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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

Public.Resource.Org., Inc.,

Petitioner,

vs.

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

Respondents.

National Fire Protection Association, Inc., and International Code Council, Inc.

Intervenors.

Case No. 34-2021-80003612

INTERVENORS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF MANDATE

Date: January 21, 2022
Time: 1:30 p.m.
Dept.: 27
Judge: Hon. Steven M. Gevercer

Action Filed: March 17, 2021

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I. INTRODUCTION

Through this writ petition, Petitioner Public.Resource.Org ("PRO") seeks to bring this Court into its years-long crusade to change federal copyright law. PRO has been advancing—in federal court and before Congress and federal agencies—the same copyright theories it touts in this California Public Records Act ("CPRA") action: that Intervenors National Fire Protection Association ("NFPA") and International Code Council ("ICC"), and other standards-development organizations, are not entitled to copyright protection for the standards and model codes they privately create when governmental entities incorporate them by reference; and that even if those works retained copyright protection, PRO's infringement would be excused by the defense of fair use. (See generally *American Society for Testing and Materials v. Public.Resource.Org., Inc.* (D.D.C., No. 1:13-cv-01215) ("*ASTM v. PRO*").) NFPA and ICC intervened to address the copyright issues implicated by PRO's CPRA request to Respondent Building Standards Commission ("BSC") as to Parts 2, 2.5, 3, 9, and 10 of Title 24 of the California Code of Regulations ("CCR").[1]

But this Court need not and should not enter the fray. The Court should stay these writ proceedings against the BSC[2] until the federal copyright issues that PRO, NFPA, and ICC are actively litigating in federal court are resolved. (See *Caiafa Prof. Law Corp. v. State Farm Fire & Cas. Co.* (1993) 15 Cal.App.4th 800, 803-804 ("*Caiafa Prof.*") [factors for stay in favor of federal proceeding].) The copyright claims and defenses PRO seeks for this Court to weigh in on are not only "best [] determined" (*id.* at p. 804), in federal court; Congress has vested *exclusive jurisdiction* over such matters in the federal courts (28 U.S.C. § 1338(a)). There is no need for

[1] Intervenors limit their objection to PRO's CPRA request to the BSC, which seeks an unauthorized reproduction of their copyrighted material in Title 24 of the CCR. While other aspects of the CCR make reference to Intervenors' standards, Intervenors do not read PRO's request to the Office of Administrative Law ("OAL") as seeking copies of those standards, as opposed to the statutory text that references the relevant work. Intervenors therefore take no position on PRO's request to the OAL or for other portions of the CCR that do not include their copyrighted works.

[2] Respondents BSC and OAL likely have and will assert different bases for opposing PRO's Petition. Intervenors have no objection to the denial of PRO's Petition on grounds other than those discussed herein and that do not implicate Intervenors' copyright. To the extent PRO's Petition is not denied for the reasons articulated by the BSC, Intervenors' preference is that the proceedings against the BSC be stayed pending the resolution of the federal cases.

this Court to risk the potential for "'unseemly conflicts'" with the federal courts on these copyright issues. (*Caiafa Prof.*, at p. 804.)

If the Court does reach the merits, PRO's Petition, as it relates to the portions of Title 24 that incorporate Intervenors' standards by reference, should be denied for at least two reasons.

First, section 6254, subdivision (k) of the CPRA exempts Intervenors' works from disclosure as requested by PRO. To be clear, Intervenors have no objection if the BSC produces public records that include only those portions of Title 24 that are authored *by the BSC*, and to the extent such documents exist. But the electronic documents authored *by Intervenors* that PRO requests are a different matter. Those works are protected by copyright. Granting PRO's Petition would undermine California law that governs Title 24 and require the BSC to violate the Copyright Act, by making unauthorized copies and distributing them to PRO. Under section 6254, subdivision (k), the Petition may not be granted as to Intervenors' works.

Moreover, if section 6254, subdivision (k) were held not to apply, then production under the CPRA would undermine Intervenors' rights under federal law and be preempted under the doctrine of implied conflict preemption. (*Rim of the World Unified School Dist. v. Superior Court* (2002) 104 Cal.App.4th 1393, 1399-1400 [state statute requiring disclosure of records was preempted when disclosure would violate federal law].)

Second, the records are exempt from disclosure under section 6255 because the public interest in disclosure is clearly outweighed by the public interest in not disclosing Intervenors' works in the manner PRO seeks. The public interest is served by the creation of Intervenors' works and the free access for viewing that Intervenors provide. Indeed, Intervenors make their works available to the public not only for free online viewing but through numerous other channels (including affordable subscription services and print copies commonly used by professionals, as well as free library copies). Ordering the BSC to provide new electronic copies of those works to PRO—which has made clear it then will use them for unauthorized copying and distribution—does not provide any *additional* benefit to the public interest. The public interest in incorporation by reference is served by respecting Intervenors' copyrights, which provide the incentive for the creation and updating of new standards. California's legislature has recognized

and codified this public interest by setting forth the standard for incorporation by reference in the Health and Safety Code section 18910, et seq. PRO hopes that this Court will nevertheless grant disclosure and undermine these interests, either by interpreting the federal Copyright Act to conclude that Intervenors cannot be copyright owners once their works are incorporated by reference; or just by ordering disclosure under the CPRA, a result that PRO will use in the federal courts to argue that Intervenors' works are "government" records and therefore do not qualify for copyright protection. Under section 6255, because the public does not share PRO's interest in disclosure and there is clearly a strong public interest in non-disclosure to protect Intervenors' copyright, the Petition may not be granted as to Intervenors' works.

Intervenors respectfully request the Petition be stayed or denied.

II. BACKGROUND

A. The Intervenors And Their Standards-Development Processes

Intervenors are standards-development organizations ("SDOs"). While each Intervenor has its own unique mission, structure, and processes, the similarities are more relevant to this proceeding than the differences. To the extent differences between NFPA and ICC become relevant, each Intervenor reserves its rights as to such issues.

