No. A19A0076

IN THE COURT OF APPEALS OF GEORGIA

INSTITUTE FOR JUSTICE,

Plaintiff-Appellant,

v.

WILLIAM L. REILLY, IN HIS OFFICIAL CAPACITY AS CLERK OF THE GEORGIA HOUSE OF REPRESENTATIVES; DAVID A. COOK, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE GEORGIA STATE SENATE; MARTHA WIGTON, IN HER OFFICIAL CAPACITY AS DIRECTOR OF THE BUDGET & RESEARCH OFFICE OF THE GEORGIA HOUSE OF REPRESENTATIVES; MELODY DEBUSSEY, IN HER OFFICIAL CAPACITY AS DIRECTOR OF THE BUDGET & EVALUATION OFFICE OF THE GEORGIA STATE SENATE; ELIZABETH HOLCOMB, IN HER OFFICIAL CAPACITY AS DIRECTOR OF THE RESEARCH OFFICE OF THE GEORGIA STATE SENATE; AND RICHARD C. RUSKELL, IN HIS OFFICIAL CAPACITY AS LEGISLATIVE COUNSEL,

Defendants-Appellees.

On Appeal from the Superior Court of Fulton County, State of Georgia
(Civil Action File No. 2016CV281578)

REPLY BRIEF OF APPELLANT INSTITUTE FOR JUSTICE

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INTRODUCTION

Appellees' "response" brief does not respond to, or even acknowledge, most of the issues presented in this appeal, which ultimately turns on a straightforward question of statutory interpretation: Given that the Open Records Act's text is concededly "all-encompassing" (Appellees Br. 6), should it be construed to include the legislative offices named as defendants here? The statute provides its own answer: "[T]here is a strong presumption that public records should be made available for public inspection without delay," and courts must "broadly construe[]" the statute, resolving any uncertainty in favor of openness. O.C.G.A. § 50-18-70(a).

Appellees pretend that this statutory language does not exist, and that the Assembly required openness for every organ of government except its own offices. But the Open Records Act provides only a tailored exemption for *particular* legislative records—clearly indicating that all others are subject to the Act. Appellees have no explanation for this statutory provision. Instead, they ask the Court to blindly follow a four-decades-old case construing a different statute—one lacking any parallel provisions or rule of construction and addressing a procedural rule constitutionally committed to each House. That is not how statutory construction works.

Perhaps recognizing that the Act speaks plainly and requires production of the records that IJ seeks, Appellees resort to the novel and remarkable argument that the courts lack the jurisdiction the General Assembly granted them: "to entertain actions

against" State record-holders and "to enforce compliance with" the Act. O.C.G.A. § 50-18-73(a). They contend the Georgia Constitution allows the Assembly's employees to refuse to comply with a statute in which the Assembly named them and thereby granted the public access to their records.

No court has ever read the Georgia Constitution to provide the expansive immunity Appellees seek—and other states have rejected the same argument they advance. Indeed, Georgia courts have regularly entertained suits against legislative officials in their official capacities, and Georgia's civil procedure statutes make provision for such suits to minimize their burdens.

There are also no political questions for this case to resolve. The political branches have settled them, by enacting legislation that applies to the Legislative Branch and expressly vests the courts with jurisdiction to hear disputes under the Act. All that remains is for this Court to enforce the law they passed—the classic judicial function.

The Court should see Appellees' new arguments for what they are—a last-ditch effort to avoid the plain terms of the Open Records Act—and reverse.

ARGUMENT

Each of the arguments put forth by Appellees is specious.

Appellees' primary submission is that this Court should cast aside the statutory text and principles of construction that ought to decide this case, in favor of an

interpretation of the Open Records Act that Appellees concede is contrary to the Act's plain meaning and structure. They are forced to make this remarkable, and erroneous, argument because the Act by its terms applies to the legislative "offices" at issue here.

As a fallback position, Appellees argue that the Legislative Counsel can evade responding to records requests by asserting that he *should* not have records, without actually denying so and without judicial review. The Act again says otherwise.

Sounding a full retreat from all principles of statutory construction, Appellees finally advance two quasi-constitutional doctrines—"political question" and "legislative immunity"—in an effort to convince the Court it lacks jurisdiction to decide the issue at all. Neither applies.

