of the Code Revision Commission to "prepare and have introduced at each regular session of the General Assembly one or more bills to reenact and make corrections in the Official Code of Georgia Annotated." In this way, the statutory portions of the OCGA are voted on at least twice, once when they are voted on as individual bills after having gone through the regular legislative process, and once as part of the Georgia legislature's vote to reenact the updated OCGA as prepared by the Commission. By contrast, the annotations are prepared by the Commission outside of the normal channels of the legislative process in the manner we have detailed, and are not voted on individually in the way that Georgia session laws are.

However, it is also the case that the Georgia General Assembly voted to adopt the annotations as prepared by the Commission as an integral part of the official Code. Further, it did so through a legislative act that necessarily passed both Houses of the legislature and was signed into law by the Governor. Moreover, and significant for our purposes, the General Assembly votes each year to amend the OCGA and reaffirm its status as the official codification of Georgia's laws.

Under the American system of government, the essential hallmarks of legislative process are bicameralism and presentment. While legislative processes may ordinarily include the introduction of an individual bill and its passage through the relevant committee before it receives a vote of the full House, those are not the essential steps that endow the bill with its legal status. Rather, the vote of both Houses of the legislature, and presentment to an executive are the defining moments in an exercise of the sovereign authority. This is so even when the legislature adopts as its own a work authored outside the normal channels of the legislative process.

That the process by which the OCGA annotations were created is similar to the ordinary process by which laws are enacted also is relevant to our inquiry. The importance of this consideration is apparent from well settled procedural mechanisms by which the power to make and interpret the law is exercised, and from the observation that deviating from the process may deprive the edict of its legal effect. As we've noted, bicameral passage of a bill and its presentment to the executive are the ordinary means by which a legislative body exercises the sovereign power entrusted to it. Similarly, the judicial power to propound the meaning of the law must be exercised according to established procedures. In particular, judges issue official interpretations of the law as part of deciding a case or controversy, after considering the arguments made by both parties to the case. An exposition on the meaning of a law, even if written by a judge, would obviously not qualify as an exercise of the sovereign power to interpret law if it were written outside the ordinary procedural channels by which that power is exercised.

In short, as is the case with the identity of the creator of the work and the nature of the work, fundamental principles that govern how sovereign power is exercised under a republican form of government suggest that the process by which an edict is promulgated is probative as well on the question of whether a work was created through the exercise of such power. Just as an action is not deemed a legitimate exercise of sovereign power if it is undertaken by the wrong official, so too it may be invalid if undertaken outside the proper procedural channels. The converse follows naturally: if an action is undertaken through the ordinary procedural channels by which the sovereign power is exercised, it is more likely that the action represents an exercise of sovereign power.

The importance of process was suggested long ago in *Banks* when the Supreme Court emphasized that only those works created by judges in "the discharge of their judicial duties" are uncopyrightable. In other words, a work made by a judge outside the normal channels by which judicial action is taken would not be subject to the rule in *Banks*. It is therefore fair to say that, just as the Court in Banks emphasized that the justices of the Supreme Court of Ohio had authored the work in question "in the discharge of their judicial duties," the Georgia legislature's use of bicameralism and presentment to adopt the annotations as their own and merge them with statutory text indicates that the work was created by the legislators in the discharge of their official duties. This too bolsters our conclusion

IV.

Our inquiry has focused on whether the official annotations represent a direct exercise of sovereign power, and are therefore attributable to the constructive authorship of the People. In making this determination, we have compared the work in question to works that represent the prototypical exercise of sovereign power, which is to say statutes and official interpretations of the law. We have been guided by three factors that may be regarded as the defining characteristics of law -- the identity of the public official who created the work; the nature of the work; and the process by which the work was produced.

When the wrong public official exercises a power delegated in the law, when the power exercised is of a type not contemplated by the law, or when the power is exercised outside the procedural channels prescribed by the law, the act cannot be considered a valid exercise of the sovereign power. From these principles, the corollary logically follows: when the action taken is of the type entrusted by the People to their agents, when it is wielded by a public official whose assigned duties include the exercise of sovereign power, and when it is exercised pursuant to constitutionally designated processes, it more likely represents an exercise of the sovereign authority. The reasoning found in *Banks* also suggests the importance of these factors.

All of them point strongly toward the conclusion that the OCGA annotations are not copyrightable. The OCGA annotations are created by Georgia's legislative body, which has been entrusted with exercising sovereign power on behalf of the people of Georgia. While the annotations do not carry the force of law in the way that statutes or judicial opinions do, they are expressly given legal significance so that, while not "law," the annotations undeniably are authoritative sources on the meaning of Georgia statutes. The legislature has stamped them "official" and has chosen to make them an integral part of the official codification of Georgia's laws. By wrapping the annotations and the statutory text into a single unified edict, the Georgia General Assembly has made the connection between the two inextricable and, thereby, ensured that obtaining a full understanding of the laws of Georgia requires having unfettered access to the annotations. Finally, the General Assembly's annual adoption of the annotations as part of the laws of Georgia is effected by the legislative process -- namely bicameralism and presentment -- that is ordinarily reserved for the exercise of sovereign power.

Thus, we conclude that the annotations in the OCGA are attributable to the constructive authorship of the People. To advance the interests and effect the will of the People, their agents in the General Assembly have chosen to create an official exposition on the meaning of the laws of Georgia. In creating the annotations, the legislators have acted as draftsmen giving voice to the sovereign's will. The resulting work is intrinsically public domain material, belonging to the People, and, as such, must be free for publication by all.

As a result, no valid copyright can subsist in these works. We, therefore, reverse the judgment of the district court, direct that judgment be entered for appellant PRO, vacate the district court's order granting the State of Georgia injunctive relief, and remand for further proceedings consistent with this opinion.

REVERSED IN PART, VACATED IN PART AND REMANDED

“Supreme Court Will Hear Case Over Copyrights To Legal Texts”

Law360

Bill Donahue

June 24, 2019

The U.S. Supreme Court on Monday agreed to hear a case about the extent to which state and local governments can claim copyright control over legal texts.

The court agreed to tackle a lawsuit filed by the state of Georgia against an activist group called Public.Resource, which republished an annotated version of the state’s code without permission. In November, the Eleventh Circuit tossed that case out, saying citizens should have “unfettered access to the legal edicts that govern their lives.”

In appealing to the high court, Georgia warned the justices that the ruling would make it harder for states to produce more robust versions of their state laws. Surprisingly, Public.Resource also asked for high court review, saying it wanted final clarity on the state of the law.

As is customary, the justices did not explain why they agreed to hear the case.

Like many states, Georgia makes a simple text of its code available online but also hires a private firm to create a more robust annotated version, which features citations, analysis and opinions from the state attorney general. The simple version is free, but users must pay for the annotated version.

States say the arrangement allows for the cost-efficient creation of more detailed legal materials; critics say it deprives those who can’t afford the fees of full access to the law.

In October, the Eleventh Circuit sided with Public.Resource, a transparency group that aims to make legal texts available online. The court said the annotations were effectively an extension of state law, making them "a work of the people" and thus "inherently public domain material."

"Answering this question means confronting profound and difficult issues about the nature of law in our society and the rights of citizens to have unfettered access to the legal edicts that govern their lives," the court wrote at the time.

“We conclude that the people are the ultimate authors of the annotations," the court wrote. "As a work of the people the annotations are inherently public domain material and therefore uncopyrightable."

On Monday, an attorney for the state of Georgia said the court was pleased that the Supreme Court had taken the case.

"The Eleventh Circuit’s decision ... threatens to upend Georgia’s longstanding arrangement for creating and distributing annotations useful to guide legal research, while ensuring that the state's laws are widely distributed and easily accessible—free of charge," said Joshua Johnson of Vinson & Elkins LLP.

An attorney for Public.Resource declined to comment.

Georgia and its Code Revision Commission are represented by John P. Elwood, Joshua Johnson and Matthew X. Etchemendy of Vinson & Elkins LLP and Anthony B. Askew, Lisa C. Pavento and Warren Thomas of Meunier Carlin & Curfman LLC.

Public.Resource is represented by Elizabeth H. Rader and Sarah P. Lafantano of Alston & Bird LLP and Eric F. Citron of Goldstein & Russell PC.

The case is Georgia et al. v. Public.Resource.Org Inc., case number 18-1150, in the U.S. Supreme Court.

“The Law©?: No one owns the law, and no one should be able to copyright it”

The New York Times

The Editorial Board

June 25, 2019

No one owns the law, because the law belongs to everyone. It’s a principle that seems so obvious that most people wouldn’t give it a second thought. But that’s what is at issue in Georgia v. Public.Resource.Org, a case about whether the State of Georgia can assert copyright in its annotated state code. This week, the Supreme Court agreed to hear the case in its next term.

Americans deserve free and easy access to public records of all kinds, including court documents. But access to the law is the most important of all: Democracy depends on it. Keeping the law free of copyright is the first step.

Yet the law is in disarray on the topic. The last time the Supreme Court ruled on the issue was in 1888, and it only addressed opinions written by judges. In the last century, a number of lower courts issued lofty proclamations on how the law belongs to the people and the people alone. Meanwhile, copyright laws passed in 1909and 1976 explicitly excluded any “work of the United States government.” But that exclusion applies only to the federal government.

So when the nonprofit organization Public.Resource.Org purchased, scanned and uploaded all 186 volumes of the annotated Georgia state code to its website, the state sued to take it down. The code was already available free online through the state’s partnership with LexisNexis. As part of the deal, Georgia gave LexisNexis exclusive rights to official “annotations” that elaborate on the law but aren’t legally binding. LexisNexis allowed users to read the law free and it sold the annotated code for $404 per copy.

Public.Resource.Org is no stranger to litigation. For years, it has been embroiled in lawsuits over its publication of fire and electrical safety standards, air duct leakage standards, nonprofit tax returns and European Union baby pacifier regulations. The founder of Public.Resource.Org was once labeled a “rogue archivist.” But if publishing building safety standards online is an act of roguery, it is time for the courts to take a hard look at what copyright is for.

Much of the litigation against Public.Resource.Org falls into an ever-expanding gray zone of the law, created by government outsourcing bits and pieces of its regulatory function to the private sector. Regulations for everything from student loan eligibility to food additives can use standards written by trade groups.

Courts have issued conflicting opinions on this premium tier of the law. In the Georgia case, an appeals court ruled that the annotations were “sufficiently law-like,” partly because LexisNexis had created the annotations at the direction of the state. As a consequence, “the people are the ultimate authors of the annotations.”