1. National Fire Protection Association

NFPA's mission is to reduce the risk of death, injury, and property and economic loss due to fire, electrical, and related hazards. (Second Declaration of Christian Dubay ("Supp. Dubay Decl.") ¶ 2.) NFPA develops and publishes over 300 standards, including its flagship standard, the *National Electrical Code* ("NEC"). (*Id.* ¶¶ 2-3.) The NEC is the world's leading standard for electrical safety and is over 900 pages long. (*Id.* ¶ 3.) NFPA updates the NEC every three years to account for the latest advancements and learnings in the field. (*Ibid.*)

NFPA is accredited by the American National Standards Institute ("ANSI"), a non-profit, non-governmental membership organization whose mission is to enhance the global competitiveness of U.S. business and the quality of life in the U.S. ANSI does this by promoting, facilitating, and safeguarding the integrity of voluntary consensus standards and conformity assessment systems. (Supp. Dubay Decl. ¶ 4.) ANSI accredits SDOs, like NFPA, whose

procedures comply with ANSI's essential requirements, including openness, balance, consensus, and due process. (*Id.* ¶ 5.) ANSI not only accredits NFPA but classifies it as an Audited Designator, meaning NFPA submits to ANSI auditing of its standards-development processes that is even more rigorous than ANSI's baseline auditing for accreditation. (*Id.* ¶ 7.)

NFPA's standards-development process has multiple stages that typically span a two-plus year period. (Supp. Dubay Decl. ¶ 8.) NFPA Technical Committees—comprised of industry representatives, state and agency representatives, consumers, public interest groups, subject-matter experts, and academics—hold open meetings to consider all proposals and revisions to the standards, including changes, deletions, or additions. (*Id.* ¶ 9.) This includes proposals and comments that are submitted by members of the public, each of which receives consideration. (*Ibid.*) NFPA staff work with the Committees to draft the standards. (*Ibid.*) The entire process is repeated before each standard is released. (*Id.* ¶ 8.) One round of revisions for the NEC can involve consideration of and responses to thousands of public comments, multi-day meetings with hundreds of Technical Committee members, and active assistance from dozens of NFPA staff. (*Id.* ¶ 11.)

All of this requires a substantial investment of time and resources. (Supp. Dubay Decl. ¶ 13.) In 2019 alone, NFPA spent more than $15.3 million on standards development. (*Ibid.*) In more recent years, NFPA invested a further $3 million to ensure the process could be conducted virtually, which increased the number of participants and proved critical during the pandemic. (*Id.* ¶ 12.) This investment yields highly creative, sophisticated, original works of authorship. (*Id.* ¶ 9.)

NFPA, like other copyright owners, is able to create and maintain these works by charging people for copies and other modes of dissemination that rely on the exclusive rights of copyright ownership. (Supp. Dubay Decl. ¶ 13.) Historically, the sale of NFPA's copyrighted publications has accounted for over 70 percent of NFPA's revenues, the majority of which came from the sale of copies of the standards. (*Ibid.*) Unsurprisingly, the purchasers of NFPA's standards are the businesses and tradespeople who use the standards' content in the course of running their businesses. (*Ibid.*)

NFPA balances generating revenue to support its work with providing free access to members of the public who want to read what its standards say. Since 2006, NFPA has maintained a "Free Access" webpage, where NFPA posts full texts of all of its standards. (*Id.* ¶¶ 17, 20.) Any member of the public can view NFPA's works online at no cost. (*Id.* ¶ 20.) NFPA has partnered with state governments to create a "Free Access Widget" to link to NFPA's website and the relevant standard incorporated by reference. (*Id.* ¶ 18.) NFPA makes accommodations for those who are visually impaired, as well as for academics and researchers. (*Id.* ¶ 19.) Anyone interested in the standards at issue here can also view them on the Building Standards Commission website, <https://www.dgs.ca.gov/BSC/Codes>, and in libraries throughout the state. (*Id.* ¶ 20.)

2. International Code Council

ICC is a non-profit organization that exists for the purpose of advancing public safety, ensuring compatibility across products and services, facilitating training, and spurring innovation through the development, maintenance, and publication of model codes and standards. (Supplemental Declaration of Mark Johnson ("Supp. Johnson Decl.") ¶ 3.) ICC's mission is safety. (*Id.* ¶ 4.) ICC provides the highest quality codes, standards, products, and services for all concerned with the safety and performance of the built environment. (*Ibid.*)

ICC has over 64,000 members comprising manufacturers, testing laboratories, consumers, regulators, builders, contractors, designers, product certifiers, and academics from more than 50 countries. (Supp. Johnson Decl. ¶ 5.) By facilitating participation from its vast network of members, ICC ensures that no one group or industry dominates the code development process. (*Ibid.*)

ICC has developed 15 comprehensive model codes through its exhaustive code-development process, including the four International Codes ("I-Codes") that make up substantial portions of Title 24 at issue in this Petition. (Supp. Johnson Decl. ¶ 6.) Among these codes and standards, ICC publishes the *International Building Code* ("IBC"), *International Residential Code* ("IRC"), *International Fire Code* ("IFC"), and *International Existing Building Code* ("IEBC"). The IBC, IRC, and IEBC set forth minimum safety standards for the design, installation, and

inspection of safe, sustainable, affordable, and resilient structures. The IFC sets forth minimum safety standards to safeguard life and property from fires and explosions. (*Id.* ¶ 7.)

Interested stakeholders participate in the development of the I-Codes through the submission of code change proposals and public comments as well as by testifying at the hearings and through participating on technical committees. (Supp. Johnson Decl. ¶ 8.) ICC's code-development processes draw on a wide range of input from a variety of interests and sources of expertise. (*Id.* ¶ 9.) ICC coordinates code-development committees composed of subject-matter experts, regulators, and interest groups to create a transparent and inclusive consensus-based process. (*Id.* ¶ 10.) Because each code addresses technical and complex issues, ICC relies on focused, skilled committees to consider testimony presented at hearings and to act on code change proposals. (*Ibid.*) ICC's goal is to conduct a process open to all parties with safeguards to avoid domination by proprietary interests. (*Id.* ¶ 11.) ICC's members and interested stakeholders participate in the development of ICC's codes through service on ICC's more than 40 technical committees, including 17 committees that conduct hearings on proposed code changes. (*Ibid.*) To address advancements in technology and safety standards, all I-Codes are revised on a three-year schedule and either reapproved, revised, or withdrawn in two revision cycles that typically take up to 12-18 months to complete. (*Id.* ¶ 12.)

