No. 18-1150

In The
Supreme Court of the United States

GEORGIA, ET AL.,

Petitioners,

v.

PUBLIC.RESOURCE.ORG, INC.

Respondent.

On Writ of Certiorari To
The United States Court of Appeals
For the Eleventh Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES IN SUPPORT OF *NEITHER PARTY*

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QUESTIONS PRESENTED

This Court has held, as a matter of "public policy," that judicial opinions are not copyrightable. *Banks v. Manchester,* 128 U.S. 244, 253-254 (1888). Lower courts have extended that holding to state statutes. See, e.g., *John G. Danielson, Inc. v. Winchester-Conant Props., Inc.,* 322 F.3d 26, 38 (1st Cir. 2003). But the rule that "government edicts" cannot be copyrighted has "proven difficult to apply when the material in question does not fall neatly into the categories of statutes or judicial opinions." *Ibid.*

The question presented is:

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

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, *Amicus* National Association of Home Builders of the United States ("NAHB") states that it is a non-profit 501(c)(6) corporation incorporated in the State of Nevada, with its principal place of business in Washington, D.C. NAHB has no corporate parents, subsidiaries or affiliates, and no publicly traded stock. No publicly traded company has a ten percent or greater ownership interest in NAHB.

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Home Builders of the United States ("NAHB") is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the building industry. Chief among NAHB's goals is providing and expanding opportunities for all people to have safe, decent, and affordable housing. Founded in 1942, NAHB is a federation of more than 700 state and local associations. About one-third of NAHB's approximately 140,000 members are home builders or remodelers, and constitute 80% of all homes constructed in the United States. NAHB is an active and respected voice in the development of model codes and standards pertaining to residential and commercial construction.

NAHB is a vigilant advocate in the nation's courts. It frequently participates as a party litigant and *amicus curiae* to safeguard the constitutional and statutory rights and business interests of its members and those similarly situated.

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae's* intention to file this brief. All parties have given consent. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae,* its members, or its counsel made a monetary contribution to its preparation or submission.

ARGUMENT

At issue before the Court is "whether the government edicts doctrine extends to . . . works that lack the force of law, such as the annotations in the Official Code of Georgia Annotated." (Pet'rs Cert. Br. at I, *State of Georgia, et al. v. Public.Resource.Org, Inc.,* No. 18-1150, 2019 WL 1077396 (March 10, 2019)). Despite treatment to the contrary in the Petitioner and Respondent's briefs, the question of the copyright status of other documents, such as model codes and standards related to the construction industry, is not before the Court.

The purpose of this brief is to assist the Court in understanding the substantial differences that exist between the annotations at issue in this case, and model codes and standards which are not before the Court. There are active cases currently under consideration in the lower courts that concern model codes and standards. NAHB respectfully urges the Court to allow those cases to make their way through the lower courts before rendering a ruling that may upset the carefully orchestrated world of model code and standard development.

I. AN OVERLY BROAD RULING FROM THIS COURT COULD ADVERSELY IMPACT THE CODE AND STANDARD SETTING PROCESS.

Stark differences exist between the purposes and development processes employed in creating annotated statutes and model codes and standards. Moreover, current litigation concerning model codes and standards centers on legal issues that are distinct from the chief legal issue present in this case.

As Judge Tatel in *Am. Soc'y for Testing and Materials, et al. v. Public.Resource.Org, Inc.,* 896 F.3d 437, 441 (D.C. Cir. July 17, 2018) (*ASTM)* notes, model codes and "standards are as diverse as they are many." *Amicus* limits its focus in this brief to those model codes and standards that impact the construction industry.

A. Model Codes and Standards Are Distinct From Annotated Statutes.

Model codes and standards that concern construction activity are developed using a consensus-based process; that is, stakeholders engage in a practice designed to present all views and incorporate a wide range of expertise into the final product. The model codes and standards that impact NAHB members are developed using two different methods.

Most consensus-based model standards are approved by the American National Standards

Institute (ANSI).[2] ANSI helps facilitate the development of standards covering a limitless range of topics. They do so as an oversight organization which approves standards that have been developed in a fair and equitable manner. To have a standard approved by ANSI, it is necessary to adhere to an ANSI-approved development procedure which incorporates ANSI's essential requirements and insures due process for all materially interested parties.[3] Under this regime, ANSI standards are created by a balanced committee of stakeholders with interest and expertise in the topic area of the standard. Committee members for standards relevant to the construction industry include building officials, builders, engineers, and manufacturers. The stakeholder committee receives public comments, creates a proposal, and then, using the public comments and committee member expertise, finalizes a standard. This standard is then published and typically available for purchase and use by the building community.

