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17 Attorneys for Proposed Intervenor
International Code Council, Inc.

18 SUPERIOR COURT OF THE STATE OF CALIFORNIA

19 COUNTY OF SACRAMENTO

20 Public.Resource.Org., Inc.,

21 Petitioner,

22 vs.

23 California Office of Administrative Law, and
the California Building Standards
24 Commission,

25 Respondents.

Case No. 34-2021-80003612

**NOTICE OF MOTION AND MOTION TO
INTERVENE BY NATIONAL FIRE
PROTECTION ASSOCIATION, INC.
AND INTERNATIONAL CODE
COUNCIL, INC.; MEMORANDUM OF
POINTS AND AUTHORITIES;
[PROPOSED] ANSWER-IN-
INTERVENTION**

Date: August 27, 2021

Time: 10:00 a.m.

Dept.: 27

Judge: Hon. Steven M. Gevercer

28 Action Filed: March 17, 2021

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TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on Friday, August 27, 2021, at 10:00 a.m. in Department 27 of the California Superior Court, County of Sacramento, located at 720 9th Street, Sacramento, California, 95814, Proposed Intervenors National Fire Protection Association, Inc. and International Code Council, Inc. will, and hereby do, move this Court for an order granting leave to intervene in the above-captioned case pursuant to Code of Civil Procedure section 387. The proposed Answer-in-Intervention is attached hereto as Exhibit A.

The grounds for this application, which are more fully set forth in the Memorandum of Points and Authorities filed herewith, are as follows: Intervention as of right is warranted under Code of Civil Procedure section 387, subdivision (d)(1), because: (1) the application is timely; (2) Proposed Intervenors hold copyright interests in certain records Petitioners seek to obtain through this action and thereafter distribute publicly; (3) Proposed Intervenors are so situated that the disposition of this action may as a practical matter impair or impede their ability to protect their interests; and (4) Proposed Intervenors’ interests are not adequately represented by the existing parties.

Alternatively, the Court should permit Proposed Intervenors to intervene under Code of Civil Procedure section 387, subdivision (d)(2), because: (1) the application is timely and procedurally proper; (2) Proposed Intervenors have a direct and immediate interest in this action; (3) intervention will not enlarge the issues presented in this action; and (4) the reasons for intervention outweigh the original parties’ interest in pursuing this action without intervention.

Before filing this motion, Proposed Intervenors asked all parties for their position on the relief requested. Petitioner intends to oppose the motion. Respondents do not.

This motion is based upon this Notice, the attached Memorandum of Points and Authorities, the attached Declarations of Christian Dubay and Mark Johnson and the attached Answer-in-Intervention.

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DATED: May 24, 2021

MUNGER, TOLLES & OLSON LLP

By: /s/ Bryan H. Heckenlively
BRYAN H. HECKENLIVELY
Attorneys for Proposed Intervenor National Fire
Protection Association, Inc.

DATED: May 24, 2021

MORGAN, LEWS & BOCKIUS LLP

By: /s/ Louis Y. Lee
LOUIS Y. LEE
Attorneys for Proposed Intervenor International Code
Council, Inc.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 The National Fire Protection Association, Inc. (“NFPA”) and the International Code
4 Council, Inc. (“ICC”) seek to intervene to protect their copyright interests in materials that
5 Petitioner asks Respondents to turn over and that Petitioner intends to copy and distribute. NFPA
6 and ICC are nonprofit organizations that have developed hundreds of standards governing highly
7 technical issues such as building and electrical safety. Because of Proposed Intervenor’s
8 recognized expertise and the high standards they follow in the field of developing voluntary
9 consensus standards, federal, state, and local jurisdictions have frequently incorporated their
10 standards by reference. As the Petition recognizes, this incorporation by reference includes the
11 California Electrical Code (Title 24, Part 3 of the California Code of Regulations), a substantial
12 portion of which is comprised of NFPA’s National Electrical Code (“NEC”). Other works
13 incorporated by reference by Respondents here include the California Building Code (Title 24,
14 Part 2 of the California Code of Regulations), a substantial portion of which is comprised of ICC’s
15 International Building Code, the California Residential Code (Title 24, Part 2.5 of the California
16 Code of Regulations), a substantial portion of which is comprised of ICC’s International
17 Residential Code, the California Fire Code (Title 24, Part 9 of the California Code of
18 Regulations), a substantial portion of which is comprised of ICC’s International Fire Code, and the
19 California Existing Building Code (Title 24, Part 10 of the California Code of Regulations), a
20 substantial portion of which is comprised of ICC’s International Existing Building Code.

21 NFPA and ICC hold copyrights in the standards they create. NFPA and ICC generate
22 revenue to fund their not-for-profit activities by selling copies or licensing the exercise of their
23 exclusive rights under copyright, predominantly to the professionals who utilize those standards in
24 the course of their work. NFPA and ICC recognize that members of the public may be interested
25 in reviewing incorporated standards, and NFPA and ICC therefore make their standards available
26 online. Such material is available for free on a read-only basis, without a license to download,
27 copy, distribute, or otherwise exercise the rights exclusive to the copyright owners. Intervenor
28 also provide free printed copies of their works to over 100 Depository Libraries that receive the

1 complete set of Title 24 of the California Code of Regulations. As Petitioner recognizes, the
2 materials that are the subject of its request in this matter are no exception: the portions of the
3 standards at issue here are available online, at absolutely no cost to Petitioner or any other member
4 of the public.