ICC incurs substantial costs for its code-development infrastructure and delivery platforms, including the resources it provides to encourage collaboration among members and the public. (Supp. Johnson Decl. ¶ 13.) ICC spends millions of dollars per year on code development. (*Id.* ¶ 14.) In 2019 alone, ICC spent more than $3.4 million on code-development costs, including on the development of technology that allows the public to submit comments and proposed changes to the I-Codes. (*Ibid.*)

ICC heavily relies on the revenues that it earns from the sale and licensing of the I-Codes to fund these expenses. In 2019 alone, over 45 percent of ICC's revenue derived from sales of the I-Codes and state-specific codes that incorporate portions of the I-Codes by reference, including the California Building Code. (Supp. Johnson Decl. ¶ 15.) ICC also generates over a million

dollars of revenue from licensing its codes to organizations like MADCAD, an online reference library, where users can purchase model codes, commentary, and guidelines. (*Id.* ¶ 16.) Like NFPA, the purchasers of ICC's publications are people who routinely use and reference the I-Codes in the course of their business, including architects, code officials, contractors, builders, and designers. (*Id.* ¶ 17.)

ICC recognizes the importance of ensuring that the public has meaningful access to the I-Codes. As a result, ICC makes its codes available for free on its website—in a read-only format—through its publicACCESS site. (Supp. Johnson Decl. ¶ 18.) ICC contracts with states, like California, to publish integrated codes that contain both state-specific provisions and amendments and significant portions of the model code text that have been adopted by the jurisdiction. (*Id.* ¶ 19.) ICC publishes and distributes Parts 1, 2, 2.5, 6, and 8-12 of Title 24 to the CCR at no additional charge to the BSC. (*Id.* ¶ 20.)

The development, maintenance, and free public access to these provisions are funded by the sale of these documents in print and electronic formats. (Supp. Johnson Decl. ¶ 20.) ICC owns the copyright to the IBC, IRC, IFC, IEBC, and its other model codes and standards. (*Id.* ¶ 21.)

Like its model I-Codes, ICC makes the portions of the California Building Standards Code that it publishes available through its publicACCESS website at <https://codes.iccsafe.org/codes/california> and from the California Building Standards Commission website at <https://www.dgs.ca.gov/BSC/Codes>. ICC also donates copies of the portions of the California Building Standards Code at issue to libraries throughout California. (*Id.* ¶¶ 22-23.) In short, any member of the public who wants *to read or access* the I-Codes or the portions of the CBSC at issue can do so—at no cost—simply by going to ICC's website. Persons that want *to copy* or *distribute copies* of the I-Codes pay for that right or otherwise obtain a license. (*Id.* ¶ 24.)

B. Incorporation By Reference Of Privately Authored Standards

This Petition involves certain of Intervenors' works that have been incorporated by reference, or "IBR'd." IBR refers to the process by which state and federal governmental entities

rely on privately authored standards to set the baseline for compliance with various governmental requirements.

The public benefits that flow from the IBR process are manifest. As the federal Office of Management and Budget ("OMB") has explained, IBR (i) saves government the cost of developing standards on its own; (ii) provides incentives for private organizations to create standards that serve important national needs; (iii) promotes efficiency and economic competition through harmonized standards; and (iv) furthers the U.S. policy, as expressed in the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. § 3701 et seq.), of relying on the private sector to meet government needs for goods and services. (OMB Circular A-119, 63 Fed. Reg. 8546 (Feb. 19, 1998), as updated and amended, Jan. 27, 2016, <https://www.nist.gov/system/files/revised_circular_a-119_as_of_01-22-2016.pdf>.)

Because IBR involves privately authored works, the governmental entity must balance two interests. The first is ensuring public access to and knowledge of the IBR'd standard. The second is preserving the SDO's copyright interest in its standard.

For example, at the federal level, the Office of Federal Register ("OFR") requires that, before it IBRs a standard, the relevant agency make a finding that it is "reasonably available to and usable by the class of persons affected."[3] (1 C.F.R. Part 51 et seq.; *id.* § 51.7; see also OFR IBR Handbook (July 2018) pp. 8-9 <https://www.archives.gov/files/federal-register/write/handbook/ibr.pdf> [instructing agencies to "balance" considerations, including "work[ing] with copyright owners to further the goals of both transparency and public-private collaboration"].) At the same time, federal governmental entities have recognized that preserving the copyright is essential if SDOs are to have incentives to create standards in the first place and to update existing standards. The OMB has directed that federal agencies "*must observe and protect the rights of the copyright holder and meet any other similar obligations*" when they incorporate by reference any part of a standard. (OMB Circular A-119, 63 Fed. Reg. 8546, 8553-8558 (rev. Feb. 10, 1998), italics added.)

[3] PRO has not provided any evidence that any member of the public interested in knowing what the standards say is unable to access them for free on NFPA's or ICC's website.

California has followed the federal model. Specific regulations apply to the incorporation by reference of standards and model codes into Title 24. Health and Safety Code section 18928.1 provides that:

> Building standards adopted or approved by the commission shall incorporate the text of the model codes, applicable national specifications, or published standards, in whole or in part, only by reference, with appropriate additions or deletions therefrom. The commission may elect to adopt or approve standards which incorporate, in whole or in part, the text of these publications, with changes therein, or deletions therefrom, directly incorporated into the text of the California Building Standards Code, but no textual material contained in any of the model codes, as enumerated in Section 18916, may be included in the California Building Standards Code by means other than incorporation by reference, unless the commission and the governing body of the organization that publishes the model codes first reach a written agreement concerning the terms and conditions of the publication, including, but not limited to, whether the publication will be by the commission or the model code organization, or both. The model code governing body may not withhold any publication agreement on the basis of the substantive provisions contained in the California Building Standards Code.