A number of organizations employ the ANSI process to develop model standards. For example, the American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) (a non-profit society) develops and publishes ANSI/ASHRAE/IES

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[2] *See* https://www.ansi.org/about_ansi/introduction/introduction?menuid=1, *last visited* Aug. 26, 2019.

[3] https://share.ansi.org/Shared%20Documents/Standards%20Activities/American%20National%20Standards/Procedures,%20Guides,%20and%20Forms/2019_ANSI_Essential_Requirements.pdf, *last visited* Aug. 27, 2019.

Standard 90.1-2016: Energy Standard for Buildings Except Low-Rise Residential Buildings. NAHB members often use Standard 90.1 to comply with their state or local energy efficiency requirements for multifamily and commercial buildings. Model standards are simply that – unbinding models with no legal effect – unless and until they are adopted by a state or local government entity. Currently, the cost to purchase ASHRAE 90.1 is $166 for an electronic or printed version, or $228 for both versions.[4]

While similar in substance and form, model building codes are developed through a somewhat different process. NAHB members are most familiar with the set of building codes produced by the International Codes Council (ICC) (a non-profit council), known as the "I-Codes." The process by which the I-Codes are developed is detailed in ICC Council Policies CP#28-05 – Code Development (Rev. Jan. 22, 2019) *available at* https://www.iccsafe.org/wp-content/uploads/CP28-05.pdf. As with an ANSI-type standard, any materially affected person can petition for a code change, which is first considered by a code development committee. Code development committees are made up of members representing a broad range of interests, including building officials, engineers, builders, and plans examiners. Following a multi-step process, the code development

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[4] https://www.techstreet.com/ashrae/standards/ashrae-90-1-2016-ip?ashrae_auth_token=&product_id=1931793&utm_campaign=landingpage&utm_content=86274&utm_medium=landingpage&utm_source=promotion&utm_term=86274, *last visited* Aug.19, 2019.

committees receive proposals, engage in public hearings and extend comment opportunities, and then the Public Comment Hearing is held. *See* CP#28-05.7.0. A vote takes place at the conclusion of the Hearing. Following this vote, an Online Governmental Consensus Vote takes place. *See* CP#28-05.8.0. Eligible voters in this process are ICC governmental members, who are federal, state, or local government officials, such as building inspectors, state officials, and federal Department of Energy employees. If the proposal is adopted, the proposal becomes a final action and is published at the conclusion of the cycle.

While only government officials can vote in this final stage, the code does not have the force or effect of law. Like a standard, it remains unbinding. Only if the code is adopted by a federal, state, or local government does the code become legally operative. Of the I-Codes, the International Residential Code is one of the most important to NAHB members. Currently, the cost to purchase the 2018 International Residential Code ranges from $133-$214 (non-member pricing).[5]

The process employed to develop annotations to state statutes is decidedly different. As Petitioner explains, in Georgia the Code Revision Commission, created by the state's General Assembly, contracts with a private for-profit entity, the Lexis Nexis

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[5] https://shop.iccsafe.org/codes/2018-international-codes-and-references/2018-international-residential-code-and-references/2018-international-residential-coder.html, *last visited* Aug. 27, 2019.

Group (Lexis) to "maintain, publish, and distribute" Georgia's annotated statute. Pet'rs Cert. Br. at 8. Georgia purports to hold copyright in the annotations, and its agreement grants Lexis an exclusive license to sell the annotated statute in various formats. Pet'rs Cert. Br. at 9.

Lexis itself develops the annotations, which are then approved by the Georgia General Assembly. Pet'rs Cert. Br. at 7, 9. Thus, the annotations are not developed by a non-profit organization using a consensus-based process. Nor is there an effort to strike the right balance of expertise and diverse perspectives by applying a stringent set of rules designed to achieve that purpose.