If the law is confused, it is in part thanks to the Supreme Court, which handed down two rulings on the subject in 1888. One stated that the law is in the public domain, and the other said that compiling the law with a table of contents, summaries and an index could be copyrightable. It’s this latter case that the State of Georgia relies on.

The modern-day outsourcing of regulations to the private sector makes this issue all the more important to take up anew. If the law belongs to anyone, it belongs to the people. After a hundred or so years of confusion, the Supreme Court now has the chance to affirm this principle of self-governance.

“Accused of ‘Terrorism’ for Putting Legal Materials Online”

The New York Times

Adam Liptak

May 13, 2019

Carl Malamud believes in open access to government records, and he has spent more than a decade putting them online. You might think states would welcome the help.

But when Mr. Malamud’s group posted the Official Code of Georgia Annotated, the state sued for copyright infringement. Providing public access to the state’s laws and related legal materials, Georgia’s lawyers said, was part of a “strategy of terrorism.”

A federal appeals court ruled against the state, which has asked the Supreme Court to step in. On Friday, in an unusual move, Mr. Malamud’s group, Public.Resource.Org, also urged the court to hear the dispute, saying that the question of who owns the law is an urgent one, as about 20 other states have claimed that parts of similar annotated codes are copyrighted.

The issue, the group said, is whether citizens can have access to “the raw materials of our democracy.”

The case, Georgia v. Public.Resource.Org, No. 18-1150, concerns the 54 volumes of the Official Code of Georgia Annotated, which contain state statutes and related materials.

The state, through a legal publisher, makes the statutes themselves available online, and it has said it does not object to Mr. Malamud doing the same thing. But people who want to see other materials in the books, the state says, must pay the publisher.

This is part of a disturbing trend, according to a new law review article, “Who Owns the Law? Why We Must Restore Public Ownership of Legal Publishing,” by Leslie Street, a law professor and librarian at Mercer University in Macon, Ga., and David Hansen, a librarian at Duke. It will be published in The Journal of Intellectual Property Law.

States have struck deals with legal publishers, the article said, that have effectively privatized the law. “Publishers now use powerful legal tools to control who has access to the text of the law, how much they must pay and under what terms,” the article said.

Mr. Malamud said those arrangements have complicated his efforts.
“When I started Public Resource,” he said, “I thought our mission would be a focus on making the laws easier to use and read, but because of a buzz saw of opposition we have

spent much of our time fighting back takedown notices and lawsuits."

There is no question that judicial opinions cannot be copyrighted. The last time the Supreme Court addressed the matter, in 1888, it ruled that "the whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all."

Lower courts have said the same thing about statutes. But the status of other sorts of legal materials has not been definitively resolved. In the Georgia case, the question is whether annotations commissioned and approved by the state may be copyrighted.

The annotations include descriptions of judicial decisions interpreting the statutes. Only a very bad lawyer would fail to consult them in determining the meaning of a statute.

For instance, Georgia has a law on the books making sodomy a crime. An annotation tells the reader that the law has been held unconstitutional "insofar as it criminalizes the performance of private, unforced, noncommercial acts of sexual intimacy between persons legally able to consent."

Professor Street said she tells her law students to be sure to consult the annotations in Georgia's official code.

"When you go to a statute, you see the language of the statute, but that doesn't necessarily tell you the meaning," she said. "You go to the annotations, which leads you to the court decisions, where the judges actually tell you what the words mean."

In ruling for Mr. Malamud, the appeals court made a similar point.

"The annotations clearly have authoritative weight in explicating and establishing the meaning and effect of Georgia's laws," Judge Stanley Marcus wrote for a unanimous three-judge panel of the court, the United States Court of Appeals for the 11th Circuit, in Atlanta. "Georgia's courts have cited to the annotations as authoritative sources on statutory meaning and legislative intent."

Still, the annotations are not themselves law, Judge Marcus wrote, making the case a hard one. But he concluded that the annotations were "sufficiently lawlike" that they could not be copyrighted.

The annotations were prepared by lawyers working for LexisNexis as part of a financial arrangement with the state. Georgia holds the copyright to the annotations, but the company has the right to sell them while paying the state a royalty.

The state says this is a sensible cost-saving measure, "minimizing burdens on taxpayers" by sparing them from paying for the preparation of annotations.

Professor Street said there was no good reason for the state to outsource the task.
"States are privatizing the functions of government," she said. "But the incentives are different for a private company when it

comes to publishing the law than it is for a state government."

I asked Mr. Malamud why he had urged the Supreme Court to hear his case even though he had won in the appeals court.

"Repeating the laws of our country should not be considered a crime," he said. "I would like the Supreme Court to tell us which laws we are allowed to speak."

"Eleventh Circuit Finds No Valid Copyright in Official Code of Georgia Annotated"

IP Watchdog

Steve Brachmann

October 29, 2018

On Friday, October 19th, the U.S. Court of Appeals for the Eleventh Circuit issued a decision in *Code Revision Commission v. Public.Resource.Org, Inc.*, which reversed-in-part, vacated-in-part and remanded a lower court's ruling in a copyright infringement case involving an annotated version of Georgia's official state code. Applying U.S. Supreme Court case law from the 19th Century, the last time the nation's highest court decided issues relevant to this case, the Eleventh Circuit found that no valid copyright interest can be asserted in any part of the annotated state code.

In July 2015, the Code Revision Commission, a body established by the Georgia General Assembly in 1977 to recodify Georgia's state laws, filed suit in the Northern District of Georgia seeking injunctive relief to prevent Public.Resource.Org (PRO), a non-profit working to improve public access to government materials, from publishing all 186 volumes of the Official Code of Georgia Annotated (OCGA) online for free public access. PRO responded to the lawsuit by arguing that the state of Georgia didn't hold an enforceable copyright to the OCGA. Although a LexisNexis Group subsidiary publishes the OCGA and is responsible for its ongoing maintenance, the publication agreement between LexisNexis and Georgia retains the copyright to the annotations in Georgia's name. The Northern Georgia court entered a permanent injunction against PRO, finding that the annotations are not in the public domain because they lack the force of law.

On appeal, the Eleventh Circuit found that the heart of this case rests on the question of whether Georgia's copyright in the OCGA is valid. Although the appellate court notes that "authorship" is central to the statutory scheme regarding copyright protection, the meaning of authorship takes on a special meaning in cases considering the copyrightability of a government edict. The Eleventh Circuit cited three Supreme Court cases regarding the issue, the last of which was decided in 1888. In *Wheaton v. Peters* (1834), the Supreme Court found that a reporter cannot hold a copyright in written opinions produced by the Court. The Supreme Court revisited the issue twice in 1888, first in *Banks v. Manchester*, a copyright infringement case where the Court found that decisions issued by the Supreme Court of Ohio are not copyrightable because a judge's interpretation of the law is free for publication to all under public policy. Less than a month later, the Supreme Court decided *Callaghan v. Myers*where the Court found that a copyright claim asserted by a publisher of reports containing opinions issued by the Supreme Court of Illinois were valid because the publisher had obtained proprietary interest in the reports from an Illinois state official, although the rights did not extent to the decisions themselves.

The Eleventh Circuit also noted that Congress partially codified the rule from *Banks* into the 1909 Copyright Act, which provided that “no copyright shall subsist in the original text of any work which is in the public domain… or in any publication of the United States Government.” A 1961 Register’s Report released by the Copyright Office stated that Congress’ prohibition of copyright on federal government texts also extends to state government laws, judicial decisions and similar documents.

“The ultimate inquiry posed by the rule in *Banks* is thus whether a work is attributable to the constructive authorship of the People, which is to say whether it was created by an agent of the People in the direct exercise of sovereign authority,” the Eleventh Circuit opinion reads. An analysis of the OCGA led the appellate court to find that the annotations, while not having the force of law, are part and parcel of the law. First, the Eleventh Circuit found that the Georgia General Assembly was the driving force behind the annotations in the OCGA. Although the annotations were prepared by LexisNexis, those annotations were drafted based upon highly detailed instructions contained within its publishing agreement with the Code Revision Commission, making Georgia’s legislators the creators of the annotations.

Further, the annotations are authoritative sources on the meaning of Georgia statutes, heightening their legal significance. This makes the annotations closely analogous to a work representing an exercise of sovereign authority, which under U.S. public policy makes them a work of the people. The fact that the OCGA contains the word “Official” in its title further strengthens the significance of the document as not being simply one of many annotated versions of Georgia’s statutes.

Finally, the process used to create the annotations was closely related to the process used to create the statutes themselves, bringing the Eleventh Circuit to the conclusion that the OCGA is not copyrightable.

Aurelius Investment, LLC v. Puerto Rico

Ruling Below: *Aurelius Investment, LLC v. Puerto Rico*, 915 F.3d 838 (1st Cir. 2019).

Overview: This case is an appeal arising from the restricting of Puerto Rico's public debt. Aurelius Investment are Puerto Rico general obligation bondholders, who are filing for injunctive and declaratory relief claiming that they possess a priority and property interest over other revenues of the Puerto Rico government. The Financial and Oversight Management Board filed a motion to dismiss for lack of subject matter jurisdiction and failure to state a claim.

Issue: Whether the de facto officer doctrine allows courts to deny meaningful relief to successful separation-of-powers challengers who are suffering ongoing injury at the hands of unconstitutionally appointed principle officers

Note: *Aurelius Investment, LLC v. Puerto Rico* is consolidated with *Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC*; *Official Committee of Debtors v. Aurelius Investment, LLC*; *United States v. Aurelius Investment, LLC*; *UTIER v. Financial Oversight and Management Board of Puerto Rico*

AURELIUS INVESTMENT, LLC, ET AL., ***Plaintiffs-Appellants***

v.

Commonwealth of PUERTO RICO, ***Defendants- Appellees***

United States Court of Appeals, First Circuit

Decided on February 15, 2019

[Excerpt; some citations and footnotes omitted]

TORRUELLA, *Circuit Judge*:

The matter before us arises from the restructuring of Puerto Rico's public debt under the 2016 Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"). This time, however, we are not tasked with delving into the intricacies of bankruptcy proceedings. Instead, we are required to square off with a single question of constitutional magnitude: whether members of the Financial Oversight and Management Board created by PROMESA ("Board Members") are "Officers of the United States" subject to the U.S. Constitution's Appointments Clause. Title III of PROMESA authorizes the Board to initiate debt adjustment proceedings on behalf of the Puerto Rico government, and the Board exercised this authority in May

2017. Appellants seek to dismiss the Title III proceedings, claiming the Board lacked authority to initiate them given that the Board Members were allegedly appointed in contravention of the Appointments Clause.