This process was followed with respect to Intervenors' standards here. (Supp. Dubay Decl. ¶¶ 15-16 [explaining that the BSC has IBR'd portions of the NEC and the parties have entered into an agreement regarding the publishing and public dissemination of the *California Electrical Code*, which incorporates portions of the NEC and also California-specific amendments]; Supp. Johnson Decl. ¶¶ 20-21 [explaining that the *California Building Code* incorporates substantial portions of four ICC model codes (the IBC, IRC, IFC, and IEBC) and that ICC publishes and distributes copies of the integrated *California Building Code* with both California-specific amendments and portions of the model codes subject to its agreement with the BSC].)

California law also specifies how such IBR'd material shall be made available to the public. Section 18942 specifies that "[e]ach state department concerned and each city, county, or city and county shall have an up-to-date copy of the code available for public inspection" and that "[t]he commission *may* publish, stockpile, and sell at a reasonable price the code and materials incorporated therein by reference *if* it deems the latter is insufficiently available to the public, or unavailable at a reasonable price." (*Id.* at § 18942, subds. (d), (e)(1), italics added.)

In short, IBR is a public-private partnership. It ensures that SDOs have the ability to sell copies of the standards so they can continue to invest in new editions and new standards and that

they can protect their works from unauthorized copying and dissemination. (See Supp. Dubay Decl. ¶¶ 13-14; Supp. Johnson Decl. ¶¶ 13-16, 24.)

C. BSC Has Incorporated By Reference The Standards In Issue Here

This case involves Respondent BSC's incorporation by reference of several of Intervenors' standards:

- BSC has IBR'd portions of NFPA's NEC in Title 24, Part 3, of the CCR and also drafted California-specific amendments.
- BSC has IBR'd ICC's IBC, IRC, IFC, and IEBC in Title 24, Parts 2, 2.5, 9, and 10, of the CCR and also drafted California-specific provisions.

BSC itself has drafted its own portions of Title 24, including (1) standards specifically adapted to address California, and (2) amendments authorized by the California legislature and drafted specifically for California. (See <https://www.dgs.ca.gov/BSC/Codes> [describing three sources of material for Title 24].) Intervenors do not object to BSC producing to PRO any of BSC's original contributions to Title 24 or other aspects of the CCR, but PRO has not so limited its request.

It is undisputed that the entirety of the documents that PRO seeks are available online for anyone in the State (or anywhere in the country) to access without cost.

D. PRO's Multiple Unsuccessful Attempts To Change The Law, And The Ongoing Federal Litigation Involving Efforts To Have The Standards Declared To Be In The Public Domain

PRO is a corporation founded and run by Carl Malamud. He is PRO's President and only employee. PRO's professed mission is to make "laws" available to the public. (Heckenlively Decl. ¶ 2, Ex. A [C. Malamud Testimony].) PRO's view is that any standard that has been IBR'd is the "law," and that anyone, anywhere, must be free to copy and distribute the IBR'd standards. (*Ibid.*)

PRO has repeatedly—and unsuccessfully—fought to destroy copyright protection for IBR'd standards. PRO has tried and failed to have Congress, federal agencies, and state agencies declare that a standard automatically loses copyright protection, and is part of the public domain, whenever any governmental entity, at any level, adopts the standard. The government has rejected

PRO's pleas at each turn.

- PRO has testified before Congress in favor of amending the Copyright Act to strip works that are IBR'd of their copyright protection. (Heckenlively Decl. Ex. A) Congress has not adopted PRO's proposed rewriting of the Copyright Act.
- PRO asked OFR to change its rules to require that any standard IBR'd by a federal agency be freely available for copying and distribution. OFR refused, stating that standards "should not lose their copyright" as a result of being IBR'd. (Incorporation by Reference, 79 Fed. Reg. 66267, 66268 (Nov. 7, 2014).)
- The U.S. Department of the Interior, the U.S. Department of Housing and Urban Development, and the U.S. Consumer Product Safety Commission each rejected federal Freedom of Information Act requests submitted by PRO. (See <https://public.resource.org/pro.docket.html#s6> [linking to PRO's FOIA requests for IBR'd standards and responses].) Those agencies said the requested documents were protected by copyright and therefore would not be produced in response to PRO's FOIA requests.
- BSC has also denied PRO's request on the basis that it does not have "publishing rights" because Intervenors "retain[] copyright protections." (Pet. Ex. G.)

Undeterred, PRO has taken matters into its own hands. It has willfully infringed, and encouraged others to infringe, Intervenors' copyrights. PRO posted PDF copies of Intervenors' standards that had been processed with character-recognition software, both on its website and the Internet Archive website, resulting in tens of thousands of downloads. (Heckenlively Decl. ¶ 3, Ex. B [C. Malamud Dep. at 156:21-157:2, 224:8-13]; *id.* ¶ 4, Ex. C [Internet Archive Search Results].) PRO openly competes with Intervenors' authorized distribution channels by driving internet traffic to its own site, where PRO engages in fundraising efforts. (*Id.* ¶ 5, Ex. D [PRO website asking users to "Donate to Public Resource!" and "$$ Support the Public Domain."].)

NFPA and two other SDOs sued PRO for copyright and trademark infringement in a case pending in federal district court in Washington, D.C.: *American Society for Testing and Materials, et al. v. Public.Resource.Org., Inc.* (D.D.C., Feb. 2, 2017, No. 1:13-cv-01215-TSC)

("*ASTM v. PRO*"). In that case, PRO has made, and continues to make, the same arguments it advances here: that NFPA and the other plaintiffs in that case do not have the benefit of copyright protection for their standards once they are incorporated by reference. On summary judgment, the district court rejected PRO's arguments. It held that NFPA's and the other plaintiffs' copyrighted works did not fall into the public domain as a result of being IBR'd. (See *id.* at *14.)

PRO appealed that decision to the D.C. Circuit. Contrary to PRO's representation to this Court, the D.C. Circuit did *not* hold that IBR'd standards are "unambiguously in the public domain" upon being IBR'd. (PRO Br. at 7.) The D.C. Circuit instead vacated the district court's decision on the ground that it should have considered PRO's affirmative defense of fair use under a different standard. (See *ASTM v. PRO* (D.C. Cir. 2018) 896 F.3d 437, 441.)