I. The Open Records Act Applies to Legislative Offices

In denying IJ's request to see how the laws of this State are made, the Legislative Counsel quipped, "The three cardinal rules of statutory interpretation are: (1) Read the statute; (2) Read the statute; (3) Read the statute." R-99. Appellees have decided not to heed this advice. They do not address any of the Open Records Act's unmistakable demonstrations that it applies to their records.

First, like the superior court, Appellees never once acknowledge that the statute's text supplies its own rules of construction, requiring courts to presume its application broad and its exceptions narrow. O.C.G.A. § 50-18-70(a). In other words,

for the Open Records Act, the General Assembly enacted the *opposite* of the presumption in *Harrison Co. v. Code Revision Comm'n*, 244 Ga. 325 (1979), and *Coggin v. Davey*, 233 Ga. 407 (1975), against application of a statute to certain parts of government.

Second, Appellees *concede* that the words the statute uses to define "agency" are "all-encompassing"—and even that the Legislative Branch is a "department" under the Act's plain meaning. Appellees Br. 6.

Third, Appellees have no explanation for why the provision excepting certain records of the Legislative Counsel, O.C.G.A. § 28-4-3.1—which, they observe, must serve a different function than "the attorney-client privilege or any other privilege," Appellees Br. 19—would be necessary or what application it could have if the Act did not apply to the Legislative Branch *at all*. Settled canons of construction prohibit such a reading. IJ Br. 11-14.

Appellees note that the Assembly relocated Section 28-4-3.1 into Title 28 from its former home in Title 50. Appellees Br. 11 n.4. But they offer no explanation why this move makes any difference, when the section's explicit purpose is to exempt certain records from "inspection or disclosure *under Article 4 of Chapter 18 of Title 50*." O.C.G.A. § 28-4-3.1 (emphasis added).

Fourth, rather than grapple with the statutory text, Appellees rest their entire argument on *Coggin*, a case about the Open Meetings Act, *not* the Open Records

Act at issue here. Further, the plaintiffs in *Coggin* "sought a declaration" that the Open Meetings Act was applicable to the Legislature generally, 233 Ga. at 408, while this case is solely about record-keeping *officials* who happen to be in the Legislative Branch.

Appellees argue that because the statute in *Coggin* used some of the same words as are in the Open Records Act, and *that* statute did not apply to the General Assembly, the Act cannot apply to the records-keeping offices at issue here. That is not how statutory construction works—another point Appellees ignore. IJ Br. 19-20. That is especially so given the entirely different *language* and *subject matter* of the Open Records Act. *See id.* at 20-23. The statute in *Coggin* lacked any rule of construction or mention of the Legislative Branch. And it did not include "offices." Contrary to Appellees' argument (at 9 n.3), there is every reason to think that the term "office" would include the offices named here, even if "department" does not. IJ Br. 19. And as all agree (IJ Br. 20; Appellees Br. 7, 9-10; R-670-71), *Coggin* was grounded on the notion that each House is free to set its own rules of procedure. Access to existing records is not such a rule. IJ Br. 20-21. Nor does it conflict with either chamber's rules. *Id.* at 21.

And like *Coggin*, the Attorney General opinions Appellees cite also concern construction of the Open Meetings Act. By contrast, the Attorney General has said

that all documents not expressly exempted from the Open *Records* Act must be open to the public. IJ Br. 16.

Finally, Appellees astutely observe that the General Assembly says what the law is. Appellees Br. 15-16. It has done so by enacting a law requiring Appellees here—individuals who head its records-keeping offices—to open their records to the public. Appellees' *litigating position* is not the law; it is an attempt to *evade* the law—a fact made plain by Appellees' argument that they have unreviewable "discretion as to whether to follow the statutory open records provisions here." *Id.* at 28. If the General Assembly would like the Open Records Act to no longer be interpreted in favor of open government, and to no longer include every department and office of the state, it needs to pass legislation amending the Act to that effect—and bear the political consequences and public outcry that might attend legislative secrecy. *That* action—passing legislation—is how the Assembly "says what the law is." *See* Ga. Const. art. III § V.