Before we can determine whether the Board Members are subject to the Appointments Clause, we must first consider two antecedent questions that need be answered in sequence, with the answer to each deciding whether we proceed to the next item of inquiry. The first question is whether, as decided by the district court and claimed by appellees, the Territorial Clause displaces the Appointments Clause in an unincorporated territory such as Puerto Rico. If the answer to this first question is "no," our second area of discussion turns to determining whether the Board Members are "Officers of the United States," as only officers of the federal government fall under the purview of the Appointments Clause. If the answer to this second question is "yes," we must then determine whether the Board Members are "principal" or "inferior" United States officers, as that classification will dictate how they must be appointed pursuant to the Appointments Clause. But before we enter fully into these matters, it is appropriate that we take notice of the developments that led to the present appeal.

BACKGROUND

The centerpieces of the present appeals are two provisions of the Constitution of the United States. The first is Article II, Section 2, Clause 2, commonly referred to as the "Appointments Clause," which establishes that:

[The President] . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The second is Article IV, Section 3, Clause 2, or the "Territorial Clause," providing Congress with the "power to dispose of and make all needful Rules and Regulations respecting the Territory . . . belonging to the United States."

A. Puerto Rico's Financial Crisis

The interaction between these two clauses comes into focus because of events resulting from the serious economic downfall that has ailed the Commonwealth of Puerto Rico since the turn of the 21st Century, and its Governor's declaration in the summer of 2015 that the Commonwealth was unable to meet its estimated $72 billion public debt obligation. This obligation developed, in substantial part, from the triple tax-exempt bonds issued and sold to a large variety of individual and institutional investors, not only in Puerto Rico but also throughout the United States. Given the unprecedented expansiveness of the default in terms of total debt, the number of creditors affected, and the creditors' geographic diversity, it became self-evident that the Commonwealth's insolvency necessitated a national response from Congress. Puerto Rico's default was of particular detriment to the municipal bond market where Commonwealth bonds are traded and upon which state and local governments across the United States rely to finance many of their capital projects.

From 1938 until 1984, Puerto Rico was able, like all other U.S. jurisdictions, to seek the protection of Chapter 9 of the U.S. Bankruptcy Code when its municipal instrumentalities ran into financial difficulties. But without any known or documented explanation, in 1984, Congress extirpated from the Bankruptcy Code the 1 availability of this relief for the Island. In an attempt to seek self-help, and amidst the Commonwealth's deepening financial crisis, the Puerto Rico Legislature passed its own municipal bankruptcy legislation in 2014. The Commonwealth's self-help journey, however, was cut short by the Supreme Court in *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938 (2016), which invalidated the Puerto Rico bankruptcy statute. Coincidentally, the Supreme Court decided *Franklin Cal.* on June 13, 2016 -- seven days before the following congressional intervention into this sequence of luckless events.

B. Congress Enacts PROMESA

On June 30, 2016, Congress's next incursion into Puerto Rico's economic fortunes took place in the form of Public Law 114- 187, the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), which Congress found necessary to deal with Puerto Rico's "fiscal emergency" and to help mitigate the Island's "severe economic decline." Congress identified the Territorial Clause as the source of its authority to enact this law.

To implement PROMESA, Congress created the Financial Oversight and Management Board of Puerto Rico (the "Board"). Congress charged the Board with providing independent supervision and control over Puerto Rico's financial affairs and helping the Island "achieve fiscal responsibility and access to the capital markets." In so proceeding, Congress stipulated that the Board was "an entity [created] within the territorial government" of Puerto Rico, which "shall not be considered to be a department, agency, establishment, or instrumentality of the Federal Government,"), and that it was to be funded entirely from Commonwealth resources.

Although PROMESA places the Board "within" the Puerto Rico territorial government, Section 108 of PROMESA, which is labeled "Autonomy of Oversight Board,", precludes the Puerto Rico Governor and Legislature from exercising any power or authority over the so-called "territorial entity" that PROMESA 10- creates. Instead, it subordinates the Puerto Rico territorial government to the Board, as it unambiguously pronounces that:
(a) . . . Neither the Governor nor the Legislature may –

(1) exercise any control, supervision, oversight, or review over the . . . Board or its activities; or

(2) enact, implement, or enforce any statute, resolution, policy, or rule that would impair or defeat the purposes of this chapter, as determined by the . . . Board.

PROMESA also provides additional authority and powers to the Board with similarly unfettered discretion. For example, Section 101(d)(1)(A) grants the Board, "in its sole discretion at such time as the . . . Board determines to be appropriate," the designation of "any territorial instrumentality as a covered territorial instrumentality that is subject to the requirements of [PROMESA]." Under Section 101(d)(1)(B), the Board, "in its sole discretion," may require the Governor of Puerto Rico to submit "such budgets and monthly or quarterly reports regarding a covered territorial instrumentality as the … Board determines to be necessary…" Pursuant to Section 101 (d)(1)(C), the Board is allowed, "in its sole discretion" to require separate budgets and reports for covered territorial instrumentalities apart from the Commonwealth's budget , and to require the Governor to develop said separate documents. Per Section 101(d)(1)(D), the "Board may require, in its sole discretion," that the Governor "include a covered territorial instrumentality in the applicable Territory Fiscal Plan." Further, as provided in Section 101(d)(1)(E), the Board may, "in its sole discretion," designate "a covered territorial instrumentality to be the subject of [a separate] Instrumentality Fiscal Plan. Finally, Section 101(d)(2)(A) bestows upon the Board, again "in its sole discretion, at such time as the . . . Board determines to be appropriate," the authority to "exclude any territorial instrumentality from the requirements of [PROMESA]."

PROMESA also requires the Board to have an office in Puerto Rico and elsewhere as it deems necessary, and that at any time the United States may provide the Board with use of federal facilities and equipment on a reimbursable or non-reimbursable basis. Additionally, Section 103(c) waives the application of Puerto Rico procurement laws to the Board while Section 104(c) authorizes the Board to acquire information directly from both the federal and Puerto Rico governments without the usual bureaucratic hurdles. Moreover, the Board's power to issue and enforce compliance with -12- subpoenas is to be carried out in accordance with Puerto Rico law. Finally, PROMESA directs the Board to ensure that any laws prohibiting public employees from striking or engaging in lockouts be strictly enforced.

We thus come to PROMESA's Title III, the central provision of this statute, which creates a special bankruptcy regime allowing the territories and their instrumentalities to adjust their debt. This new bankruptcy safe haven applies to territories more broadly than Chapter 9 applies to states because it covers not just the subordinate instrumentalities of the territory, but also the territory itself

An important provision of PROMESA's bankruptcy regime is that the Board serves as the sole representative of Puerto Rico's government in Title III debtor-related proceedings and that the Board is empowered to "take any action necessary on behalf of the debtor" -- whether the Commonwealth government or any of its instrumentalities -- "to prosecute the case of the debtor,".

C. Appointment of Members to PROMESA's Board

PROMESA establishes that the "Board shall consist of seven members appointed by the President," who must comply with federal conflict of interest statutes. The Board's membership is divided into six categories, labelled A through F, with one member for Categories A, B, D, E, and F, and two members for Category C. The Governor of Puerto Rico, or his designee, also serves on the Board, but in an ex officio, non-voting capacity. The Board's duration is for an indefinite period, at a minimum four years and likely more, given the certifications that Section 209 of PROMESA requires.

Pursuant to Section 101(f) of PROMESA, individuals are eligible for appointment to the Board only if they:

(1) ha[ve] knowledge and expertise in finance, municipal bond markets, management, law, or the organization or operation of business or government; and

(2) prior to appointment, [they are] not an officer, elected official, or employee of the territorial government, a candidate for elected office of the territorial government, or a former elected official of the territorial government.

In addition, there are certain primary residency or primary business place requirements that must be met by some of the Board Members. Of particular importance to our task at hand is Section 101(e)(2)(A), which outlines the procedure for the appointment of the Board Members:

(A) The President shall appoint the individual members of the . . . Board of which –

(i) the Category A member should be selected from a list of individuals submitted by the Speaker of the House of Representatives;

(B) the expenditures made by the territorial government during each fiscal year did not exceed the revenues of the territorial government during that year, as determined in accordance with modified accrual accounting standards.

(ii) the Category B member should be selected from a separate, non-overlapping list of individuals submitted by the Speaker of the House of Representatives;

(iii) the Category C member should be selected from a list submitted by the Majority Leader of the Senate;

(iv) the Category D member should be selected from a list submitted by the Minority Leader of the House of Representatives;

(v) the Category E member should be selected from a list submitted by the Minority leader of the Senate; and

(vi) the category F member may be selected in the President's sole discretion.

In synthesis, pursuant to this scheme, six of the seven Board Members shall be selected by the President from the lists provided by House and Senate leadership, with PROMESA allowing the President to select the seventh member at his or her sole discretion. Senatorial advice and consent is not required if the President makes the appointment from one of the aforementioned lists. In theory, the statute allows the President to appoint a member to the Board who is not on the lists, in which case, "such an appointment shall be by and with the advice and consent of the Senate." Consent by the Senate had to be obtained by September 1, 2016 so as to allow an off-list appointment, else the President was required to appoint directly -16- from the lists. And because the Senate was in recess for all but eight business days between enactment of the statute and September 1, one might conclude that, in practical effect, the statute forced the selection of persons on the list.

As was arguably inevitable, on August 31, 2016, the President chose all Category A through E members from the lists submitted by congressional leadership and appointed the Category F member at his sole discretion.

It is undisputed that the President did not submit any of the Board member appointments to the Senate for its advice and consent prior to the Board Members assuming the duties of their office, or, for that matter, at any other time.

D. Litigation Before the District Court

In May 2017, the Board initiated Title III debt adjustment proceedings on behalf of the Commonwealth in the U.S. District Court for the District of Puerto Rico. This was followed by the filing of several other Title III proceedings on behalf of various Commonwealth government instrumentalities. Thereafter, some entities -- now the appellants before us -- arose in opposition to the Board's initiation of debt adjustment proceedings on behalf of the Commonwealth.