The litigation between NFPA and PRO is currently on remand to the district court. The parties filed cross-motions for summary judgment on fair use under the D.C. Circuit's standard. Those motions are pending. In briefing related to those motions, PRO has asked the district court in that case to adopt the same erroneous interpretation of the Supreme Court's decision in *Georgia v. Public.Resource.Org, Inc.* (2020) 140 S. Ct. 1498 ("*Georgia v. PRO*") that PRO asks this Court to adopt. (Compare PRO Opp'n at 3, *ASTM v. PRO* (Nov. 12, 2019) Dkt. 202-2 at 3, Supp. Memo., *ASTM v. PRO* (July 24, 2020) Dkt. 226 at 1 [arguing that codes "governments have expressly incorporated into law" lose copyright protection and that standards incorporated by reference are themselves "government edicts" under *Georgia v. PRO*] with PRO Br. 1, 7 [arguing that under the government-edicts doctrine and *Georgia v. PRO*, "the law cannot be copyrighted, even when it incorporates portions of works authored or published by private parties"].)

E. PRO's CPRA Requests

PRO sent CPRA requests to Respondents OAL and BSC on December 29, 2020. (Admin Record at pp. 30, 41.) As relevant here, PRO asked the BSC for a copy of Title 24 of the California Code of Regulations in "all formats in your possession, including (but not limited to) structured, machine-readable digital formats, such as XML or PDF files." (*Id.* at 41.) BSC replied that PRO had numerous avenues to view Title 24, including on the BSC website or at a local city or county building or planning department, the BSC, or a state document depository library. (*Id.*

at 42.) BSC explained that it did not have the "publishing rights" to provide PRO with a copy, that Intervenors ICC and NFPA retained their copyrights, and referred PRO to Intervenors to obtain a copy. (*Id.* at p. 42).

PRO filed this petition for a writ of mandate on March 17, 2021, seeking a court order directing Respondents to provide electronic copies of the CCR.

On August 27, 2021, this Court granted Intervenors' Motion to Intervene.

III. ARGUMENT

At the outset, it is important to note what is and is not in dispute, at least as to Intervenors. Intervenors do not object to Respondents providing PRO with electronic copies of Title 24 material originally authored by the BSC, nor do Intervenors take any position on the other Parts of Title 24 or the CCR. What *is* in dispute is whether PRO may use a Public Records Act request to force the BSC to provide PRO with electronic copies of *Intervenors'* copyrighted works.

PRO asks this Court to order Respondent BSC to take two actions that implicate Intervenors' exclusive rights under copyright. First, BSC would have to make new, unauthorized electronic copies of Intervenors' works to provide to PRO. The unauthorized copying of Intervenors' works infringes their exclusive right to reproduce their works. (17 U.S.C. § 106(1).) Second, BSC would have to transfer those copies to PRO. This would infringe Intervenors' exclusive right to distribute copies of their works. (17 U.S.C. § 106(3).) PRO's position before this Court is that none of this matters because no portion of the CCR, including portions that are IBR'd from privately authored standards, may "be copyrighted at all." (PRO Br. at 7.) According to PRO, any IBR'd materials "***are*** the law," and thus, according to PRO, no longer protected by copyright. (*Ibid*., quoting *Georgia v. PRO*, *supra*, 140 S. Ct. at p. 1507, bold and italics by PRO.)

The Court should stay these writ proceedings against the BSC because the very issues PRO asks this Court to decide are pending before federal district courts that have exclusive jurisdiction over such issues. Alternatively, the Court should deny PRO's request under the section 6254, subdivision (k) exemption or the section 6255 catchall exemption of the CPRA, or both.

A. This Court Should Stay PRO's Petition Because It Implicates Federal Copyright Issues Currently Being Litigated In Federal Court.

It is "black letter law" in California that "when a Federal action has been filed covering the same subject matter as is involved in a California action," the California court has discretion to abstain from issuing any ruling and "stay the state court action." (*Caiafa Prof.*, *supra*, 15 Cal.App.4th at pp. 803-804; see also, e.g., *Thomson v. Continental Ins. Co.* (1967) 66 Cal.2d 738, 748.) Like other abstention doctrines, the principle reflected in *Caiafa Prof.* and other similar cases is rooted in comity and serves to "avoid a multiplicity of suits and prevent vexatious litigation, conflicting judgments, confusion and unseemly controversy between litigants and courts." (*Simmons v. Superior Court in and for. Los Angeles County* (1950) 96 Cal.App.2d 119, 124-125.) Staying this proceeding would serve each of these judicial interests.

Here, there are not one but two different federal lawsuits that cover the same subject matter as PRO's Petition. PRO claims that, because Respondents IBR'd Intervenors' works, Intervenors have no copyright interest to interpose against PRO's request. PRO is making the same argument in the *ASTM v. PRO* case, in which PRO and NFPA are directly adverse. While ICC is not a party to that case, ICC is involved in pending litigation in the district court for the Southern District of New York, where the accused infringer (a for-profit company called UpCodes) has raised the same defenses based on incorporation by reference that PRO raises in *ASTM v. PRO* and here. (*International Code Council, Inc. v. UpCodes, Inc.* (S.D.N.Y. May 27, 2020, No. 17-cv-6261) ("*ICC v. UpCodes*").)

California courts consider several factors in deciding whether to stay a proceeding pending an ongoing federal action, including, as most relevant here, "'whether the rights of the parties can best be determined by the court of the other jurisdiction because of the nature of the subject matter'"; "'the stage to which the proceedings in the other court have already advanced'"; and the interest in "'avoiding unseemly conflicts with the courts of other jurisdictions.'"[4] (*Caiafa Prof.*, 15 Cal.App.4th at pp. 803-804, citation omitted [affirming stay of state proceeding pending

[4] Other factors that may be relevant are: "'the importance of discouraging multiple litigation[s] designed solely to harass an adverse party,'" and "'the availability of witnesses.'" (*Caiafa Prof.*, *supra*, 15 Cal.App.4th at pp. 803-804, citation omitted.)

resolution of federal case]; see also *Mave Enterprises, Inc. v. Travelers Indemnity Co.* (2013) 219 Cal.App.4th 1408, 1424 [applying same factors].) Stay of the Petition is clearly appropriate here.