Furthermore, model codes and standards, and annotations to statutes have two very different purposes. Standard and code setting bodies engage in their work to establish a uniform set of requirements for various aspects of the construction industry, using evolving technology and incorporating a range of stakeholder perspectives. The organizations and individuals that participate in this process do so with the hope that the codes and standards will be used by industry professionals and, where appropriate, be adopted into law by federal, state, and/or local jurisdictions. For example, various editions of the International Residential Code have become law in jurisdictions in 49 states, Washington, D.C., and Puerto Rico. Many of the code and standard setting organizations require a revenue stream to conduct their work. Any change to the copyright status of their products would drastically alter the processes currently in

place to produce these highly technical codes that are an integral part of construction today.

States that decide to include annotations with their statutes do not develop or secure annotations to establish uniform requirements. Instead, as Petitioner states, the purpose of statutory annotations is to provide the reader with information about case law and other relevant developments concerning the statutory provision at issue. Pet'rs Cert. Br. at 6.

The vast differences between the purposes and development processes employed to develop model codes and standards and annotated statutes present two very different fact patterns, each with its attendant stakeholder impacts and real-world consequences.

Only one of these fact patterns is currently before the Court – Georgia's annotated statutes. NAHB respectfully calls on this Court to focus its attention accordingly.

B. The Legal Issues Presented in This Case and Model Codes and Standards Cases Are Not the Same.

The key legal issue in this case is whether the annotations attached to Georgia's state statutes fall under an exception to copyright protection known as the "government edicts" doctrine. As Petitioner explains (Pet'rs Cert. Br. at 4-5), the doctrine was born out of three opinions of this Court issued in the 1800s. These cases held that judicial opinions cannot be copyrighted. Federal copyright law declines copyright protection to any work of the

federal government, including the law. 17 U.S.C. § 105.

The government edicts doctrine, explains the Petitioner, is a "narrow, judicially created exception to copyright protection for certain works having the force of law." Pet'rs Cert. Br. at 4. As the Respondent notes, "the government edicts doctrine is difficult to apply when a work does not fall neatly into a category, like statutes or judicial opinions, already held to be edicts." Brief in Opposition, *Georgia, et al. v. Public.Resource.Org, Inc.,* No. 18-1150, 2019 WL 2121378 (May 10, 2019) at 9. While not codified in the Copyright Act, the Copyright Office in its compendium states that copyright protection does not extend to "government edict[s]" that have the "force of law." Pet'rs Cert. Br. at 5. (citing U.S. Copyright Office, *Compendium of U.S. Copyright Office Practices* §313.6(C)(2) (3d ed. 2017)).

Hence, the question at issue here is whether a private work without legal effect that is intertwined with a government edict itself becomes subject to the government edicts doctrine.

It is telling that, of the two cases cited by the parties that concern model codes and standards, neither mentions the government edicts doctrine by name. The first case, *S. Bldg. Code Cong. Int'l v. Veeck,* 293 F.3d 791 (5th Cir. June 7, 2002), *on reh'g en banc,* 539 U.S. 969 (2003), *cert. denied*, discussed the three Supreme Court cases that form the basis of the government edicts doctrine for the proposition that "the law" cannot be copyrighted. *See id.* at 796-800; s*ee also* Pet'rs Cert. Br. at 21. However, the

Fifth Circuit in *Veeck* did not reach the more nuanced question of works not having the force of law present in this case.

The second case, *ASTM,* currently on remand at the U.S. District Court for the District of Columbia - focuses primarily on whether Public.Resource.Org's posting of hundreds of standards satisfies the fair use doctrine. 896 F3d. at 447. Federal copyright law provides that "the fair use of a copyrighted work . . . for purposes such as criticism, comment[s], news reporting, teaching . . ., scholarship, or research, is not an infringement of copyright." 17 U.S.C. § 107. In *ASTM*, the U.S. Court of Appeals for the D.C. Circuit explicitly declined to consider the constitutional question. *Id.* at 447 (acknowledging a "responsibility to avoid 'pass[ing] on questions of constitutionality . . . unless such adjudication is unavoidable.'")(internal citations omitted). Instead, that court devoted its opinion to the district court's application of the fair use doctrine. *Id.* at 448-9 (remanding the case back to the district court to "further develop the factual record" and apply the fair use factors as elucidated by the court to each standard at issue in the case). The case is now back at the district court, and briefing is scheduled to be completed by the end of this year.