II. IJ's Records Requests Seek Nonexempt Information from the Office of Legislative Counsel

Appellees also fail to defend the superior court's alternate ruling dismissing the Legislative Counsel on the *assumption* that he possesses no responsive, nonexempt records. He *still* refuses to say whether he possesses any such records. Instead, he argues that, given his statutory duties, he *should* not have any. Appellees Br. 18-

19. He is wrong—the statute does not foreclose the Legislative Counsel from possessing *any* records, IJ Br. 26-28—and that is not the question in any event. The public could not "evaluate" whether government officials are following the law—a core purpose of the Act, O.C.G.A. § 50-18-70(a)—if officials could respond to any request by pointing to the law and noting that they are *supposed to* follow it. By accepting this nonresponse, the superior court violated its duty to construe the complaint against dismissal, and save factual disputes for later. *See* IJ Br. 10, 25, 28; Appellees Br. 1.

In fact, the Legislative Counsel's brief *confirms* he may have responsive, nonexempt records.

As IJ explained, the second paragraph of its request seeks all documents related to enforcement actions; the Legislative Counsel may have enforcement-*related* documents even if he does not enforce the law himself. IJ Br. 25-27.

And the Legislative Counsel may possess numerous nonexempt records related to the first paragraph. As he does not deny, communications with third parties like special-interest groups (whether received or sent) would not be exempt; nor would research, floor debates, or committee meetings. IJ Br. 27-28, 32-33. The Legislative Counsel also notes that he may disclose other documents with the permission of an Assembly member. Appellees Br. 19. He does not say whether he has sought or received such permission. If any responsive documents exist, he

needed to produce them within three days; if they do not, he needed to certify to that effect. IJ Br. 26-29. He did neither.

Even though the Legislative Counsel has violated the Act, he argues that his records are immune from judicial review under Section 28-4-3.1. Appellees Br. 20-21. This argument rests on a misconstruction of the statute, as IJ explained. IJ Br. 34-35. As the Legislative Counsel himself acknowledges, only "such communications" as Section 28-4-3.1 *actually exempts* are immune from disclosure "under judicial process." Appellees Br. 20. To determine if records *are* exempt, the agency must first produce a privilege log and the judge must review the supposedly exempt records—as IJ explained (IJ Br. 29-35) and the Legislative Counsel fails to address. He also does not address the Supreme Court precedent interpreting the phrase "under judicial process" or the dual presumptions in favor of judicial review and narrow constructions of Open Records Act exemptions (*id.* at 34-35)—except to denounce the entire principle of judicial review as transgressing the "separation of powers." Appellees Br. 20-22.

III. The Construction of the Open Records Act Is a Justiciable Issue

Unable to show that the Open Records Act exempts them from compliance, Appellees ask the Court not to decide the issue at all. These arguments smack of desperation.

Appellees first argue that the construction of the Act is "not judicially reviewable." Appellees Br. 28. But the General Assembly has never viewed it that way: It provided the superior courts with jurisdiction to hear this suit. O.C.G.A. § 50-18-73. The political branches have spoken, and they have subjected the Assembly to the Open Records Act. The Legislative Counsel may represent the Assembly in court, but that does not entitle him to nullify legislation actually passed by the Assembly by declaring it unenforceable.

Appellees' own cases find justiciable issues, not barred by the political-question doctrine. *See Thompson v. Talmadge*, 201 Ga. 867, 875 (1947) (determining which person is properly the Governor); *Baker v. Carr*, 369 U.S. 186, 237 (1962) (proportional representation). Georgia courts may hear a case that "has political overtones"; if the case "may be decided by the application of the facts and the reading of the … documents in a straightforward and impartial manner," it "does not present a purely political question." *Owens v. City of Greenville*, 290 Ga. 557, 558 (2012); *see also Bibb Cty. v. Monroe Cty.*, 294 Ga. 730, 734 (2014) ("alleged violations of the boundary dispute statute by the Secretary [of State] are not non-justiciable 'political questions'"); *Airport Auth. of City of St. Marys v. City of St. Marys*, 297 Ga. App. 645, 647 (2009) ("The rule [against adjudicating political questions] has no application where, as here, the parties' relationship is governed by a lease.");

Bowen v. Griffith, 258 Ga. 162, 163 (1988) (whether "acceptance of county funds in excess of [the] statutory salary" is permissible is not a "political question").