5 The Petition, however, goes well beyond requesting that Petitioner be able to freely access
6 NFPA and ICC's works. The Petition candidly admits that it seeks not only the disclosure of
7 NFPA and ICC's works, but also to obtain electronic copies that Petitioner intends to copy and
8 upload to the internet for unrestricted dissemination. That use would infringe NFPA and ICC's
9 copyrights. Indeed, NFPA is already suing Petitioner for its unauthorized copying and distribution
10 of the NEC and other works in federal district court in Washington, D.C.¹ The Public Records Act
11 must yield to, and does not provide a basis to avoid federal copyright law. Giving Petitioner
12 electronic copies of NFPA's and ICC's copyrighted materials *without any restriction on copying*
13 *or use*, as the Petition requests, would have a significant effect on each organization. It would
14 severely limit their ability—and incentive—to invest the technical expertise and time necessary to
15 develop and update their standards. That would, in turn, undermine the public interest that
16 Petitioners serve in producing high quality building safety, fire safety, and other standards.
17 Because of the obvious impact that the Petition could have on NFPA's and ICC's interests, and
18 because they have satisfied all of the other requirements for intervention, the Court should grant
19 NFPA and ICC leave to intervene as of right. Alternatively, NFPA and ICC respectfully request
20 that the Court exercise its discretion to permit both organizations to intervene.

21 ARGUMENT

22 **I. The Court Should Grant Intervention as of Right Under CCP § 387(d)(1)**

23 NFPA and ICC have the right to intervene under CCP section 387(d)(1). The statute
24 provides:
25
26

27 ¹ The case is *American Society for Testing and Materials, et al. v. Public.Resource.Org., Inc.*,
28 Case No. 1:13-cv-01215-TSC (D.D.C.).

1 The court shall, upon timely application, permit a nonparty to
2 intervene in the action or proceeding if either of the following
conditions is satisfied:

3 . . .

4 (B) The person seeking intervention claims an interest relating to the
5 property or transaction that is the subject of the action and that
6 person is so situated that the disposition of the action may impair or
7 impede that person’s ability to protect that interest, unless that
person’s interest is adequately represented by one or more of the
existing parties.

8 All of the statutory requirements are met. This motion is timely; NFPA and ICC have an interest
9 in the subject matter of the action, which seeks the unrestricted public release of their copyrighted
10 works; they stand to have their interests impaired if the Petition is granted and those works are
11 released to the public without restriction; and their interests will not be adequately represented by
12 the existing parties.

13 *First*, this motion to intervene, filed shortly after the Petition was filed, is timely. It is a
14 longstanding rule that “a right to intervene should be asserted within a reasonable time.” (*Allen v.*
15 *Cal. Water & Tel. Co.* (1947) 31 Cal. 2d 104, 108.) Whether a motion to intervene has been made
16 within a reasonable time is “determined based on the date the proposed interveners knew or should
17 have known their interests in the litigation were not being adequately represented,” (*Ziani*
18 *Homeowners Ass’n v. Brookfield Ziani LLC* (2015) 243 Cal. App. 4th 274, 282) and whether the
19 parties to the litigation would be prejudiced by the intervention, (see *Noya v. A.W. Coulter*
20 *Trucking* (2006) 143 Cal. App. 4th 838, 843). Here, NFPA and ICC are moving to intervene
21 approximately two months after the Petition was filed on March 17, 2021 and approximately three
22 weeks after the answers to the Petition were filed. NFPA and ICC had no basis to intervene before
23 the action was filed and are moving to intervene promptly after filing. In addition, the intervention
24 would not delay the Court’s consideration of the Petition, as NFPA and ICC have filed their
25 motion at the outset of the case and well before the briefing on the merits of the Petition. Indeed,
26 the Petition is not set to be heard until November 19, 2021—nearly six months from now and
27 nearly three months after the hearing date on this motion to intervene.

1 *Second*, NFPA and ICC have the requisite interest in the subject matter of this action. One
2 of the documents that Petitioner seeks here is an electronic version of the California Electrical
3 Code, Title 24, Part 3 of the California Code of Regulations (“CEC”) without any restrictions on
4 use, copying, or dissemination. The CEC includes large portions of NFPA’s copyrighted NEC.
5 The CEC also includes portions authored by the BSC. Those portions include California-specific
6 amendments to the NEC. (Declaration of Christian Dubay ¶¶ 3-4.) Proposed Intervenors take no
7 position on Petitioner’s request with respect to the State-authored portions of the CEC or any other
8 material in which they do not hold a copyright interest.

9 The NEC sets forth standards for safe electrical design, installation, and inspection to
10 protect people and property from electrical hazards. (*Id.* ¶ 3.) Respondent Building Standards
11 Commission (“BSC”) uses the NEC pursuant a license agreement with NFPA. (*Id.* ¶ 5.) NFPA,
12 which is a non-profit organization, receives fees from sales of the CEC and uses such fees to fund
13 the development and improvement of its standards. (*Id.* ¶¶ 5, 8.)