Among the challengers are Aurelius Investment, LLC, et al. and Assured Guaranty Corporation, et al. ("Aurelius"). Before the district court, Aurelius argued that the Board lacked authority to initiate the Title III proceeding because its members were appointed in violation of the Appointments Clause and the principle of separation of powers. The Board rejected this argument, positing that its members were not "Officers of the United States" within the meaning of the Appointments Clause, and that the Board's powers were purely local in nature, not federal as would be needed to qualify for Appointments Clause coverage. The Board further argued that, in any event, the Appointments Clause did not apply even if the individual members were federal officers, because they exercised authority in Puerto Rico, an unincorporated territory where the Territorial Clause endows Congress with plenary powers. This, according to the Board, exempted Congress from complying with the Appointments Clause when legislating in relation to Puerto Rico. In the alternative, the Board argued that the Board Members' appointment did not require Senate advice and consent because they were "inferior officers." The United States intervened on behalf of the Board, pursuant to 28 U.S.C. §

2403(a), to defend the constitutionality of PROMESA and the validity of the appointments and was generally in agreement with the Board's contentions.

The other challenger to the Board's appointments process, and an appellant here, is the Unión de Trabajadores de la Industria Eléctrica y Riego ("UTIER"), a Puerto Rican labor organization that represents employees of the government-owned electric power company, the Puerto Rico Electric Power Authority ("PREPA"). The Board had also filed a Title III petition on behalf of PREPA, which led the UTIER to file an adversary proceeding as a party of interest before the District Court in which it raised substantially the same arguments as Aurelius regarding the Board Members' defective appointment

E. The District Court's Opinion

The district court, in separate decisions, ruled against Aurelius and UTIER and rejected their motions to dismiss the Board's Title III petitions. In brief, the district court determined that the Board is an instrumentality of the Commonwealth government established pursuant to Congress's plenary powers under the Territorial Clause, that Board Members are not "Officers of the United States," and that therefore there was no constitutional defect in the method of their appointment. The court arrived at this conclusion after considering the jurisprudence and practice surrounding the relationship between Congress and the territories, including Puerto Rico, along with Congress's intent with regards to PROMESA.

The district court based its ruling on the premise that "the Supreme Court has long held that Congress's power under [the Territorial Clause] is both 'general and plenary.'" Such a plenary authority is what, according to the district court, allows Congress to "establish governmental institutions for territories that are not only distinct from federal government entities but include features that would not comport with the requirements of the Constitution if they pertained to the governance of the United States." The district court further pronounced that Congress "has exercised [its plenary] power with respect to Puerto Rico over the course of nearly 120 years, including the delegation to the people -21- of Puerto Rico elements of its . . . Article IV authority by authorizing a significant degree of local self-governance."

The district court also relied on judicial precedents holding that Congress may create territorial courts that do not "incorporate the structural assurances of judicial independence" provided for in Article III of the Constitution -- namely, life tenure and protection against reduction in pay -- as decisive authority. From the perdurance of these non-Article III courts across the territories (excepting, of course, Puerto Rico which although still an unincorporated territory has had, since 1966, an Article III court), the district court reasoned that "Congress can thus create territorial entities that are distinct in structure, jurisdiction, and powers from the federal government."

Turning to the relationship between Congress and Puerto Rico, the district court noted that

"Congress has long exercised its Article IV plenary power to structure and define governmental entities for the island," in reference to the litany of congressional acts that have shaped Puerto Rico's local government since 1898, including the Treaty of Paris of 1898, the Foraker Act of 1900, the Jones-Shafroth Act of 1917, and Public Law 600 of 1950.

Furthermore, with regards to PROMESA and its Board, the district court afforded "substantial deference" to "Congress's determination that it was acting pursuant to its Article IV territorial powers in creating the . . . Board as an entity of the government of Puerto Rico." The district court then proceeded to consider whether Congress can create an entity that is not inherently federal. It concluded in the affirmative, because finding otherwise would "ignore[] both the plenary nature of congressional power under Article IV and the well-rooted jurisprudence . . . establish[ing] that any powers of self-governance exercised by territorial governments are exercised by virtue of congressional delegation rather than inherent local sovereignty." Accordingly, the district court found that the "creation of an entity such as the . . . Board through popular election would not change the . . . Board's ultimate source of authority from a constitutional perspective." The court deemed this so because "neither the case law nor the historical practice . . . compels a finding that federal appointment necessarily renders an appointee a federal officer." The district court therefore concluded that the Board is a territorial entity notwithstanding [t]he fact that the . . . Board's members hold office by virtue of a federally enacted statutory regime and are appointed by the President[,] [because this] does not vitiate Congress's express provisions for creation of the . . . Board as a territorial government entity that "shall not be considered to be a department, agency, establishment, or instrumentality of the Federal Government."

After ruling that the Board is a "territorial entity and its members are territorial officers," the district court finally determined that "Congress had broad discretion to determine the manner of selection for members of the . . . Board," which Congress "exercised . . . in empowering the President with the ability to both appoint and remove members from the . . . Board." On this final point, the district court observed that "[a]lthough historical practice . . . indicates that Congress has required Senate confirmation for certain territorial offices, nothing in the Constitution precludes the use of that mechanism for positions created under Article IV, and its use does not establish that Congress was obligated to invoke it."

The district court was certainly correct that Article IV conveys to Congress greater power to rule and regulate within a territory than it can bring to bear within the fifty states. In brief, within a territory, Congress has not only its customary power, but also the power to make rules and regulations such as a state government may make within its state. As we will explain, however, we do not view these expanded Article IV powers as enabling Congress to ignore the structural limitations on the manner in which the federal government chooses federal officers, and we deem the Board Members -- save its ex officio member -- to be federal officers.

DISCUSSION

A. The Territorial Clause Does Not Trump the Appointments Clause

However much Article IV may broaden the reach of Congress's powers over a territory as compared to its power within a state, this case presents no claim that the substance of PROMESA's numerous rules and regulations exceed that reach.

Instead, appellants challenge the way the federal government has chosen the individuals who will implement those rules and regulations. This challenge trains our focus on the power of Congress vis-à-vis the other branches of the federal government. Specifically, the Board claims that Article IV effectively allows Congress to assume what is otherwise a power of the President, and to share within the two bodies of Congress a power only assigned to the Senate.

We reject this notion that Article IV enhances Congress's capabilities in the intramural competitions established by our divided system of government. First, the Board seems to forget -- and the district court failed to recognize and honor -- the ancient canon of interpretation that we believe is a helpful guide to disentangle the interface between the Appointments Clause and the Territorial Clause: generalia specialibus non derogant (the "specific governs the general").

The Territorial Clause is one of general application authorizing Congress to engage in rulemaking for the temporary governance of territories. But such a general empowerment does not extend to areas where the Constitution explicitly contemplates a particular subject, such as the appointment of federal officers. Nowhere does the Territorial Clause reference the subject matter of federal appointments or the process to effectuate them. On the other hand, federal officer appointment is, of course, the raison d'etre of the Appointments Clause. It cannot be clearer or more unequivocal that the Appointments Clause mandates that it be applied to "all . . . Officers of the United States." Thus, we find in answering the first question before us a prime candidate for application of the specialibus canon and for the strict enforcement of the constitutional mandate contained in the Appointments Clause.

Consider next the Presentment Clause of Article I, Section 7. Under that clause, a bill passed by both chambers of Congress cannot become law until it is presented to, and signed by, the President (or the President's veto is overridden). Surely no one argues that Article IV should be construed so as to have allowed Congress to enact PROMESA without presentment, or to have overridden a veto without the requisite super-majority vote in both houses. Nor does anyone seriously argue that Congress could have relied on its powers under Article IV to alter the constitutional roles of its two respective houses in enacting PROMESA.

Like the Presentment Clause, the Appointments Clause constitutionally regulates how Congress brings its power to bear, whatever the reach of that power might be. The Appointments Clause serves as one of the Constitution's important structural pillars, one that was intended to prevent the "manipulation of official appointments" -- an "insidious . . . weapon of eighteenth century despotism." The Appointments Clause was designed "to prevent[] congressional encroachment" on the President's appointment power, while "curb[ing] Executive abuses" by requiring Senate confirmation of all principal officers. It is thus universally considered "among the significant structural safeguards of the constitutional scheme."

It is true that another restriction that is arguably a structural limitation on Congress's exercise of its powers -- the nondelegation doctrine -- does bend to the peculiar demands of providing for governance within the territories. In normal application, the doctrine requires that "when Congress confers decision-making authority upon agencies," it must "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." Otherwise, Congress has violated Article I, Section 1 of the Constitution, which vests "[a]ll legislative Powers herein granted . . . in a Congress of the United States.". In connection with the territories, though, Congress can delegate to territorial governments the power to enact rules and regulations governing territorial affairs. The Supreme Court has analogized the powers of Congress over the District of Columbia and the territories to that of states over their municipalities. In the state-municipality context, "[a] municipal corporation . . . is but a department of the State.

The legislature may give it all powers such a being is capable of receiving, making it a miniature State within its locality." The Supreme Court has also made clear that, in delegating power to the territories, Congress can only act insofar as "other provisions of the Constitution are not infringed."

The territorial variations on the traditional restrictions of the nondelegation doctrine pose no challenge by Congress to the power of the other branches. Any delegation must take the form of a duly enacted statute subject to the President's veto. Furthermore, the territorial exception to the nondelegation doctrine strikes us as strongly implicit in the notion of a territory as envisioned by the drafters of the Constitution. The expectation was that territories would become states. Hence, Congress had a duty -- at least a moral duty -- to manage a transition from federal to home rule. While the final delegation takes place in the act of formally creating a state, it makes evident sense that partial delegations of home-rule powers would incrementally precede full statehood. Accordingly, from the very beginning, Congress created territorial legislatures to which it delegated rule-making authority.

None of these justifications for limiting the nondelegation doctrine to accommodate one of Congress's most salient purposes in exercising its powers under Article IV applies to the Appointments Clause. Nor does the teaching of founding era history. To the contrary, the evidence suggests strongly that

Congress in 1789 viewed the process of presidential appointment and Senate confirmation as applicable to the appointment by the federal government of federal officers within the territories. That first Congress passed several amendments to the Northwest Ordinance of 1787 "so as to adopt the same to the present Constitution of the United States." One such conforming amendment eliminated the pre-constitutional procedure for congressional appointment of officers within the territory and replaced it with presidential nomination and appointment "by and with the advice and consent of the Senate.".