Appellees nonetheless argue (at 23-24) that the Assembly can never bind itself *or its employees*—or, at least, not for any longer than two years, when a new Assembly is convened. In other words, Appellees are above the law. Appellees have never explained how to reconcile this view with the numerous cases in which legislative officials are named as defendants in their official capacities and Georgia courts decide whether the Assembly has subjected itself to a statute. *See*, *e.g.*, *GeorgiaCarry.Org, Inc. v. Code Revision Comm'n*, 299 Ga. 896, 896-97 (2016) (defendants were "the Code Revision Commission and its members, David Ralston, in his official capacity as Speaker of the House of Representatives of Georgia, Lowell Cagle, in his official capacity as President of the Senate of Georgia, and Governor Nathan Deal"); *Murphy v. Am. Civil Liberties Union of Ga.*, 258 Ga. 637, 637 (1988) (defendants were "several leaders of the General Assembly"); *Harrison*, 244 Ga. at 327 (defendants were the Code Revision Commission and its individual members); *Coggin*, 233 Ga. at 408 ("The defendants were a member of the Senate and a member of the House of Representatives."). Instead of declaring such questions non-justiciable, the Supreme Court has adopted a narrower rule: So long as the Legislative

Branch is "named" in a statute "or the intent that it be included be clear and unmistakable," the Court will find that the Assembly has subjected itself to a statute. *Harrison*, 244 Ga. at 328 (citing *Coggin*, 233 Ga. 407).

Indeed, the Georgia Code—in a provision Appellees have previously employed in this case (R-133-69)—specifically contemplates lawsuits against members or officers of the Assembly, providing that they may obtain a stay while the Assembly is in session and under other conditions. *See* O.C.G.A. § 9-10-150. Likewise, the Assembly created the Office of Legislative Counsel and empowered that Office "to represent the interests of the legislative branch in matters involving litigation," *id.* § 28-4-3(c)(4). These provisions—like the grant of jurisdiction over this case—would be meaningless if suits against Legislative Branch officials inherently violated the separation of powers.

Unsurprisingly, Appellees' cases do not say that a legislature can never bind itself or subject itself to suit. They address the right of "[e]ach house" to "determine its rules of procedure." Ga. Const. art. III, § IV, ¶ IV. This obvious point arguably may affect open-meetings statutes (*see Mayhew v. Wilder*, 46 S.W.3d 760, 770 (Tenn. Ct. App. 2001); *Hughes v. Speaker of the New Hampshire House of Representatives*, 876 A.2d 736, 744 (N.H. 2005)), but the Open Records Act has nothing to do with the "rules of procedure" of a house. It is purely backwards-looking, requiring disclosure only of already-existing records. *See* IJ Br. 20-21; Appellees Br.

27. Indeed, Appellees admit that there is no textual commitment of open records issues that would prohibit the General Assembly from binding itself: "the Constitution does not otherwise provide for open records." Appellees Br. 27 n.5.

Moreover, this case presents only the Act's application to public officials, not to the Assembly itself. Legislative officials still must comply with normal legislation. A legislative official cannot, for example, hit someone with his car on the job and plead unwaivable legislative immunity when sued for personal injury because it was the *previous* General Assembly that passed the tort claims statute. *See* Ga. Const. art. I, § II, ¶ IX; O.C.G.A. § 50-21-23 (waiving sovereign immunity for tort claims).

Likewise, the provision of the Georgia Constitution stating that "[n]o law enacted by the General Assembly shall be construed to limit its powers," Ga. Const. art. III, § VI, ¶ III, refers solely to the powers the Constitution grants the Assembly—i.e., "the power to make all laws not inconsistent with this Constitution" (*id.*, § VI, ¶ I) and "the power to provide by law for" the subjects listed in Article III, Section VI, Paragraph II. *See City of Fort Oglethorpe v. Boger*, 267 Ga. 485, 486 (1997) (General Assembly could not limit its own "plenary" "power to annex municipal property"); 72 Am. Jur. 2d States, Territories and Dependencies § 40 (2017) ("[A] state legislature has unlimited power to act in its sphere of legislation and to pass any law it sees fit …. One legislature does not have the power to restrict the power

of the succeeding legislature."). The Open Records Act limits none of those powers. It does not affect the Assembly's ability to make any law whatsoever.