14 The relevant licenses do not permit the BSC to disseminate electronic copies of NFPA’s
15 copyrighted works. (*Id.* ¶ 7.) That said, NFPA makes read-only versions available for free
16 online.² (*Id.* ¶ 6.) Individuals who view the free-access CEC on NFPA’s website may read the
17 CEC but may not download or distribute copies of it. (*Id.*) Petitioner here seeks to compel the
18 public disclosure of the California Code of Regulations, including NFPA’s copyrighted works,
19 without any restrictions on copying, dissemination, or use. That result would directly harm
20 NFPA’s market for its copyrighted materials and, in turn, would deprive NFPA of the resources
21 and incentive to continue investing in its highly technical standards.

22 Petitioner also seek here an electronic version of Parts 1, 2, 2.5, 6, 8, 9, 10, 11 and 12 of
23 Title 24 of the California Code of Regulations (“CCR”) without any restrictions on use, copying,
24 or dissemination. Parts 2, 2.5, 9, and 10 of the CCR include large portions of ICC’s copyrighted
25 International Codes or “I-Codes,” a family of fifteen coordinated modern building safety codes.

26
27 _____
28 ² The CEC, for example, is available at <https://www.nfpa.org/codes-and-standards/all-codes-and-standards/codes-andstandards/free-access?mode=view>.

1 These portions of the CCR also include portions authored by the BSC. Those portions include
2 California-specific amendments to the I-Codes. (Declaration of Mark Johnson ¶ 4.) Proposed
3 Intervenor take no position on Petitioner’s request with respect to the State-authored portions of
4 the CCR or any other material in which they do not hold a copyright interest.

5 The I-Codes are a series of building safety codes that ensure the engineering of safe,
6 sustainable, affordable, and resilient structures. (*Id.* ¶¶ 2-3.) ICC, which is a non-profit
7 organization, funds the development and improvement of its codes through the licensed sale of its
8 I-Codes and its other standards. (*Id.* ¶¶ 1, 4, 8.) BSC uses portions of the I-Codes pursuant a
9 license agreement with ICC. (*Id.* ¶ 5.)

10 The relevant licenses do not permit the BSC to disseminate electronic copies of ICC’s
11 copyrighted works. (*Id.* ¶ 6.) That said, ICC makes read-only versions available for free online.³
12 (*Id.*) Petitioner here seeks to compel the public disclosure of the CCR, including ICC’s
13 copyrighted works, without any restrictions on copying, dissemination, or use. That result would
14 directly harm ICC’s market for its copyrighted materials and, in turn, would deprive ICC of the
15 resources and incentive to continue investing in its highly technical codes and standards.

16 *Third*, NFPA and ICC are so situated that the disposition of this action may as a practical
17 matter impair or impede their ability to protect their interests. If the Court orders Respondents to
18 turn over NFPA’s or ICC’s copyrighted materials to Petitioner without any restriction on
19 dissemination, copying, or use, that would significantly impair or impede each organization’s
20 ability to protect its copyright.

21 At a minimum, it would irreversibly disrupt the status quo at a time while a federal court in
22 Washington, D.C. is currently considering whether Petitioner is liable for copyright infringement
23 for the very conduct it seeks, through its Petition here, to engage in with respect to the copies of
24 the NEC and other copyrighted works. NFPA and other standards development organizations
25 have sued Petitioner for copyright infringement in federal court for copying and distributing their
26

27 _____
28 ³ Part 2 of the CCR, for example, is available at <https://codes.iccsafe.org/content/CBC2019P4>.

1 copyrighted works online, including the NEC and one or more other NFPA works at issue here.
2 The federal court in Washington will determine whether the Copyright Act permits Petitioner to
3 post those materials.⁴ If this Court were to order Respondents to disclose NFPA’s copyrighted
4 works without any restriction, that would create a conflict with the Copyright Act that NFPA has a
5 direct interest in avoiding.⁵ Relatedly, NFPA and ICC have an interest in ensuring that
6 Respondents do not provide a copy of any copyrighted work to an entity that openly plans to
7 infringe the copyright. This could force NFPA to expand its copyright infringement lawsuit in
8 Washington and/or force ICC to initiate its own infringement lawsuit.

9 *Finally*, no party is adequately representing NFPA or ICC’s interests. Petitioner, of course,
10 is asking for a result directly contrary to NFPA and ICC’s interest in protecting their copyrights.
11 Respondents have acted responsibly in declining to provide the requested records, and they have a
12 contractual obligation not to disclose copyrighted materials licensed to them. They do not,
13 however, have nearly the same level of interest in protecting the copyrights because they are not
14 the copyright holders. NFPA and ICC should be allowed to intervene to assert their interests in
15 the manner they deem most appropriate.

16 **II. In the Alternative, the Court Should Grant Permissive Intervention Under**
17 **CCP § 387(d)(2)**

18 Even if NFPA and ICC did not qualify for intervention as a matter of right under CCP
19 section 387(d)(1), the Court would nonetheless have discretion to allow them to intervene under
20 section 387(d)(2), which provides that a “court may, upon timely application, permit a nonparty to
21 intervene in the action or proceeding if the person has an interest in the matter in litigation, or in
22 the success of either of the parties, or an interest against both.” In exercising this discretion, courts
23 have set forth the following requirements for permissive intervention:

24
25 ⁴ NFPA initially prevailed on summary judgment in the district court. The D.C. Circuit vacated
26 and remanded for the district court to consider whether Petitioner could establish a fair use
defense. The matter is now again before the district court.