First, Congress has made "'the nature of the subject matter,'" (*Caiafa Prof.*, *supra*, 15 Cal.App.4th at p. 804, citation omitted)—federal copyright law—the exclusive province of federal courts, (see *Sears, Roebuck & Co. v. Stiffel Co.* (1964) 376 U.S. 225, 231, fn. 7 [citing 28 U.S.C. § 1338(a)].) The crux of PRO's position is that, upon BSC's incorporation by reference of Intervenors' works, those works lost copyright protection and became freely available for unlimited copying and distribution by anyone, including Respondents and PRO. (See PRO Br. 1, 7-8; Pet. at 16-18.) Those are federal copyright issues, and only federal courts have jurisdiction to resolve them. (See *Topolos v. Caldewey* (9th Cir. 1983) 698 F.2d 991, 993-994 [explaining that state courts may not decide federal patent or copyright issues that are the "'principal issue,'" or the "'fundamental controversy,'" of the lawsuit in state court due to federal district courts' exclusive jurisdiction, citations omitted]; 28 U.S.C. § 1338(a) [federal courts have exclusive jurisdiction over copyright].)

PRO tries to confuse the issue by claiming that "California law" determines when the work of California agencies may be subject to copyright protection. (See PRO Br. 1, 8.) That is a red herring. The case PRO cites, *County of Santa Clara v. Superior Court* (2009) 170 Cal.App.4th 1301 ("*Santa Clara Cty.*"), deals with materials the County itself developed, not with materials created by private organizations. (See *id.* at p. 1326.) It is therefore inapposite. California courts may determine whether California agencies may claim copyright protection in their own works. (See *Santa Clara Cty.*, at p. 1331.) But, as discussed above, Intervenors have no objection to BSC producing to PRO copies of the works that *BSC* authored, i.e., the California-specific amendments drafted by the state government. The issue that is disputed is whether *federal* copyright law protects *Intervenors'* works. Federal courts have exclusive jurisdiction over federal copyright issues.

Second, a stay will avoid the potential for "unseemly conflicts" with the federal courts on the copyright issues PRO raises. For example, PRO argues that pursuant to the "government edicts" doctrine, as articulated by the Supreme Court in *Georgia v. PRO*, Intervenors do not own

copyright in the portions of their works that BSC has IBR'd. (PRO Br. at 7 [asserting that *Georgia* stands for the proposition that "copyright does not vest in the law and legal materials issued in the name of the state"][5].) PRO has made the same argument in the *ASTM v. PRO* case. (See *supra* at 12.) NFPA has argued in that litigation that PRO has misread *Georgia v. PRO,* which holds that the government edicts doctrine does not apply to "works created by … private parties." (140 S. Ct. at p. 1507.) Analogous arguments have been raised in the *ICC v. UpCodes* case. (Reply Mem. at pp. 5-10, *ICC v. UpCodes* (Aug. 2, 2019) Dkt. 96.)

Likewise, PRO argues that "[n]umerous courts have held" the act of incorporating by reference causes the incorporated standards to lose their copyright and fall "unambiguously in the public domain." (PRO Br. at 7.) Intervenors submit that PRO has misread the applicable case law. (See *infra* at 18-19.) But the question whether incorporation by reference injects privately authored standards into the public domain is squarely raised in the pending federal court actions. (See PRO Opp'n at 3, *ASTM v. PRO* (Nov. 12, 2019) Dkt. 202-2, PRO Supp. Br., *ASTM v. Pro* (July 24, 2020) Dkt. 226; Reply Mem. at pp. 5-10, *ICC v. UpCodes* (Aug. 2, 2019) Dkt. 96.) PRO's Petition invites this Court to decide issues of federal copyright law that may conflict with how the federal courts ultimately resolve these issues.

Third, "'the stage to which the proceedings in the other court have already advanced,'" (*Caiafa Prof.*, 15 Cal.App.4th at p. 804, citation omitted), weighs in favor of a stay. The *ASTM v. PRO* action is on remand from the D.C. Circuit and has been briefed fully at summary judgment, including supplemental briefing on the government edicts question. (See *ASTM v. PRO* Dkts. 198, 202, 225-228.) The district court in the *ICC v. UpCodes* case has issued a summary judgment ruling setting forth that court's views on the legal issues, but that court has not issued judgment as to any of ICC's standards. Even if that court ultimately enters judgment for UpCodes, ICC has the

[5] Notably, PRO *asked* the Supreme Court to hold that all "[l]egal materials adopted by or published under the authority of the State are not the proper subject of private copyright." (Brief of Respondent at 35, *Georgia v. PRO* (U.S., Oct. 9, 2019, No. 18-1150), italics added.) The Court did not do so. Instead, it confirmed that the government edicts doctrine "does not apply" to works created by "private parties[] who lack the authority to make or interpret the law." (*Georgia*, 140 S. Ct. at p. 1507.)

right to appeal to the Second Circuit. In short, the federal actions, which are before courts with exclusive jurisdiction to decide the disputed issues of federal law, are at a significantly more advanced stage than this action is.

For all these reasons, this Court should exercise its discretion to stay the Petition until the District of Columbia federal district court issues a final judgment on the very copyright issues presented here and all appellate review from that decision is exhausted. PRO would then be free to move to lift the stay, or more likely, the issue will be settled and none would be required.

B. Section 6254, Subdivision (k) Exempts Intervenors' Standards From PRO's Request; If The CPRA Does Mandate Granting PRO's Request, Then Federal Copyright Law Preempts It.

PRO asks the Court to order BSC to take actions that contravene California law and infringe Intervenors' copyrights. Section 6254, subdivision (k) of the CPRA therefore exempts Intervenors' standards from PRO's request. If that provision (and section 6255, discussed *infra*) were held not to apply, then the CPRA could not be applied to order the copying and distribution of Intervenors' works under the doctrine of implied conflict preemption.

1. PRO Seeks Disclosures In Violation Of Federal Copyright Rights, And Section 6254, Subdivision (k)'s Exemption Therefore Applies.