More difficult to explain is *United States v. Heinszen*. The actual holding in *Heinszen* sustained tariffs on goods to the Philippines where the tariffs were imposed first by the President and then thereafter expressly ratified by Congress. In sustaining those tariffs, the Court stated that Congress could have delegated the power to impose the tariffs to the President beforehand, citing *United States v. Dorr*, a case that simply held that Congress could provide for criminal tribunals in the territories without also providing for trial by jury. *Heinszen* cannot be explained as an instance of Congress enabling home rule in a territory. Rather, it seems to allow Congress to delegate legislative power to the President, citing the territorial context as a justification. *Heinszen*, though, has no progeny that might shed light on how reliable it might serve as an apt analogy in the case before us. Moreover, *Heinszen* concerned a grant of power by Congress, not a grab for power at the expense of the executive.

For the foregoing reasons, we find in the nondelegation doctrine no apt example to justify an exception to the application of the Appointments Clause within the territories. An exception from the Appointments Clause would alter the balance of power within the federal government itself and would serve no necessary purpose in the transitioning of territories to states.

Further, the Board points us to *Palmore v. United States*. That case arose out of Congress's exercise of its plenary powers over the District of Columbia under Article I, Section 8, Clause 17, powers which are fairly analogous to those under Article IV. The Court held that Congress could create local courts -- like state courts -- that did not satisfy the requirements of Article III. The Board would have us read Palmore as an instance of Congress's plenary powers over a territory trumping the requirements of another structural pillar of the Constitution. We disagree. The Court explained at length how Article III itself did not require that all courts created by Congress satisfy the selection and tenure requirements of Article III. ("It is apparent that neither this Court nor Congress has read the Constitution as requiring every federal question arising under the federal law, or even every criminal prosecution for violating an Act of Congress, to be tried in an Art. III court before a judge enjoying lifetime tenure and protection against salary reduction."). Rather, the requirements of Article III are applicable to courts "devoted to matters of national concern,", and that local courts "primarily. . . concern[ed] . . . with local law and to serve as a local court system" created by Congress pursuant to its plenary powers are simply another example of those courts that did not fit the Article III template (like state courts empowered to hear federal cases, military tribunals, the Court of Private Land Claims, and consular courts). In short, Article III was not trumped by Congress's creation of local courts pursuant to its Article I power. Rather, Article III itself accommodates exceptions, and the local D.C. court system fits within the range of those exceptions. That there are courts in other territories of the same ilk does not alter this analysis. *Palmore* therefore offers no firm ground upon which to erect a general Article IV exception to separation-of-powers stalwarts such as the Appointments Clause.

Finally, nothing about the "Insular Cases" casts doubt over our foregoing analysis. This discredited lineage of cases, which ushered the unincorporated territories doctrine, hovers like a dark cloud over this case. To our knowledge there is no case even intimating that if Congress acts pursuant to its authority under the Territorial Clause it is excused from conforming with the Appointments Clause, whether this be by virtue of the "Insular Cases" or otherwise. Nor could there be, for it would amount to the emasculation from the Constitution of one of its most important structural pillars. We thus have no trouble in concluding that the Constitution's structural provisions are not limited by geography and follow the United States into its unincorporated territories.

Notwithstanding this doctrine, appellant UTIER asks us to go one step further and reverse the "Insular Cases." Although there is a lack of enthusiasm for the perdurance of these cases, which have been regarded as a "relic from a different era,", and which Justice Frankfurter described as "historically and juridically, an episode of the dead past about as unrelated to the world of today as the one-hoss shay is to the latest jet airplane,", we cannot be induced to engage in an ultra vires act merely by siren songs. Not only do we lack the authority to meet UTIER's request, but even if we were writing on a clean slate, we would be required to stay our hand when dealing with constitutional litigation if other avenues of decision were available, and we believe there are in this case.

In this respect, we are aided again by the Supreme Court's decision in *Reid*, which although refusing to reverse the "Insular Cases" outright, provides in its plurality opinion instructive language that outlines the appropriate course we ought to pursue in the instant appeal:

The "Insular Cases" can be distinguished from the present cases in that they involved the power of Congress to provide rules and regulations to govern temporarily territories with wholly dissimilar traditions and institutions whereas here the basis for governmental power is American citizenship. . . . [I]t is our judgment that neither the cases nor their reasoning should be given any further expansion.

The only course, therefore, which we are allowed in light of Reid is to not further expand the reach of the "Insular Cases." Accordingly, we conclude that the Territorial Clause and the "Insular Cases" do not impede the application of the Appointments Clause in an unincorporated territory, assuming all other requirements of that provision are duly met.

B. Board Members Are "Officers of the United States" Subject to the Appointments Clause

We must now determine whether the Board Members qualify within the rubric of "Officers of the United States," the Appointments Clause's job description that marks the entry point for its coverage. The district court determined that the Board Members do not fall under such a rubric. We disagree. We begin our analysis by turning to a triad of Supreme Court decisions: *Lucia v. SEC*; *Freytag*; and *Buckley v. Valeo*. From these cases, we gather that the following "test" must be met for an appointee to qualify as an "Officer of the United States" subject to the Appointments Clause: (1) the appointee occupies a "continuing" position established by federal law; (2) the appointee "exercis[es] significant authority"; and (3) the significant authority is exercised "pursuant to the laws of the United States.". In our view, the Board Members readily meet these requirements.

First, Board Members occupy "continuing positions" under a federal law since PROMESA provides for their appointment to an initial term of three years and they can thereafter be reappointed and serve until a successor takes office The continuity of the Board Members' position is fortified by the provision that only the President can remove them from office and then only for cause. In fact, the Board Members' term in office could well extend beyond three years, as PROMESA stipulates that the Board will continue in operation until it certifies that the Commonwealth government has met various fiscal objectives "for at least 4 consecutive fiscal years."

Second, the Board Members plainly exercise "significant authority." For example, PROMESA empowers the Board Members to initiate and prosecute the largest bankruptcy in the history of the United States municipal bond market with the bankruptcy power being a quintessential federal subject matter. The Supreme Court recently reminded the Commonwealth government of the bankruptcy power's exclusive federal nature in *Franklin Cal. Tax-Free Trust*.

The Board Members' federal authority includes the power to veto, rescind, or revise Commonwealth laws and regulations that it deems inconsistent with the provisions of PROMESA or the fiscal plans developed pursuant to it. Likewise, the Board showcases what can be construed as nothing but its significant authority when it rejects the budget of the Commonwealth or one of its instrumentalities; when it rules on the validity of a fiscal plan proposed by the Commonwealth; when it issues its own fiscal plan if it rejects the Commonwealth's proposed plan; and when it exercises its sole discretion to file a plan of adjustment for Commonwealth debt. The Board can only employ these significant powers because a federal law so provides.

Moreover, Board Members' investigatory and enforcement powers, as carried out collectively by way of the Board, exceed or are at least equal to those of the judicial officers the Supreme Court found to be "Officers of the United States" in Lucia. There, the Supreme Court held that administrative law judges are "Officers of the United States," in part, because they can receive evidence at hearings and administer oaths. PROMESA grants the Board Members the same right and more. In short, the Board Members enjoy "significant discretion" as they carry out "important functions”, under a federal law -- qualities that the Supreme Court has considered for decades as the birthmark of federal officers who are subject to the Appointments Clause.

Third, the Board Members' authority is exercised "pursuant to the laws of the United States." The Board Members trace their authority directly and exclusively to a federal law, PROMESA. That federal law provides both their authority and their duties. Essentially everything they do is pursuant to federal law under which the adequacy of their performance is judged by their federal master. And this federal master serves in the seat of federal power, not San Juan. The Board Members are, in short, more like Roman proconsuls picked in Rome to enforce Roman law and oversee territorial leaders than they are like the locally selected leaders that Rome allowed to continue exercising some authority.

The United States makes two arguments in support of the district court's opinion and PROMESA's current appointments protocol that warrant our direct response at this point. First, the United States argues that historical precedent suggests the inapplicability of the Appointments Clause to the territories. Second, the United States contends that if we find for appellants, such a ruling will invalidate the present-day democratically elected local governments of Puerto Rico and the other unincorporated territories because the officers of such governments took office without the Senate's advice and consent. We reject each argument in turn.

The relevant historical precedents of which we are aware lead us to a different conclusion than that claimed by the United States. Excepting the short period during which Puerto Rico was under military administration following the Spanish-American War, the major federal appointments to Puerto Rico's civil government throughout the first half of the 20th century all complied with the Appointments Clause.

Beginning in 1900 with the Foraker Act, the Governor of Puerto Rico was to be nominated by the President and confirmed by the Senate to a term of four years "unless sooner removed by the President." An Act temporarily to provide revenues and a civil government for Porto Rico, ch. 191, 31 Stat. 77, 81 (1900). The Foraker Act also mandated presidential nomination and Senate confirmation of the members of Puerto Rico's "Executive Council" (which assumed the dual role of executive cabinet and upper chamber of the territorial legislature). The Executive Council consisted of a secretary, an attorney general, a treasurer, an auditor, a commissioner of the interior, a commissioner of education, and five other persons "of good repute." In addition, the Foraker Act also subjected the justices of the Puerto Rico Supreme Court, along with the marshal and judge of the territorial U.S. District Court for the District of "Porto" Rico, to the strictures of the Appointments Clause. Even the three members of a commission established to compile and revise the laws of "Porto" Rico were made subject to the Appointments Clause.

The Foraker Act regime lasted until 1917, when Congress passed the Jones-Shafroth Act. Here again, Congress provided for all key appointments by Washington to Puerto Rico's territorial government to meet the Appointments Clause: the governor, attorney general, commissioner of education, supreme court justices, district attorney, U.S. marshal, and U.S. territorial district judge were to be appointed by the President with the advice and consent of the Senate. In sum, between 1900 and 1947 -- the last time the Island had a federally-selected Governor -- each of the presidentially appointed Governors of Puerto Rico acquired their office after receiving the Senate's blessing.

As the United States would have it, Congress's requirement of Senate confirmation for presidential nominees in all of the aforementioned contexts was mere voluntary legislative surplusage. This position, however, directly contravenes the published opinions of the United States' own Office of Legal Counsel issued as recently as 2007. The original public meaning of 'officer' in Article II includes all federal officials with responsibility for an ongoing statutory duty."). At a minimum, the United States' posture runs head against the sound principle of legislative interpretation bordering on dogma that "'[l]ong settled and established practice is a consideration of great weight in proper interpretation of constitutional provisions' regulating the relationship between Congress and the President." Furthermore, the United States fails to support its assertion with legislative history or other evidence establishing that Congress's largely consistent adherence to Appointments Clause procedures in appointing territorial officials was gratuitous. Lacking such an explanation, we believe it is more probable that Congress was simply complying with what the Constitution requires. Furthermore, that largely consistent compliance with Appointment Clause procedures in hundreds if not thousands of instances over two centuries belies any claim that adherence to those procedures impedes Congress's exercise of its plenary powers within the territories.