27 ⁵ The Public Records Act must be interpreted to avoid conflicts with federal law. (See *Rim of the*
28 *World Unified Sch. Dist. v. Superior Court* (2002) 104 Cal. App. 4th 1393, 1399.)

1 [T]he trial court has discretion to permit a nonparty to intervene
2 where the following requirements are satisfied: (1) the proper
3 procedures have been followed; (2) the nonparty has a direct and
4 immediate interest in the action; (3) the intervention will not enlarge
the issues in the litigation; and (4) the reasons for the intervention
outweigh any opposition by the parties presently in the action.

5 (*W. Heritage Ins. Co. v. Superior Court* (2011) 199 Cal. App. 4th 1196, 1205 fn. 12.) “The
6 purpose of allowing intervention is to promote fairness by involving all parties potentially affected
7 by [the] judgment,” and intervention under this provision is generally favored. (*Simpson Redwood*
8 *Co. v. State of California* (1987) 196 Cal. App. 3d 1192, 1199.) The fair result here is to allow
9 NFPA and ICC to participate in the action to protect their copyright interests that could be affected
10 by the judgment.

11 NFPA and ICC have satisfied all four requirements for permissive intervention. *First*,
12 NFPA has followed all statutory requirements for intervention. NFPA timely moved to intervene
13 by presenting a noticed motion, including a copy of a proposed Answer-in-Intervention setting
14 forth the grounds upon which intervention rests. (Code Civ. Proc., § 387, subd. (c).)

15 *Second*, NFPA and ICC have a direct and immediate interest in this action. A party’s
16 interest is direct and immediate, rather than merely consequential, if “the moving party will either
17 gain or lose by the direct legal operation and effect of the judgment.” (*Lindelli v. Town of San*
18 *Anselmo* (2006) 139 Cal. App. 4th 1499, 1505, citation and internal quotation marks omitted; *id.* at
19 p. 1515 [permitting intervention by plaintiff’s former attorneys to allow the attorneys to seek
20 attorney’s fees on their own behalf].) Petitioner here seeks a judgment requiring the public
21 disclosure of copyrighted works of NFPA and ICC in electronic format, without any restrictions
22 on copying, dissemination, or use. Such a judgment would have a direct and immediate impact on
23 the value of NFPA’s and ICC’s copyright interests. As noted above, by the “direct legal operation
24 and effect of the judgment,” the works that NFPA and ICC make available only through license
25 agreements or on a read-only basis would be disclosed to an entity that has openly stated its intent
26 to copy and disseminate the works. This would directly harm the market for paid licenses of the
27 copyrighted works and, in turn, would deprive NFPA and ICC of the resources and incentive to
28 continue investing in their highly technical standards.

1 *Third*, allowing NFPA and ICC to intervene will not enlarge the issues in the litigation.
 2 Petitioners seek to compel the public disclosure of electronic versions of various documents,
 3 including copyrighted works of NFPA and ICC. Respondents have taken the position that none of
 4 those documents are subject to disclosure under the Public Records Act because (a) they are not
 5 public records in Respondents' possession and/or (b) they are exempt from disclosure under
 6 statutory exemptions in the Public Records Act. If permitted to intervene, NFPA and ICC will
 7 explain why their copyrighted material is exempt from disclosure under some of those statutory
 8 exemptions. NFPA and ICC will not seek relief beyond denial of the Petition.

9 *Finally*, any interest NFPA and ICC have in presenting their perspectives far outweighs
 10 any interests other parties may assert in opposition to intervention. The Court should be permitted
 11 to consider the interests and views of all affected parties in deciding whether to order the relief
 12 that directly affects NFPA and ICC.

13 **CONCLUSION**

14 For the foregoing reasons, NFPA and ICC respectfully request that the Court grant leave to
 15 intervene and to file the attached proposed Answer-in-Intervention.

16
 17 DATED: May 24, 2021

MUNGER, TOLLES & OLSON LLP

18
 19 By: /s/ Bryan H. Heckenlively
 20 BRYAN H. HECKENLIVELY
 21 Attorneys for Proposed Intervenor National Fire
 Protection Association, Inc.

22 DATED: May 24, 2021

MORGAN, LEWS & BOCKIUS LLP

23
 24
 25 By: /s/ Louis Y. Lee
 26 LOUIS Y. LEE
 27 Attorneys for Proposed Intervenor International Code
 Council, Inc.

EXHIBIT A

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18 SUPERIOR COURT OF THE STATE OF CALIFORNIA

19 COUNTY OF SACRAMENTO

20 Public.Resource.Org., Inc.,

21 Petitioner,

22 vs.

23 California Office of Administrative Law, and
the California Building Standards
24 Commission,

25 Respondents.

Case No. 34-2021-80003612

**[PROPOSED] ANSWER-IN-
INTERVENTION**

Date: August 27, 2021

Time: 10:00 a.m.