Government Code section 6254, subdivision (k) provides that disclosure is not required under the CPRA if disclosure is "exempted or prohibited pursuant to federal or state law." Here, the federal Copyright Act protects Intervenors' works from, inter alia, unauthorized copying and distribution. And, as discussed, an order for BSC to comply with PRO's demand would require BSC to copy and distribute Intervenors' works. Because that is prohibited by federal copyright law—and also runs counter to the careful balance struck by the California legislature in Health and Safety Code section 18910 et seq. (discussed *supra* at 9)—section 6254, subdivision (k) applies and the records need not be disclosed.

PRO responds with the same arguments it is making in the *ASTM v. PRO* case. If the Court does not abstain from deciding those issues by staying this CPRA writ petition, the Court should reject PRO's arguments as contrary to law.

First, as discussed, PRO argues that under *Georgia v. PRO*, once Intervenors' standards

were IBR'd, they became government edicts, which are not subject to copyright protection. As noted, PRO ignores the Supreme Court's holding that the government edicts doctrine does not apply to "works created by … private parties." (140 S. Ct. at p. 1507.) The Supreme Court held that judges and legislators "may not be considered the 'authors' of the works they produce in the course of their official duties," and thus such works when produced by judges and legislators are not subject to copyright protection. (*Id.* at p. 1506.) NFPA and ICC are not judges or legislators. They are private parties. The government edicts doctrine does not apply to their works.

Second, PRO is wrong that the case law "unambiguously" holds that privately authored works fall into the public domain when incorporated by reference. (PRO Br. at 7-8.) The cases PRO cites do not support this proposition. *ASTM v. PRO*, as noted, held only that the district court had applied the incorrect standard to evaluate PRO's fair use defense.[6] The D.C. Circuit's statement about "the express text of the law" not being subject to copyright protection was about text written by legislators in their lawmaking capacity. (896 F.3d at p. 451 [cited in PRO Br. at 7].) Intervenors' standards are privately authored works that have been incorporated by reference, and thus the D.C. Circuit's statement is inapposite.

The OFR has stated in published regulations that *Veeck v. Southern Building Code Congress International, Inc.* (5th Cir. 2002) 293 F.3d 791 ("*Veeck*") (cited in PRO Br. at 7), has "not eliminated the availability of copyright protection for privately developed codes and standards referenced in or incorporated into federal regulations." (79 Fed. Reg. at 66268.) There is no final judgment in *ICC v. UpCodes* (cited in PRO Br. at 8); the district court *denied* summary judgment against ICC, and the case is awaiting trial. And, *Building Officials & Code Administrators v. Code Technology, Inc.* (1st Cir. 1980) 628 F.2d 730 ("*BOCA*") (cited in PRO Br. at 8), refrained from adopting the "public domain" holding PRO has long sought. The *BOCA* court did not issue such a definitive judgment because of the "important public function" served by standards-development organizations. (*BOCA*, at p. 736.)

[6] Another federal district court recently determined that fair use issues needed to be resolved to determine whether NFPA could succeed on its copyright infringement claims against UpCodes. (*National Fire Protection Association, Inc. v. UpCodes, Inc.* (C.D. Cal. Aug. 9, 2021, No. 2:21-cv-05262) Dkt. 30.)

Thus, the cases PRO cites do not stand for the sweeping proposition PRO advances. But there is more: PRO ignores case law holding that incorporation by reference does *not* terminate copyright protection for privately produced standards. In *Practice Management Information Corp. v. American Medical Association* (9th Cir. 1997) 121 F.3d 516 ("*Prac. Mgmt. Info.*"), the Ninth Circuit held that the American Medical Association's copyright in its standard for coding medical procedures was not invalidated because a federal agency had IBR'd that standard. (*Id.* at pp. 518-519.) The Ninth Circuit also rejected the application of the government edicts doctrine, because the American Medical Association was a private non-profit that "authored, owns, and maintains [its code] and claims a copyright in it." (*Id.* at p. 518.) Other federal courts are in agreement that incorporation by reference does not invalidate a private party's copyright in its incorporated standards. (See *CCC Information Services, Inc. v. Maclean Hunter Market Reports, Inc.* (2d Cir. 1994) 44 F.3d 61, 74 ("*CCC Info. Servs.*") ["We are not prepared to hold that a state's reference to a copyrighted work as a legal standard for valuation results in loss of the copyright."]; *John G. Danielson, Inc. v. Winchester-Conant Properties, Inc.* (D.Mass. 2002) 186 F.Supp.2d 1, 22, affd. on other grounds (1st Cir. 2003) 322 F.3d 26, 39 ["the balance of competing interests at stake … favors preserving copyright protection for works incorporated by reference into public enactments"].)

Finally, PRO's arguments ignore the federal and state statutory frameworks that are designed to preserve copyright for incorporated by reference standards. (See *supra* at 8-10.)

* * *

Federal copyright law prohibits the disclosure of the unauthorized copies of Title 24 that PRO seeks. PRO's arguments otherwise are the same theories it has asserted in other forums for nearly a decade, without acceptance. If this Court does not stay this CPRA action, it should hold that the records sought are exempt from disclosure under Section 6254, subdivision (k) because disclosure is prohibited by federal law.

2. If Intervenors' Standards Are Not Exempt From Disclosure, Then The CPRA Is Preempted.

Even if section 6254, subdivision (k) did not exist or did not apply, the Supremacy Clause

of the U.S. Constitution and principles of preemption would prohibit PRO from using the CPRA to obtain what it cannot under federal law. The CPRA, like any state law, is preempted "when it is impossible to comply with both state and federal law, or where a state law stands as an obstacle to the accomplishment of the full purposes and objectives of" a federal law. (*Rim of the World Unified School Dist. v. Superior Court* (2002) 104 Cal.App.4th 1393, 1399 ("*Rim of the World*").)