The United States, as well as the Board, also point to the manner in which Congress has for centuries allowed territories to elect territorial officials, including for example the governor of Puerto Rico since 1947. Congress created many of these territorial positions and they were filled not through presidential nomination and Senate confirmation, but rather by elections within the territory. The Board's basic point (and the United States' basic point as well) is this: If we find that the Board Members must be selected by presidential nomination and Senate confirmation, then that would mean that, for example, all elected territorial governors and legislators have been selected in an unconstitutional manner.

We disagree. The elected officials to which the Board and the United States point -- even at the highest levels -- are not federal officers. They do not "exercise significant authority pursuant to the laws of the United States." Rather, they exercise authority pursuant to the laws of the territory. Thus, in Puerto Rico for example, the Governor is elected by the citizens of Puerto Rico, his position and power are products of the Commonwealth's Constitution, see Puerto Rico Const. art. IV, and he takes an oath similar to that taken by the governor of a state.

It is true that the Commonwealth laws are themselves the product of authority Congress has delegated by statute. So the elected Governor's power ultimately depends on the continuation of a federal grant. But that fact alone does not make the laws of Puerto Rico the laws of the United States, else every claim brought under Puerto Rico's laws would pose a federal question.

C. The Board Members are Principal Officers of the United States

Having concluded that the Board Members are indeed United States officers, we now turn to the specific means by which they must be appointed pursuant to the Appointments Clause. If the officer is a "principal" officer, the only constitutional method of appointment is by the President, by and with the advice and consent of the Senate. But when an officer is "inferior," Congress may choose to vest the appointment in the President alone, the courts, or a department head. And the Board argues (but we do not decide) that the President appointed the Board Members notwithstanding the restricted choice from congressional lists.

In *Morrison v. Olson*, the Supreme Court held that an independent counsel was an "inferior" officer because she was subject to removal by the attorney general and because she had limited duties, jurisdiction, and tenure, among other factors. More than a decade later, the Court held that an "inferior" officer was one "whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." Our circuit later squared the two cases by holding that Edmond's supervision test was sufficient, but not necessary. Therefore, inferior officers are those who are directed and supervised by a presidential appointee; otherwise, they "might still be considered inferior officers if the nature of their work suggests sufficient limitations of responsibility and authority."

The Board Members clearly satisfy the *Edmond* test. They are answerable to and removable only by the President and are not directed or supervised by others who were appointed by the President with Senate confirmation. Considering the additional *Morrison* factors does not change the calculus. Though the Board Members' tenure "is 'temporary' in the sense that [they are] appointed essentially to accomplish a single task, and when that task is over the [Board] is terminated,", the Board's vast duties and jurisdiction are insufficiently limited. Significantly, while the independent counsel in *Morrison* was unable to "formulate policy for the Government or the Executive Branch," PROMESA explicitly grants such authority. And whereas the jurisdiction of the independent counsel was limited, *Morrison*, the Board's authority spans across the economy of Puerto Rico -- a territory with a population of nearly 3.5 million -- overpowering that of the Commonwealth's own elected officials. Under Edmond and Morrison, the Board Members are "principal" United States officers. They therefore should have been appointed by the President, by and with the advice and consent of the Senate.

THE REMEDY

Having concluded that the process PROMESA provides for the appointment of Board Members is unconstitutional, we are left to determine the relief to which appellants are entitled. Both Aurelius and the UTIER ask that we order dismissal of the Title III petitions that the Board filed to commence the restructuring of Commonwealth debt. In doing so, appellants suggest that we ought to deem invalid all of the Board's actions until today and that this case does not warrant application of the de facto officer doctrine. It would then be on a constitutionally reconstituted Board, they say, to ratify or not ratify the unconstitutional Board's actions. Appellants also request that we sever from 48 U.S.C. § 2121(e) the language that authorizes the Board Members' appointment without Senate confirmation.

There is no question but that in fashioning a remedy to correct the constitutional violation we have found it is unlikely that a perfect solution is available. In choosing among potential options, we ought to reduce the disruption that our decision may cause. But we are readily aided by several factors in this respect.

First, PROMESA itself contains an express severability clause, stating as follows:

Except as provided in subsection (b) [regarding uniformity of similarly situated territories], if any provision of this chapter or the application thereof to any person or circumstance is held invalid, the remainder of this chapter, or the application of that provision to persons or circumstances other than those as to which it is held invalid, is not affected thereby, provided that subchapter III is not severable from subchapters I and II, and subchapters I and II are not severable from subchapter III.

Such a clause "creates a presumption that Congress did not intend the validity of the statute in question to depend on the validity of [a] constitutionally offensive provision." Severability in this instance is especially appropriate because Congress, within PROMESA, has already provided an alternative appointments mechanism, at least as to six of the Board Members. PROMESA directs that if the mechanism we found unconstitutional is not employed, "[w]ith respect to the appointment of a Board member . . . such an appointment shall be by and with the advice and consent of the Senate, unless the President appoints an individual from a list, . . . in which case no Senate confirmation is required."

Accordingly, we hold that the present provisions allowing the appointment of Board Members in a manner other than by presidential nomination followed by the Senate's confirmation are invalid and severable. We do not hold invalid the remainder of the Board membership provisions, including those providing the qualifications for office and for appointment by the President with the advice and consent of the Senate.

Second, we reject appellants' invitation to dismiss the Title III petitions and cast a specter of invalidity over all of the Board's actions until the present day. To the contrary, we find that application of the de facto officer doctrine is especially appropriate in this case.

An ancient tool of equity, the de facto officer doctrine "confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment . . . to office is deficient." A de facto officer is "one whose title is not good in law, but who is in fact in the unobstructed possession of an office and discharging its duties in full view of the public, in such manner and under such circumstances as not to present the appearance of being an intruder or usurper." Our sister court for the D.C. Circuit has described the doctrine as "protect[ing] citizens' reliance on past government actions and the government's ability to take effective and final action."

Here, the Board Members were acting with the color of authority -- namely, PROMESA -- when, as an entity, they decided to file the Title III petitions on the Commonwealth's behalf, a power squarely within their lawful toolkit. And there is no indication but that the Board Members acted in good faith in moving to initiate such proceedings. Moreover, the Board Members' titles to office were never in question until our resolution of this appeal.

Other considerations further counsel for our application of the de facto officer doctrine. We fear that awarding to appellants the full extent of their requested relief will have negative consequences for the many, if not thousands, of innocent third parties who have relied on the Board's actions until now. In addition, a summary invalidation of everything the Board has done since 2016 will likely introduce further delay into a historic debt restructuring process that was already turned upside down once before by the ravage of the hurricanes that affected Puerto Rico in September 2017. At a minimum, dismissing the Title III petitions and nullifying the Board's years of work will cancel out any progress made towards PROMESA's aim of helping Puerto Rico "achieve fiscal responsibility and access to the capital markets."

We therefore decline to order dismissal of the Board's Title III petitions. Our ruling, as such, does not eliminate any otherwise valid actions of the Board prior to the issuance of our mandate in this case. In so doing, we follow the Supreme Court's exact approach in Buckley, which involved an Appointments Clause challenge to the then recently formed Federal Election Commission. Although the Court held that the Commission was in fact constituted in violation of the Appointments Clause, it nonetheless found that such a constitutional infirmity did "not affect the validity of the Commission's . . . past acts,". We conclude the same here and find that severance is the appropriate relief to which appellants are entitled after they successfully and "timely challenge[d] . . . the constitutional validity of" the Board Members' appointment.

Finally, our mandate in these appeals shall not issue for 90 days, so as to allow the President and the Senate to validate the currently defective appointments or reconstitute the Board in accordance with the Appointments Clause. During the 90-day stay period, the Board may continue to operate as until now.

CONCLUSION

In sum, we hold that the Board Members (other than the ex officio Member) must be, and were not, appointed in compliance with the Appointments Clause. Accordingly, the district court's conclusion to the contrary is reversed. We direct the district court to enter a declaratory judgment to the effect that PROMESA's -55- protocol for the appointment of Board Members is unconstitutional and must be severed. We affirm, however, the district court's denial of appellants' motions to dismiss the Title III proceedings. Each party shall bear its own costs.

So ordered.

Reversed in part and **Affirmed** in part.

“Puerto Rico Board Appointment Dispute Gets Supreme Court Review”

Bloomberg

Greg Stohr, Michelle Kaske, and Steven Church

June 20, 2019

The U.S. Supreme Court agreed to hear a case that could upend the work of the oversight board tasked with pulling Puerto Rico out of its record bankruptcy.

The justices will review a federal appeals court ruling that said the Financial Oversight and Management Board’s members were appointed in violation of the Constitution. At the same time, the appellate panel said the board’s past decisions could stay in force, and both sides in the dispute asked the Supreme Court to intervene.

Bondholders led by Aurelius Investment LLC are challenging the board’s composition and aiming to unravel much of its work. A win for Aurelius could threaten two tentative debt-restructuring deals: an accord with creditors of the island’s only electric utility, known as Prepa, and a recent agreement with a group of commonwealth bondholders.

Underscoring the urgency of the case, the high court indicated it will hear it on a faster-than-usual basis, with arguments in October. Both sides had urged expedited review.

“The cloud of uncertainty that now hangs over the board’s actions is intolerable,” the board argued in its appeal.

Along with certifying fiscal plans of the commonwealth and its agencies, the board restructured $4 billion of debt of the island’s former Government Development Bank in November and $17.6 billion of sales-tax debt in February.

On June 16, the board and creditors holding $3 billion of commonwealth bonds announced a tentative restructuring deal that would reduce nearly $18 billion of Puerto Rico debt. The board in 2017 filed bankruptcy for Puerto Rico, the island’s government-owned electric utility and other agencies.

Senate Confirmation

Congress created the board in 2016 as part of federal legislation aimed at solving Puerto Rico’s debt crisis. President Barack Obama picked three Democrats and four Republicans to serve as board members from a list provided by congressional leaders of both parties.

The appeals court said the board members should have been subject to Senate confirmation, as required under the Constitution’s appointments clause. The three-judge panel rejected contentions that a different part of the Constitution governing

U.S. territories overrides the appointments clause when it comes to Puerto Rico.