Dept.: 27

Judge: Hon. Steven M. Gevercer

Action Filed: March 17, 2021

1 Intervenors National Fire Protection Association, Inc. (“NFPA”) and International Code
2 Council, Inc. (“ICC”) answer the Verified Petition for Writ of Mandate on file in this action as
3 follows:

- 4 1. Answering paragraph 1, Intervenors allege that the paragraph consists of legal conclusions that
5 do not require a response.
- 6 2. Answering paragraph 2, Intervenors allege that the last clause consists of a legal conclusion to
7 which no response is required. Intervenors lack sufficient information to admit or deny the
8 remaining allegations in paragraph 2 and on that basis deny them.
- 9 3. Answering paragraph 3, Intervenors allege that the second and third sentences consist of legal
10 conclusions to which no response is required. Intervenors lack sufficient information to admit
11 or deny the remaining allegations in paragraph 3 and on that basis deny them.
- 12 4. Answering paragraph 4, Intervenors allege that the paragraph consists of legal conclusions that
13 do not require a response.
- 14 5. Answering paragraph 5, Intervenors lack sufficient information to admit or deny the
15 allegations in paragraph 5 and on that basis deny them.
- 16 6. Answering paragraph 6, Intervenors allege that the paragraph consists of legal conclusions that
17 do not require a response.
- 18 7. Answering paragraph 7, Intervenors allege that the paragraph consists of legal conclusions that
19 do not require a response.
- 20 8. Answering paragraph 8, Intervenors allege that the paragraph consists of legal conclusions that
21 do not require a response.
- 22 9. Answering paragraph 8, Intervenors allege that the paragraph consists of legal conclusions that
23 do not require a response. To the extent there are factual allegations in this paragraph,
24 Intervenors lack sufficient information to admit or deny them and on that basis deny them.
- 25 10. Answering paragraph 10, Intervenors allege that the first sentence of paragraph 10 consists of
26 legal conclusions that do not require a response. Intervenors lack sufficient information to
27 admit or deny the remaining allegations in paragraph 10 and on that basis deny them.

1 Intervenor state that Exhibits A and B are documents that speak for themselves, and
2 Intervenor therefore deny the characterization of the documents as set forth in paragraph 10.
3 11. Answering paragraph 11, Intervenor deny the allegation in the last two sentences of paragraph
4 11 that OAL has “full control” of the contents of the Master Database and “maintains
5 ownership over the CCR,” to the extent that those allegations imply control over the
6 distribution of the works. Intervenor lack sufficient information to admit or deny the
7 remaining allegations in paragraph 11 and on that basis deny them. Intervenor state that
8 Exhibit B is a document that speaks for itself, and Intervenor therefore deny the
9 characterization of the document as set forth in paragraph 11.
10 12. Answering paragraph 12, Intervenor lack sufficient information to admit or deny the
11 allegations in paragraph 12 and on that basis deny them.
12 13. Answering paragraph 13, Intervenor lack sufficient information to admit or deny the
13 allegations in paragraph 13 and on that basis deny them. Intervenor state that Exhibit C is a
14 document that speaks for itself, and Intervenor therefore deny the characterization of the
15 documents as set forth in paragraph 13.
16 14. Answering paragraph 14, Intervenor lack sufficient information to admit or deny the
17 allegations in paragraph 14 and on that basis deny them. Intervenor state that Exhibit D is a
18 document that speaks for itself, and Intervenor therefore deny the characterization of the
19 document as set forth in paragraph 14.
20 15. Answering paragraph 15, Intervenor lack sufficient information to admit or deny the
21 allegations in paragraph 15 and on that basis deny them.
22 16. Answering paragraph 16, Intervenor lack sufficient information to admit or deny the
23 allegations in paragraph 16 and on that basis deny them.
24 17. Answering paragraph 17, Intervenor lack sufficient information to admit or deny the
25 allegations in paragraph 17 and on that basis deny them.
26 18. Answering paragraph 18, Intervenor lack sufficient information to admit or deny the
27 allegations in paragraph 18 and on that basis deny them. Intervenor state that Exhibit D is a
28

1 document that speaks for itself, and Intervenor therefore deny the characterization of the
2 document as set forth in paragraph 18.

3 19. Answering paragraph 19, Intervenor lack sufficient information to admit or deny the
4 allegations in paragraph 19 and on that basis deny them. Intervenor state that Exhibit D is a
5 document that speaks for itself, and Intervenor therefore deny the characterization of the
6 document as set forth in paragraph 19.

7 20. Answering paragraph 20 and the footnote thereto, Intervenor lack sufficient information to
8 admit or deny the allegations pertaining to the International Association of Plumbing and
9 Mechanical Officials and on that basis deny them. Intervenor NFPA admits that it sells copies
10 of its copyrighted publication, the National Electrical Code. NFPA also sells copies of the
11 publication entitled the California Electrical Code (“CEC”), which includes the NEC and the
12 California-enacted amendments to the NEC. NFPA publishes and distributes the portions of
13 the CEC that NFPA does not author pursuant to agreement with the BSC. NFPA further
14 admits that it sells printed copies of the CEC for \$216.50. Intervenor ICC admits that it sells
15 copies of its copyrighted publications including the International Building Code, International
16 Residential Code, International Fire Code, and International Existing Building Code. admits
17 that it sells printed copies of the Title 24 of the California Code of Regulations (“CCR”). ICC
18 publishes and distributes the CCR that ICC does not author pursuant to agreement with the
19 BSC. ICC admits that it sells a multi-tiered subscription service (Basic and Premium) that
20 provide additional capabilities for Title 24 of the CCR, Parts 1, 2, 2.5, 6, 8, 9, 10, 11, and 12,
21 referred to as Basic Plus, Premium Lite, and Premium. ICC denies that it sells Title 24 of the
22 CCR through its Basic service, which is offered online at no cost. NFPA and ICC also make
23 the same and other publications available for no charge online in read-only format. Except as
24 otherwise admitted, Intervenor deny the allegations in paragraph 20 and the footnote thereto.