IV. Legislative Privilege Does Not Immunize Appellees from Defending This Lawsuit

Appellees' final argument is that the Georgia Legislative Privilege Clause prohibits all suits, of any nature, against Legislative Branch officials. Not so. The Clause provides a "[p]rivilege" by which "[n]o member [of the General Assembly] shall be liable to answer in any other place for anything spoken in either house or in any committee meeting of either house." Ga. Const. art. III, § IV, ¶ IX. On its face, nothing in the Clause applies to this lawsuit. This lawsuit does not name as a party, or seek to hold liable in any way, any member of the Assembly. Nor does it seek to hold *anyone* liable to answer for anything spoken in the Assembly or a committee meeting. It merely seeks records from certain Legislative Branch officials. Georgia courts have never held that the Clause provides any sort of immunity for officials of the General Assembly when they are sued in their official capacities. Indeed, the Supreme Court has noted the absence of cases considering immunity for "State legislators"; has applied legislative privilege only to personal-capacity suits; and has held only that the Clause prohibits "inquir[ing] into the motives of a municipal council in the enactment of an ordinance." *Village of N. Atlanta v. Cook*, 219 Ga. 316, 319 (1963); *see Saleem v. Snow*, 217 Ga. App. 883, 886 (1995) (Parole Board passing legislation by delegation is also immune).

Here, Appellees were named only in their official capacities, not in their personal capacities. "While suits against public employees in their personal capacities involve official immunity, suits against public employees in their official capacities are in reality suits against the state and, therefore, involve sovereign immunity." *Gilbert v. Richardson*, 264 Ga. 744, 750 (1994) (citation omitted). Thus, in *Gilbert*, the Supreme Court held that a sheriff sued in his official capacity could not claim the benefit of an official-immunity defense; he only shared the county's sovereign immunity defense—which Appellees do not claim here—and only to the extent that defense had not been waived. *Id.* at 754.

In a related context, the Supreme Court held that the privileges attendant to state action, including those motivated by separation-of-powers concerns—such as "the 'secrets of state' privilege" and "'executive privilege'"—do not apply to Open Records Act requests. *Hardaway Co. v. Rives*, 262 Ga. 631, 634-35 (1992). Likewise, no "judicially construed" legislative immunity or privilege can defeat application of the Open Records Act or litigation to enforce it. *Id.* at 635.

This is confirmed by the fact that Appellees, including the Office tasked with representing the Legislative Branch, were (apparently) unaware of their supposed "absolute" immunity when they responded to IJ's records request and subsequent amendment of that request, and when they filed their original motions to dismiss. *See* IJ Br. 4-6.

Against all this, Appellees offer only decisions from *other* jurisdictions applying clauses that materially differ from the Georgia clause. *See Copsey v. Baer*, 593 So. 2d 685, 686 n.2 (La. Ct. App. 1st Cir. 1991) ("No member shall be questioned elsewhere for any speech in either house."); U.S. Const. art. I, § 6, cl. 1 (prohibiting "question[ing]" members of Congress "in any other Place" for "any Speech or Debate in either House"). These clauses refer generally to "questioning," while the Georgia clause is limited to issues of *liability*.

Both principles of Georgia constitutional construction and the history of the Georgia clause confirm that it must be narrowly construed. "In construing a constitutional provision, the ordinary signification shall be applied to words." *Georgia Dep't of Nat. Res. v. Ctr. for a Sustainable Coast, Inc.*, 294 Ga. 593, 598 (2014) (citation omitted). As a result, the Georgia Legislative Privilege Clause "is not affected by language in federal opinions taking an expansive view of the term[s]" in the federal constitution. *Roberts v. Deal*, 290 Ga. 705, 710 n.6 (2012). And as Appellees note (at 30-31), the Georgia clause was revised to add coverage for committee meetings in 1983. That revision would be superfluous if the Georgia clause were interpreted as broadly as the Federal Speech or Debate Clause. The U.S. Supreme Court admits that its construction of the federal clause is "a practical rather than a strictly literal reading"—which is why it has read the federal clause, which does not mention committee meetings, to protect "committee hearings." *See Hutchinson v.*

Proxmire, 443 U.S. 111, 124 (1979). If the Georgia clause mirrored the federal clause, there would have been no need for the drafters to revise it shortly after *Hutchinson* to include committee meetings.