But the appeals court also refused to categorically invalidate all the board's work. The panel pointed to a legal principle known as the "de facto officer doctrine," under which courts won't nullify actions taken in good faith by someone whose appointment is later declared invalid.

"We fear that awarding to appellants the full extent of their requested relief will have negative consequences for the many, if not thousands, of innocent third parties who have relied on the board's actions until now," Judge Juan Torruella wrote for the court.

In its appeal, Aurelius and its allies said it received "no meaningful remedy." The appeals court "granted Congress free license to pass laws that violate the appointments clause," the bondholders argued.

Aurelius has a history of litigating debt restructurings. It was part of a group of holdout investors that rejected deals to resolve Argentina's debt crisis in a dispute that lasted 15 years. The firm held $360 million of Puerto Rico general obligation bonds and $18.8 million of the island's Highways and Transportation Authority debt, as of March 6, according to court documents.

Retroactive Ratification

A Supreme Court decision favoring Aurelius wouldn't necessarily invalidate past board actions, but it would almost certainly spawn a new round of litigation. One possibility is that a newly appointed board, once confirmed by the Senate, could try to retroactively ratify the prior work.

The Trump administration joined the board in urging the Supreme Court to overturn the appointments-clause part of the ruling. The administration said the lower court's reasoning is so broad it "necessarily implies that the government of Puerto Rico has been unconstitutional since its inception."

The terms of the court's current members expire Aug. 30. Earlier this month, President Donald Trump nominated the current members to complete their terms, a step aimed at minimizing the impact of the appeals court decision going forward.

The lead case is Financial Oversight Board v. Aurelius, 18-1334.

“Update 1- U.S. Supreme Court to Decide Legality of Puerto Rico Financial Board Appointments”

CNBC

Lawrence Hurley

June 20, 2019

The U.S. Supreme Court on Thursday agreed to decide whether members of Puerto Rico’s federally created financial oversight board were lawfully appointed in a dispute that could disrupt the panel’s restructuring of about $120 billion of the bankrupt U.S. commonwealth’s debt.

The justices will hear an appeal by the board after a lower court ruled in February that the 2016 appointments of its seven members violated the U.S. Constitution because they were not confirmed by the Senate.

Creditors challenging the appointments filed appeals separately, asking the Supreme Court to find that the decisions made by the board are invalid because its members were unlawfully installed. The justices also agreed to hear that part of the dispute.

The court scheduled oral arguments for October in a bid to resolve the issue quickly. The board is overseeing the restructuring of debt and pension obligations through a form of bankruptcy.

The legal challenge to the board’s composition was brought in 2017 by Puerto Rico creditors including Aurelius Investment, LLC, a hedge fund that holds Puerto Rico bonds, and Unión de Trabajadores de la Industria Eléctrica y Riego, Inc, a labor group that represents workers at Puerto Rico’s government-owned electricity utility.

Bondholders face losses as a result of debt restructuring while the labor group has said that the board’s proposed restructuring of the utility’s debt would violate the terms of a collective bargaining agreement and lead to its members having worse working conditions.

In an effort to resolve the dispute, the White House on June 18 officially sent nominations for the board’s current members to the Senate. The Trump administration also filed its own appeal to the Supreme Court defending the original appointments.

In the meantime, the oversight board has asked an appeals court to extend a July 15 deadline it set for the board’s seven members to be reappointed or replaced.

“Puerto Rico’s Bankruptcy Plan is Almost Done, and It Could Start a Fight”

New York Times

Mary Williams Walsh

July 14, 2019

After three years of negotiations, Puerto Rico’s federal overseers are at last finishing up a plan to complete the restructuring of the island’s roughly $124 billion in debt. To resolve the biggest government financial collapse in United States history, they have had to untangle the island’s thorny finances, negotiate with creditors and figure out how to do it without endangering the livelihoods of retirees who rely solely on their pensions.

That may have been the easy part.

Some of the island’s creditors — including the hedge fund Aurelius Capital Management, which held up Argentina’s debt settlement for years for a better deal — will almost certainly challenge the plan on the ground that it violates the territory’s 1952 Constitution.

At the center of it all are two intertwined issues. The oversight board wants to cut back the amount paid to some of those who hold the territory’s debt while also giving an unexpectedly good deal to more than 300,000 workers and retirees, some of whom do not even have Social Security. The good deal for the pension holders means a worse one for the holders of Puerto Rico’s debt.

“You can make social and political decisions,” said James E. Spiotto, a longtime municipal bankruptcy lawyer who is not involved in Puerto Rico’s legal proceedings. “But it’s best to have them wrapped up in a settlement that everybody agrees to.”

The plan is expected to be presented to Judge Laura Taylor Swain in Federal District Court in San Juan, P.R., in the next few weeks. But the approach the board has taken could invite titanic legal battles and appeals, Mr. Spiotto said.

“You want resolution, not litigation,” he said. “I think there’s a significant risk to what’s being done.

In many ways, Puerto Rico’s collapse has been uncharted legal territory. It took an act of Congress in 2016 to create the bankruptcy-like law, known as Promesa, that is being used to deal with the crisis.

That has turned Puerto Rico into something of a test case. Although cities and municipalities — most notably Detroit in 2013 — have declared bankruptcy, states are not eligible to do so. But a number of them are dealing with serious financial problems because of pension costs.

A combination of inadequate funding over the decades, a wave of retiring baby boomers and the lingering effects of the 2008 financial crisis has forced states to reduce benefits, increase funding or both. But a few states — including Illinois, New Jersey, Kentucky, Connecticut and Colorado — are still far behind, and more drastic measures may be tempting if Puerto Rico can provide a road map to recovery.

"If this works — if Promesa works and the restructuring works — it may make bankruptcy for states seem like something that lawmakers should be considering a little more seriously," said David A. Skeel Jr., a University of Pennsylvania law professor who is on the oversight board and has written on the possibility of states using bankruptcy. "But if it doesn't work, it would have the opposite effect."

Whether Puerto Rico is able to blaze new ground in the world of government debt restructuring will not be decided until after the courts resolve any challenges to the novel steps the oversight board has taken: its treatment of retirees and an attempt to have $9 billion of its debt declared unconstitutional.

Promesa contains a legal requirement that Puerto Rico "provide adequate funding for public pension systems" — carefully chosen language that has given the island legal cover to keep paying retirees their pensions, even as it defaulted on bonds that would normally have been paid first.

The board has essentially switched the usual order of priority used in bankruptcy: It put workers and retirees, with their roughly $55 billion in pension obligations, near the front of the line, and pushed back the general-obligation bondholders whose investments financed the island over the years.

Under the current proposals, 61 percent of the retirees would keep receiving their full pensions, said Natalie Jaresko, the oversight board's executive director. Other pensions would be cut on a sliding scale, but even those owed the most would get 91.5 percent of their payments. Current employees would be shifted into individual retirement accounts.

That's a better deal than is being offered to the general-obligation bondholders, who would get 64 cents on the dollar, at best. And retirees are being offered a far more generous deal than expected, given that the island's pension system has been stripped bare.

Normally, the money in a pension fund secures the benefits. If an employer goes bankrupt, the participants are still guaranteed benefits based on what has been set aside: A fully funded pension system will pay full benefits, and a partly funded pension system will pay partial benefits.

But there is no money set aside in Puerto Rico. The participants in such a case would normally be considered unsecured creditors — the kind who typically get a fraction of what they're owed. One group of unsecured creditors, trade vendors to the Puerto Rican government, is being offered just 9 cents on the dollar, on average.

The retirees' terms rival those achieved by Detroit's after their city went bankrupt. (Unlike states, cities are eligible for bankruptcy unless prohibited by state law.) Detroit's retired police officers and firefighters are still receiving 100 percent of their original pensions, with smaller annual cost-of-living increases, while other retirees are getting 95.5 percent.

But Detroit's pension funds were said to be about two-thirds funded, and a threat to sell off treasures owned by the Detroit Institute of Arts raised hundreds of millions of dollars more from philanthropic and governmental bodies that were horrified at the idea of pieces by van Gogh, Matisse and others going to private collectors.

At least one company that stands to lose money under the proposed Puerto Rico deal says it is preparing a challenge.

Assured Guaranty, a bond insurer with exposure to some of Puerto Rico's debt, said it was ready to go to court because the deal threatened to "significantly erode the municipal bond market's confidence" and make it harder for governments to take on big projects.

The proposed deal, the insurer said, is based on "a number of terms that violate Puerto Rico law, its Constitution and Promesa."

Under the island's Constitution, general-obligation bondholders are said to have "first claim" on "all available resources" of the government to ensure the repayment of their roughly $17 billion of bonds.

But they're being offered less than the pension holders, who are being offered more than 90 percent of what they're owed. Some general-obligation bondholders are being offered 64 cents on the dollar, but others are being offered less as part of a hardball negotiating tactic by the oversight board.

The board said this year that it would challenge the validity of several billion dollars' worth of bonds, including general-obligation bonds that were brought to market in 2012 and 2014. It says that those bonds were issued in violation of Puerto Rico's constitutional debt ceiling, and that the people of Puerto Rico should not have to repay them.

As a result, only the general-obligation bonds issued before 2012 would pay the proposed 64 cents on the dollar. Investors who hold the bonds issued in 2012 are being offered 45 cents, and those holding the 2014 vintage are being offered 35 cents.

Many holders of the older bonds are expected to take their 64 cents and be done with it. But holders of the 2012 and 2014 bonds — including Aurelius — are likely to sue.

Aurelius declined to comment on its plans. But it has already sued Puerto Rico, contending that the island must respect its constitutional pledge of using "all available resources" to ensure repayment. That suit has been stayed while the oversight board works on its plan, but any challenge could use the same argument.

Aurelius could also use the legal argument that got results in the Argentine case: that the restructuring plan illegally discriminates against the holders of similar bonds.

Such lawsuits would be an all-or-nothing gamble. If the bondholders won, they would get the same 64 percent repayment rate as the holders of the older bonds. If the board won, the bonds would be voided and the bondholders would get nothing.

That group of bondholders has some company in opposing the deal. Puerto Rican teachers — who would be moved into individual retirement accounts under the deal — voted against it in an early ballot, even though the American Federation of Teachers had urged a yes vote.

Retired teachers will not cast ballots until after the restructuring plan is introduced in court.

"Puerto Rico Faces Hedge Fund Lawsuits as U.S. Reprieve Ends"

Bloomberg

Michelle Kaske

May 2, 2017

Puerto Rico is facing a fresh round of creditor lawsuits after a temporary reprieve on litigation was lifted, exposing the distressed Caribbean island to the consequences of the defaults on much of its $70 billion of debt.