25 21. Answering paragraph 21, Intervenor lack sufficient information to admit or deny the
26 allegations in paragraph 21 and on that basis deny them. Intervenor state that Exhibit F is a
27 document that speaks for itself, and Intervenor therefore deny the characterization of the
28 document as set forth in paragraph 21.

- 1 22. Answering paragraph 22, Intervenors lack sufficient information to admit or deny the
2 allegations in paragraph 22 and on that basis deny them. Intervenors state that Exhibit G is a
3 document that speaks for itself, and Intervenors therefore deny the characterization of the
4 document as set forth in paragraph 22.
- 5 23. Answering paragraph 23, Intervenors admit that print editions of Title 24 are available at
6 libraries and for purchase. Intervenors lack sufficient information to admit or deny the
7 remaining allegations in paragraph 23 and on that basis deny them. Intervenors state that
8 Exhibit G is a document that speaks for itself, and Intervenors therefore deny the
9 characterization of the document as set forth in paragraph 23.
- 10 24. Answering paragraph 24, Intervenors admit that the sections of Title 24 that contain their
11 copyrighted works can be viewed online for free in read-only format. Intervenors lack
12 sufficient information to admit or deny the remaining allegations in paragraph 24 and on that
13 basis deny them. Intervenors state that Exhibit G is a document that speaks for itself, and
14 Intervenors therefore deny the characterization of the document as set forth in paragraph 24.
- 15 25. Answering paragraph 25, Intervenors admit that Title 24 includes standards produced by
16 Intervenors, that BSC does not have the publishing rights to the sections of Title 24 that
17 contain Intervenors' copyrighted works, that it cannot provide free copies to the public, and
18 that those works retain copyright protections. Intervenors lack sufficient information to admit
19 or deny the remaining allegations in paragraph 25 and on that basis deny them.
- 20 26. Answering paragraph 26, Intervenors lack sufficient information to admit or deny the
21 allegations in paragraph 26 and on that basis deny them. Intervenors state that Exhibit H is a
22 document that speaks for itself, and Intervenors therefore deny the characterization of the
23 document as set forth in paragraph 26.
- 24 27. Answering paragraph 27, Intervenors lack sufficient information to admit or deny the
25 allegations in paragraph 28 regarding what Petitioner's letter stated and on that basis deny
26 them. The remaining allegations in paragraph 27 consists of legal conclusions that do not
27 require a response. Intervenors state that Exhibit H is a document that speaks for itself, and
28 Intervenors therefore deny the characterization of the document as set forth in paragraph 27.

- 1 28. Answering paragraph 28, Intervenors lack sufficient information to admit or deny the
2 allegations in paragraph 28 regarding what Petitioner’s letter stated and on that basis deny
3 them. The remaining allegations in paragraph 28 consists of legal conclusions that do not
4 require a response. Intervenors state that Exhibit H is a document that speaks for itself, and
5 Intervenors therefore deny the characterization of the document as set forth in paragraph 28.
- 6 29. Answering paragraph 29, Intervenors lack sufficient information to admit or deny the
7 allegations in paragraph 29 regarding what Petitioner’s letter stated and on that basis deny
8 them. The remaining allegations in paragraph 29 consists of legal conclusions that do not
9 require a response. Intervenors state that Exhibit H is a document that speaks for itself, and
10 Intervenors therefore deny the characterization of the document as set forth in paragraph 29.
- 11 30. Answering paragraph 30, Intervenors lack sufficient information to admit or deny the
12 allegations in paragraph 30 and on that basis deny them. Intervenors state that Exhibit I is a
13 document that speaks for itself, and Intervenors therefore deny the characterization of the
14 document as set forth in paragraph 30.
- 15 31. Answering paragraph 31, Intervenors allege that the paragraph consists of legal conclusions
16 that do not require a response.
- 17 32. Answering paragraph 32, Intervenors allege that the paragraph consists of legal conclusions
18 that do not require a response.
- 19 33. Answering paragraph 33, Intervenors allege that the paragraph consists of legal conclusions
20 that do not require a response.
- 21 34. Answering paragraph 34, Intervenors allege that the paragraph consists of legal conclusions
22 that do not require a response.
- 23 35. Answering paragraph 35, Intervenors lack sufficient information to admit or deny the
24 allegations in the first sentence of paragraph 35 and on that basis deny them. Intervenors
25 allege that the second sentence of paragraph 35 consists of legal conclusions that do not
26 require a response. Intervenors admit the allegations in the third sentence of paragraph 35.
- 27 36. Answering paragraph 36, Intervenors allege that the paragraph consists of legal conclusions
28 that do not require a response.