In *Rim of the World*, the Court of Appeal held that a California statute requiring the disclosure of certain student disciplinary records was preempted by a federal statute that required school districts *not* to disclose those records. (*Id.* at pp. 1398-1399.) It was therefore impossible for the school district to comply with both state and federal law, and the state law operated as "an obvious obstacle to accomplishing Congress's purposes and objectives" of ensuring student privacy. (*Ibid.*)

The same is true here. If the CPRA required disclosure of Intervenors' works, it would not be possible for BSC to comply with both federal copyright law and the CPRA. Moreover, the CPRA would be an obstacle to Congress's objective of protecting copyrighted works. Courts have repeatedly held that state laws may not eliminate rights protected by federal copyright and patent law. (See *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.* (1989) 489 U.S. 141, 168; *id.* at pp. 164-165 ["States are simply not free" to extinguish a "federal right" under federal patent and copyright laws]; *Ryan v. Editions Ltd. West, Inc.* (9th Cir. 2015) 786 F.3d 754, 761; *In re Jackson* (2d Cir. 2020) 972 F.3d 25, 34-35; *Brown v. Ames* (5th Cir. 2000) 201 F.3d 654, 661.) In particular, "implied preemption may provide a defense against a … claim which, if allowed to proceed, would impair the ability of a copyright holder … to exploit the rights guaranteed under the Copyright Act, or in some way interfere with the proper functioning of the copyright system." (*Jackson*, at p. 35.)

If the CPRA were somehow to require disclosure of Intervenors' works, it would be preempted as an obstacle to Congress's protection of copyrights under federal law.

C. Section 6255 Requires Denial Of PRO's Petition Because The Public Interest In Nondisclosure Clearly Outweighs Any Public Interest In Disclosure.

Finally, the "catchall exemption" in Government Code section 6255 authorizes the Court to deny the Petition without staying it pending final resolution of the federal action and without passing on the merits of the copyright issue. Section 6255 permits nondisclosure when, "on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." (Gov. Code, § 6255.) This standard is met here: copyright protection furthers the public interest in incentivizing Intervenors and others like them to continue to create and update standards as set forth and enacted into law by the California legislature (see Health & Saf. Code, § 18910 et seq.; Supp. Dubay Decl. ¶¶ 13-14; Supp. Johnson Decl. ¶¶ 12-16), whereas disclosure to PRO serves no public interest because the standards *already* are available online to the public free of charge.

The public has significant interest in nondisclosure of the electronic version of the standards, which is necessary to protect Intervenors' copyright and allow them to continue to create new standards. Intervenors explain precisely how copyright serves the overall public interest in safety and their non-profit missions. (See Supp. Dubay Decl. ¶¶ 13-14; Supp. Johnson Decl. ¶¶ 3, 5-14.) The Ninth and Second Circuits, in rejecting the public domain arguments PRO advances here, noted the "increasing trend toward state and federal adoptions of model codes" (*CCC Info. Servs*., *supra*, 44 F.3d at p. 74, fn. 30, citation omitted; *Prac. Mgmt. Info.*, *supra*, 121 F.3d at p. 518), and the necessary "economic incentive" (*Prac. Mgmt. Info.*, at p. 518) that copyright protection provides. The dynamics discussed by those courts fully apply today. California, like other states and the federal government, relies on private non-profits, including Intervenors, to develop and update highly technical standards. Intervenors and other non-profits, in turn, rely on copyright protection to generate revenue that fuels the creation of new standards. Without copyright protection, this model breaks down, and regulation of public safety and industry would suffer. (See Supp. Dubay Decl. ¶¶ 13-14; Supp. Johnson Decl. ¶¶ 13-16, 24.) To the extent PRO argues that *County of Santa Clara* says such financial interests must be ignored, it would mischaracterize that case, which did not suggest that the financial interests of *private*

copyright holders are unimportant; it merely acknowledged there was conflicting evidence on the financial stakes of nondisclosure for a *governmental* entity. (*Supra*, 170 Cal.App.4th at pp. 1326-1327.)

The public's interest in nondisclosure far outweighs any interest the public may have in PRO obtaining an unrestricted, electronic copy of the standards. There is no public interest in the disclosure PRO is seeking because any member of the public can access the standards in issue for free online, so the electronic copies of Intervenors' standards that PRO requests would not shed any further light on the IBR process. Intervenors' argument is not that BSC should be exempt under section 6255 because PRO has "'alternative means to access the information.'" (*Santa Clara Cty*., *supra*, 170 Cal.App.4th at p. 1325, citation omitted.) Rather, it is that PRO seeks no *information* beyond what it and the public already has and that there is no public interest in the electronic copy that it seeks. The California Supreme Court has cautioned that the section 6255 public-interest balancing must be conducted against the backdrop "that the [CPRA] imposes no limits upon who may seek information or what he may do with it" because "once information is held subject to disclosure under the Act, the courts can exercise no restraint on the use to which it may be put." (*American Civil Liberties Union Foundation v. Deukmejian* (1982) 32 Cal.3d 440, 451.) So while "the motive of the particular requester is irrelevant; the question [remains] whether disclosure serves the *public* interest." (*Santa Clara Cty.*, *supra*, 170 Cal.App.4th at p. 1324.) Disclosure to PRO plainly does not when its sole aim is to make the electronic version available for unrestricted copying and dissemination in violation of Intervenors' copyright. (Pet. ¶ 3.) The public already has access to information about the standards and BSC's use and amendment of them thorough freely available versions. The relief that PRO seeks does not further the public interest in accessing Intervenors' standards.

Moreover, the public interest is in "encouraging creativity" through copyright enforcement (*CCC Info. Servs*., *supra*, 44 F.3d at pp. 73-74 & fn. 30.), not eroding it indirectly through a CPRA proceeding. Because there is no meaningful public interest in disclosure of an electronic version of the standards and there is a strong countervailing public interest in nondisclosure to preserve Intervenors' copyright, the Petition should be denied.

IV. CONCLUSION

For the foregoing reasons, Intervenors respectfully request that this Court stay the writ petition pending final resolution of *ASTM v. PRO*. If this Court declines to abstain, Intervenors respectfully request that the Court deny the Petition because disclosure is exempted under Sections 6254, subdivision (k) and 6255 of the CPRA, or preempted by federal law. If the Court believes it must order disclosure, Intervenors respectfully request that the Court make clear that PRO's liability for copyright infringement is a matter for the federal courts to decide and refrain from engaging substantively on the issues of federal copyright law.

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