Hedge funds holding $1.4 billion of general-obligation bonds sold in 2014, including Aurelius Capital Management and Monarch Alternative Capital, sued the commonwealth in New York state court in Manhattan, seeking payment on overdue principal and interest. Insurer Ambac Financial Group Inc. and funds that own sales-tax backed bonds sued in the U.S. District Court of San Juan in an effort to block the government from spending that money before bondholders are paid.

"They're breaking every agreement and security feature they set up to borrow the money," said Daniel Solender, head of municipals at Lord Abbett & Co., which manages $19 billion of state and local debt, including commonwealth securities. "The creditors have to challenge that because the rules have been broken."

The cases filed Tuesday are the first of what's expected to be a wave of new legal challenges from investors seeking to force the U.S. territory to pay what it owes. With the government so far unable to reach an agreement with bondholders, such lawsuits threaten to expose Puerto Rico to adverse legal rulings and could lead the island and its federal overseers to use bankruptcy-like procedures to cut its debts in court.

That process was created under U.S. legislation enacted last year to help Puerto Rico arrest its fiscal crisis, given the difficulty of restructuring debt sold by more than a dozen agencies and backed by varying legal pledges. Analysts have speculated that Puerto Rico would need to utilize such a court-supervised proceeding to force creditors to accept losses.

The lawsuits, similar to others that were filed months ago, came after a stay imposed by the federal rescue law lapsed on Monday night.

In one of the new cases, funds holding about $1.9 billion of senior sales-tax bonds know as Cofinas -- including those run by Whitebox Advisors, Merced Partners and Tilden Park Capital Management -- sued Governor Ricardo Rossello and his administration to stop a fiscal plan that diverts the revenue to the commonwealth's general fund, which they said violates the U.S. and Puerto Rico constitutions. Such shifts raise the risk that the island will default on the bonds, and the fiscal plan doesn't specify which creditors have the highest legal claim to the small share of money allocated to bondholders.

Puerto Rico has already defaulted on its general-obligation bonds, the securities behind the lawsuit filed in New York state court.

Senior Cofinas with a 6.05 percent coupon and maturing in 2036, the most-actively traded sales-tax bonds in the past three months, changed hands Tuesday at an average 61.3 cents on the dollar, up from an average 60.4 cents the day before, data compiled by Bloomberg show. General obligations due in 2041, the most active Tuesday, traded for an average of 59.5 cents on the dollar, up from 59.1 cents Monday.

Yennifer Alvarez, a spokeswoman for the governor, didn't immediately respond to a phone message and email.

Ambac, which insures about $1.3 billion of senior Cofinas, filed a similar suit against Rossello and the members of Puerto Rico's federal oversight board, asking the court to declare the fiscal plan unconstitutional and illegal because it requires using sales-tax revenue for general-fund expenses.

Jose Luis Cedeno, a spokesman for the federal oversight board, didn't have an immediate comment.

While negotiations between Puerto Rico and its creditors have so far failed to produce a restructuring deal, the commonwealth is still engaged in "meaningful conversations" with certain bondholders and creditor groups, Gerardo Portela Franco, executive director of the island's Fiscal Agency and Financial Advisory Authority, said in a statement Monday.

The cases are Aristeia Horizons LP v. Rossello, 17-01566; and Ambac Assurance Corp. v. Commonwealth, 17-01567, both in U.S. District Court, District of Puerto Rico (San Juan). Aurelius Investment LLC v. Commonwealth of Puerto Rico, 652357/2017, New York State Supreme Court, New York County (Manhattan.)

"First Circuit Declares Appointment of FOMB Members Violates Appointments Clause"

Law.com

Carlos J. Cuevas

March 1, 2019

[Excerpt; some citations and footnotes omitted]

The Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) is the federal legislation that was enacted to provide a special bankruptcy framework for Puerto Rico. 48 U.S.C. §§2101 et seq. An important component of PROMESA is the establishment of a Financial Oversight Board (FOMB) with oversight powers over the financial affairs of the Puerto Rican government and sole authority over the Puerto Rico bankruptcy cases. 48 U.S.C. §§2121(b), 2121(d), and 2124(j)(1). The members of the FOMB are appointed by the President. 48 U.S.C. §2101(e)(2).

In *Aurelius Investment v. Commonwealth of Puerto Rico*, 2019 WL 642328 (1st Cir. 2019) the U.S. Court of Appeals for the First Circuit held that the appointment of the members of the FOMB (the Board Members) violated the Appointments Clause of the U.S. Constitution. The Board Members are officers of the United States, and therefore they are subject to Senate confirmation. However, the court refused to dismiss the Puerto Rico bankruptcy case. The First Circuit ruled that under the de facto officer doctrine the acts of the FOMB were lawful because the Board Members of the FOMB had acted under color of law and it would be counter-productive to negate the actions of the FOMB because thousands of people have relied upon the acts of the FOMB. The court stayed enforcement of its decision for ninety days to allow the FOMB to function and to permit the Board Members of the FOMB to go through the Senate confirmation process.

Discussion

The Territorial Clause of the U.S. Constitution Does Not Supersede the Appointments Clause of the U.S. Constitution. The first issue that the court addressed was whether the Territorial Clause of the U.S. Constitution superseded the Appointments Clause of the U.S. Constitution. The Territorial Clause provides Congress with the following authority over the territories of the United States:

> power to dispose of and make all needful Rules and Regulations respecting the Territory … belonging to the United States.

The Appointments Clause states:

> [The President] … shall nominate, and by and with the Advice and Consent of the Senate, shall appoint … all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The court thought that the resolution of this issue was a straightforward issue of Constitutional interpretation. The Territorial Clause was a general clause in the U.S. Constitution. The Appointments Clause was a specific clause. An important principle of Constitutional interpretation is that the specific governs over the general. The First Circuit stated:

> Nowhere does the Territorial Clause reference the subject matter of federal appointments or the process to effectuate them. On the other hand, federal officer appointment is, of course, the raison d'etre of the Appointments Clause. It cannot be clearer or more unequivocal that the Appointments Clause mandates that it be applied to "*all* … Officers of the United States." U.S. Const. art II, §2, cl. 2 (emphasis added). Thus, we find in answering the first question before us a prime candidate for application of the specialibus canon and for the strict enforcement of the constitutional mandate contained in the Appointments Clause.

The court also rejected the argument that the Insular Cases negated the operation of the Appointments Clause in Puerto Rico:

> Finally, nothing about the "Insular Cases" casts doubt over our foregoing analysis. This discredited lineage of cases, which ushered the unincorporated territories doctrine, hovers like a dark cloud over this case. To our knowledge there is no case even intimating that if Congress acts pursuant to its authority under the Territorial Clause it is excused from conforming with the Appointments Clause, whether this be by virtue of the "Insular Cases" or otherwise. Nor could there be, for it would amount to the emasculation from the Constitution of one of its most important structural pillars. We thus have no trouble in concluding that the Constitution's structural provisions are not limited by geography and follow the United States into its unincorporated territories. (Footnotes omitted).

The Members of the FOMB Are Principal Officers of the United States. The next issue that the First Circuit addressed was whether the Board Members are officers of the United States. The court applied a three-part test to determine whether Board Members are "Officers of the United States" and therefore subject to the Appointments Clause. The three-part test was derived from Supreme Court case law:

> (1) the appointee occupies a "continuing" position established by

> federal law; (2) the appointee "exercis[es] significant authority"; and (3) the significant authority is exercised "pursuant to the laws of the United States."

A Board Member has a "continuing position" under a federal law because PROMESA provides for his or her appointment to an initial term of three years and he or she can thereafter be reappointed and serve until a successor takes office. A Board Member exercises significant authority because the FOMB has sole authority over the Puerto Rico bankruptcy case. The FOMB has the authority to countermand Puerto Rico laws or regulations that are inconsistent with PROMESA. Board Members, moreover, exercised significant authority pursuant to federal law:

> Third, the Board Members' authority is exercised "pursuant to the laws of the United States." The Board Members trace their authority directly and exclusively to a federal law, PROMESA. That federal law provides both their authority and their duties.

The court also held that the Board Members are "principal" officers, and thus, must be nominated by the President and confirmed by the Senate. An "inferior" officer is not subject to the Appointments Clause. An "inferior" officer was a government official whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate. On the other hand, Board Members are only answerable to and only removable by the President and are not directed or supervised by others who were nominated by the President and confirmed by the Senate.

The Remedy and the Application of the De Facto Officers Doctrine. The First Circuit was averse to dismissing the Puerto Rico bankruptcy case. The court stated:

> Second, we reject appellants' invitation to dismiss the Title III petitions and cast a specter of invalidity over all of the Board's actions until the present day. To the contrary, we find that application of the *de facto* officer doctrine is especially appropriate in this case.

The court applied the de facto officer doctrine:

> An ancient tool of equity, the *de facto* officer doctrine "confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment … to office is deficient."

The facts warranted the application of the de facto officer doctrine. The Board Members were acting under color of authority. The Board Members acted in good faith. Until the resolution of this appeal there was never any question of the Board Members' authority under PROMESA.

The First Circuit applied the de facto officer doctrine because of prudential considerations:

> We fear that awarding to appellants the full extent of their requested relief will have negative consequences for the many, if not thousands, of innocent third parties who have relied on the Board's actions until now. In addition, a summary invalidation of everything the Board has done since 2016 will likely introduce further delay into a historic debt restructuring process that was already turned upside down once before by the ravage of the hurricanes that affected Puerto Rico in September 2017.

The First Circuit did not invalidate any of the FOMB's actions. The court stayed the enforcement of its Decision and Order for 90 days to enable the Board Members to be confirmed by the Senate.

Conclusion

The First Circuit reached a legally correct decision that is equitable and pragmatic. The court was cognizant of the potential irreparable damage that its decision could do to Puerto Rico. In essence, the court applied what was the equivalent of the equitable mootness doctrine because after almost two years it declined to unravel the Puerto Rico bankruptcy case. The dismissal of the Puerto Rico bankruptcy case would have resulted in the dissolution of the automatic stay, and unmanageable litigation that could have destroyed Puerto Rico. If the Puerto Rico bankruptcy case had been dismissed, then millions of dollars in professional fees incurred by Puerto Rico could have been wasted. Therefore, the First Circuit reached the correct equitable and legal conclusion.