- 1 37. Answering paragraph 37, Intervenors allege that the paragraph consists of legal conclusions
2 that do not require a response.
- 3 38. Answering paragraph 38 and the footnote thereto, Intervenors lack sufficient information to
4 admit or deny the allegations in the final sentence of paragraph 38 and on that basis denies
5 them. Intervenors allege that the remainder of the paragraph and the footnote thereto consists
6 of legal conclusions that do not require a response.
- 7 39. Answering paragraph 39, Intervenors lack sufficient information to admit or deny the
8 allegations in the second sentence of paragraph 39 and on that basis deny them. Intervenors
9 allege that the remainder of the paragraph consists of legal conclusions that do not require a
10 response. Intervenors state that Exhibits D and G are documents that speak for themselves,
11 and Intervenors therefore deny the characterization of the document as set forth in paragraph
12 39.
- 13 40. Answering paragraph 40, Intervenors allege that the paragraph consists of legal conclusions
14 that do not require a response.
- 15 41. Answering paragraph 41 and the footnote thereto, Intervenors lack sufficient information to
16 admit or deny the allegations regarding the agreement between OAL and West and on that
17 basis deny them. Intervenors allege that the remainder of the paragraph and the footnote
18 thereto consists of legal conclusions that do not require a response. Intervenors state that
19 Exhibit B is a document that speaks for itself, and Intervenors therefore deny the
20 characterization of the documents as set forth in paragraph 41.
- 21 42. Answering paragraph 42, Intervenors allege that the paragraph consists of legal conclusions
22 that do not require a response.
- 23 43. Answering paragraph 43, Intervenors allege that the paragraph consists of legal conclusions
24 that do not require a response.
- 25 44. Answering paragraph 44, Intervenors lack sufficient information to admit or deny the
26 allegations in the first sentence of the paragraph and on that basis deny them. Intervenors
27 allege that the remainder of the paragraph consists of legal conclusions that do not require a
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1 response. Intervenors state that Exhibit G is a document that speaks for itself, and Intervenors
2 therefore deny the characterization of the document as set forth in paragraph 44.

3 45. Answering paragraph 45, Intervenors allege that the paragraph consists of legal conclusions
4 that do not require a response.

5 46. Answering paragraph 46, Intervenors allege that the paragraph consists of legal conclusions
6 that do not require a response.

7 47. Answering paragraph 47, Intervenors allege that the paragraph consists of legal conclusions
8 that do not require a response.

9 48. Answering paragraph 48, Intervenors allege that the paragraph consists of legal conclusions
10 that do not require a response.

11 49. Answering paragraph 49, Intervenors lack sufficient information to admit or deny the
12 allegations in the first sentence of paragraph 49 and on that basis deny them. Intervenors
13 allege that the remainder of the paragraph consists of legal conclusions that do not require a
14 response. Intervenors state that Exhibits D and G are documents that speak for themselves,
15 and Intervenors therefore deny the characterization of the documents as set forth in paragraph
16 49.

17 50. Answering paragraph 50 and the footnote thereto, Intervenors admit that ICC makes read-only
18 versions of Title 24, Parts 1, 2, 2.5, 6, 8, 9, 10, 11 and 12 available online for free at the URL
19 alleged and that NFPA makes a read-only version of Title 24, Part 3 available online for free at
20 the URL alleged. Intervenors lack sufficient information to admit or deny the allegations in
21 paragraph 50 regarding (a) statements made by Respondents and (b) the practices of IAMPO
22 and West and on that basis deny them. Intervenors allege that the remainder of the paragraph
23 and the footnote thereto consists of legal conclusions that do not require a response.

24 Intervenors state that Exhibits D and G are documents that speak for themselves, and
25 Intervenors therefore deny the characterization of the documents as set forth in paragraph 50.

26 51. Answering paragraph 51, Intervenors allege that the paragraph consists of legal conclusions
27 that do not require a response. Intervenors state that Exhibit G is a document that speaks for
28

1 itself, and Intervenors therefore deny the characterization of the document as set forth in
2 paragraph 51.

3 52. Answering paragraph 52, Intervenors allege that the paragraph consists of legal conclusions
4 that do not require a response. Intervenors state that Exhibit D is a document that speaks for
5 itself, and Intervenors therefore deny the characterization of the document as set forth in
6 paragraph 52.

7 53. Answering paragraph 53, Intervenors allege that the paragraph consists of legal conclusions
8 that do not require a response.

9 54. Answering paragraph 54, Intervenors lack sufficient information to admit or deny the
10 allegations in the first sentence of paragraph 54 and on that basis deny them. Intervenors
11 allege that the remainder of the paragraph consists of legal conclusions that do not require a
12 response. Intervenors state that Exhibits D, G and I are documents that speak for themselves,
13 and Intervenors therefore deny the characterization of the documents as set forth in paragraph
14 54.

15 55. Answering paragraph 55, Intervenors allege that the paragraph consists of legal conclusions
16 that do not require a response.

17 56. Answering paragraph 56, Intervenors allege that the paragraph consists of legal conclusions
18 that do not require a response.

19 57. Answering paragraph 57, Intervenors allege that the paragraph consists of legal conclusions
20 that do not require a response.

21 58. Answering paragraph 58, Intervenors allege that the paragraph consists of legal conclusions
22 that do not require a response.