The fair use doctrine, however, is not before the Court in this case. The district court rejected the applicability of the fair use doctrine. *See Code Revision Comm'n v. Public.Resource.Org*, 244 F. Supp.3d 1350, 1357-61 (N.D. Ga. March 23, 2017)(applying the four statutory factors of the fair use doctrine and holding that PRO failed to satisfy its burden to demonstrate its actions constitute fair

use). The Eleventh Circuit did not reach the issue because it overruled the case on other grounds. *See Code Revision Comm'n for General Assembly of Georgia v. Public.Resource.Org,* 906 F.3d 1229, 1233 (11th Cir. 2018)(finding "no occasion to address the parties' other arguments regarding originality and fair use.").

While Petitioner did not raise the fair use doctrine in its cert petition, Respondent references the fair use doctrine and the D.C. Circuit's consideration of *ASTM* in its brief. Br. in Opp'n at 22. Respondent is correct in its assessment of the D.C. Circuit's concerns regarding whether the fair use doctrine applies *in that case*. However, in the case currently before this Court, the Eleventh Circuit focused squarely on the government edicts doctrine. Moreover, that is the question presented by the Petitioners on which this Court accepted certiorari.

II. THIS COURT SHOULD LIMIT ITS RULING TO ANNOTATED STATUTES.

This Court has long limited itself to the issues that are squarely before it. In *Am. Broadcasting Companies, Inc., et al. v. Aereo, Inc., et al.*, 573 U.S. 431 (2014), the Court held that Aereo violated the Copyright Act's Transmit Clause when it offered subscribers the opportunity to watch the petitioning broadcast companies' television programs over the Internet. *Id.* at 436. While Aereo and other groups argued that the Court's action would impact a wide range of other technologies, the Court disagreed. Instead, this Court agreed with the Solicitor General that contemplation of issues concerning other

technologies "'should await a case in which they are squarely presented.'" *Id.* at 450-1 (internal citations omitted).

A corollary to this rule is that the Court refrains from considering issues not included in the petition for *certiorari*. Supreme Court Rule 14.1(a) states: "The statement of any question presented is deemed to comprise every subsidiary question fairly included therein. Only the questions set out in the petition, or fairly included therein, will be considered by the Court." Supreme Court of the U.S., *Rules of the Supreme Court of the United States*, July 1, 2019, at 14.1(a). The Court elaborated on this rule in *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27 (1993). In that case, this Court acknowledged that it "consider[s] questions not raised in the petition only in the most exceptional cases." *Id.* at 28. The Court goes on to explain that "fairly included" does not include questions that are "merely 'complementary' or 'related' to the question presented," applying the holding of *Yee v. City of Escondido*, *Calif.,* 503 U.S. 519 (1992). *Id.* In that case, the Court concluded that it could not consider whether an ordinance effected a *regulatory* taking when the question presented concerned whether the ordinance effected a *physical* taking. *Id* at 537. *Yee* points to two important functions of Supreme Court of the U.S. Rule 14.1: first, the requirement provides respondent and other interested parties with sufficient notice of the petitioner's grounds for seeking *certiorari*. Second, it provides the Court with the information it needs to determine whether a grant of *certiorari* is warranted. *Id.* at 535-6.

As described above, the facts and issues that concern the copyright status of model codes and standards are not currently before this Court. Unlike consensus-based standards and codes produced by private nonprofit entities, the annotated statutes are produced for Georgia by a for-profit private entity. Model codes and standards are developed to create uniform standards on highly technical subjects that can be adopted by government jurisdictions if those entities deem them appropriate. Annotations are created to provide additional source material and study resources designed to provide the reader with a greater understanding of statutory provisions. Finally, the legal issues at place in this case and *ASTM* (government edicts and fair use, respectively) are distinct and do not overlap. Lumping consideration of copyright protection for model codes and standards, or the fair use doctrine, with Georgia's annotated statutes would subvert the purposes of Rule 14.1 and adversely impact the public's ability to know that these issues are under consideration by the Court.

This Court therefore should not accept the invitation to devise a broad ruling that seeks to render one omnibus opinion for all copyright-related questions concerning privately produced works associated in some way with government actors and instruments.

CONCLUSION

For the foregoing reasons, NAHB respectfully asks this Court to maintain its traditionally narrow focus on the facts and issues squarely before it.

Dated: August 29, 2019

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