In addition, more recent decisions—even ones applying broader provisions like the Louisiana and federal clauses—have rejected Appellees' argument. The District of Columbia's highest court recently interpreted D.C.'s open-records statute, "D.C. FOIA," as *not* affected by D.C.'s version of the Speech and Debate Clause, the "Legislative Privilege Act." *Vining v. Council of D.C.*, 140 A.3d 439, 443-49 (D.C. 2016). The D.C. Court of Appeals held that D.C.'s clause was limited to its "text," notwithstanding the broader interpretation some federal courts have given the similarly worded federal clause. *Id.* at 446. That text, the court explained, only "prohibits 'question[ing]' Councilmembers 'in any other place' regarding 'any speech or debate made in the course of their legislative duties,'" so it provides no exception to D.C. FOIA. *Id.* (citation omitted). The presence of specific legislative exemptions in D.C. FOIA—similar to the specific, but narrow, legislative exemption in the Open Records Act, *see* IJ Br. 11-15—also supported this reading. *Vining*, 140 A.3d at 446. The Council (D.C.'s equivalent of a legislature) would not have passed these exemptions "had the Council already enjoyed broad protection under … the Legislative Privilege Act." *Id.* And since "[t]he Council chose to apply FOIA to itself," it could not invoke legislative privilege to defeat its application. *Id.* at 447.

The D.C. Court of Appeals further explained that, even if the Federal Speech or Debate Clause were relevant to interpretation of D.C.'s clause, cases interpreting the federal clause "have never held that the Speech or Debate Clause constitutes a basis for withholding documents" under the federal Freedom of Information Act, "for the simple reason that federal FOIA does not apply to Congress." *Id.* at 448. For these reasons, the court "conclude[d] that the Council may not duck its obligation to make full disclosures under the statute by invoking the Legislative Privilege Act." *Id.* at 447.

It is even clearer that the Georgia Legislative Privilege Clause does not prohibit this lawsuit, both because the Georgia clause is narrower and because Appellees are merely record-keeping officials, *not* anyone legislating.

And to the extent there are responsive documents that are "political in nature," *United States v. Brewster*, 408 U.S. 501, 512 (1972), or "administrative," *Bryan v. City of Madison, Miss.*, 213 F.3d 267, 273 (5th Cir. 2000), such documents would not be protected even under an interpretation of the broader Federal Speech or Debate Clause. The same is certainly true for Georgia's clause here.

Moreover, even if Appellees did possess some form of legislative immunity, the General Assembly has waived that immunity by passing legislation that unambiguously applies to the Legislative Branch and waiving any supposed immunity from suit by providing this Court with subject-matter jurisdiction to hear cases like

this one. *See* O.C.G.A. § 50-18-73. Appellees cannot excuse their refusal to comply with the Act by asserting legislative privilege because "[t]he force compelling [legislative officers] to disclose [their] records is none other than legislation drafted by the [Assembly] itself." *Vining*, 140 A.3d at 449.

For Appellees to assert that their employer's own law is unconstitutional as applied to themselves demonstrates "that quality enshrined in a man who, having killed his mother and father, throws himself on the mercy of the court because he is an orphan"—that is, "chutzpah." *Motorola Credit Corp. v. Uzan*, 561 F.3d 123, 128 n.5 (2d Cir. 2009).

CONCLUSION

One wonders what Appellees are so keen to hide. We will find out once the Court reverses the decision below and requires them to follow the law.

This submission does not exceed the word count limit imposed by Rule 24.

September 27, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2018, an electronic copy of the foregoing Brief of Appellant Institute for Justice was filed with the Clerk of Court for the Court of Appeals of Georgia using the court's eFast system, and a .pdf copy was served via email on counsel of record as follows:

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In addition, I certify that there is a prior agreement with Appellees to allow documents in a .pdf format sent via email to suffice for service.

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