23 59. Answering paragraph 59, Intervenors allege that the paragraph consists of legal conclusions
24 that do not require a response.

25 60. Answering paragraph 60, Intervenors allege that the paragraph consists of legal conclusions
26 that do not require a response.

27 61. Answering paragraph 61, Intervenors allege that the paragraph consists of legal conclusions
28 that do not require a response.

1 62. Answering paragraph 62, Intervenors allege that the paragraph consists of legal conclusions
2 that do not require a response.

3 63. Answering paragraph 63, Intervenors allege that the paragraph consists of legal conclusions
4 that do not require a response.

5 64. Answering paragraph 64, Intervenors allege that the paragraph consists of legal conclusions
6 that do not require a response.

7 65. Answering paragraph 65, Intervenors allege that the paragraph consists of legal conclusions
8 that do not require a response.

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AFFIRMATIVE DEFENSES

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In support of their affirmative defenses, NFPA and ICC allege the following facts:

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1. NFPA and ICC are non-profit entities that create voluntary consensus standards in
13 highly technical areas, such as electrical installation and construction. Governmental bodies often
14 incorporate portions of these standards by reference. This is a valuable public-private partnership,
15 and the results of that partnership greatly benefit the public. NFPA's and ICC's standards are
16 developed with substantial expertise and provide accurate, high-quality works that resource-
17 constrained governmental entities otherwise would have to create themselves. The existence and
18 refinement of these standards serves the critical public interest in safety.

19

2. NFPA and ICC receive remuneration when they sell copies to or license the
20 exercise of their exclusive rights to people and businesses that use these works in their commercial
21 trade. NFPA and ICC rely on this revenue to fund their development and updating of their
22 standards.

23

3. BSC has incorporated by reference NFPA's National Electrical Code ("NEC"),
24 with certain California-specific amendments. The combined document consisting of the NEC and
25 the California-specific amendments is published under the title, California Electrical Code, which
26 appears at Title 24, Part 3 of the California Code of Regulations. California's Office of
27 Administrative Law ("OAL") has also incorporated other NEC standards into Titles 8 and 19 of
28 the California Code of Regulations.

1 4. BSC has incorporated by reference ICC’s International Building Code (“IBC”),
2 International Residential Code (“IRC”), International Fire Code (“IFC”), and International
3 Existing Building Code (“IEBC”), with certain California-specific amendments. The combined
4 document consisting of the IBC and the California-specific amendments is published under the
5 title, California Building Code, which appears at Title 24, Part 2 of the California Code of
6 Regulations. The combined document consisting of the IRC and the California-specific
7 amendments is published under the title California Residential Code, which appears at Title 24,
8 Part 2.5 of the California Code of Regulations. The combined document consisting of the IFC and
9 the California-specific amendments is published under the title, California Fire Code, which
10 appears at Title 24, Part 9 of the California Code of Regulations. The combined document
11 consisting of the IEBC and the California-specific amendments is published under the title,
12 California Existing Building Code, which appears at Title 24, Part 10 of the California Code of
13 Regulations.

14 5. NFPA and ICC retain copyrights in their standards. Title 24, Parts 2, 2.5 9, and 10
15 consists of copyrighted works of ICC. Title 24, Part 3 consists of a copyrighted work of NFPA.
16 Title 8 and Title 19 also contain copyrighted works of NFPA. NFPA and ICC have not authorized
17 BSC, OAL, or any other person or entity to make and distribute unrestricted copies of their
18 copyrighted works. Yet the Petition seeks to compel Respondents to produce copyrighted works
19 created and published by NFPA and ICC without any restrictions on use, copying or
20 dissemination.

21 6. Protecting Intervenors’ copyright interest ensures that Intervenors have the
22 resources and incentive to develop and improve standards in areas such as building and fire safety.

23 7. The public interest in the disclosure Petitioner seeks is minimal because the
24 documents are already available online free of charge in read only format. NFPA makes read-only
25 versions of Title 8, Title 19, and Title 24, Part 3 available for no cost online. ICC makes read-only
26 versions of Title 24, Parts 1, 2, 2.5, 6, 8, 9, 10, 11 and 12 available for no cost online. Anyone
27 who wants to learn what the documents say can easily do so and without incurring any cost.

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FIRST AFFIRMATIVE DEFENSE – GOVERNMENT CODE 2654(K)

The portions of Title 8, Title 19, and Title 24, Parts 2, 2.5, 3,9 and 10 consisting of NFPA’s and ICC’s copyrighted material (“Intervenors’ Copyrighted Works”) are exempt from disclosure under Government Code section 6254(k). Federal copyright law prohibits Respondents from disclosing Intervenors’ Copyrighted Works in the manner requested.

SECOND AFFIRMATIVE DEFENSE - PREEMPTION

The Public Records Act is preempted by the federal Copyright Act, 17 U.S.C. § 301, to the extent it would require Respondents to provide unauthorized copies of Intervenor’s Copyrighted Works to Petitioner.

THIRD AFFIRMATIVE DEFENSE – GOVERNMENT CODE 6255

Intervenors’ Copyrighted Works are exempt from disclosure under Government Code section 6255. The public interest served by not disclosing Intervenors’ Copyrighted Works clearly outweighs the public interest served by disclosure of the record.

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DATED: May 24, 2021

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