National Association of Home Builders Appeal of the ICC 2019 Group B Code Cycle Final Action Results

Written Submission of National Association of Home Builders In Support of Appeal of RE126 (Preemption)

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I. INTRODUCTION

Over the past 25 years, the International Code Council ("ICC" or "Council") has committed its resources and efforts toward its vital mission of providing the "highest quality" model construction codes.¹ Through this commitment, the ICC has earned an exceptional reputation among states and localities for providing clear and adoptable model codes.

Providing the "highest quality" model codes hinges on the ICC's compliance with, and prophylactic interpretation of, the letter and spirit of its Bylaws, processes, and procedures. When the ICC does this, the resultant model codes are not only technically functional and economical—but they are also adoptable by states and localities.

The ICC's Bylaws, processes, and procedures protect against incorporating unadoptable standards in several important ways. First, under CP#28-05, Part 3, the proponent of a standard must clearly establish, and the ICC must independently determine, that the proposed standard is "appropriate" (*i.e.*, lawful and otherwise adoptable). Second, as the arbiter of code change proposals—the ICC and its committees in the first instance, and the Appeals Board in the second instance—have a procedural duty to

¹ About the International Code Council, Mission, *available at* <u>https://www.iccsafe.org/about/who-we-are/</u>.

ensure that the ICC acts in accordance with its Articles of Incorporation ("AOI"), Bylaws, and policies.

The ICC 2019 Group B Code Cycle Final Action Results adopting RE126 were the result of a material and significant irregularity of process or procedure for three independent reasons.

- *First*, the proponent failed to establish that RE126 is "appropriate," which is a fundamental requirement that must be satisfied *before* a standard can even be considered for reference.
- *Second*, no ICC body properly verified that RE126 was "appropriate" because no independent legal analysis for RE126 was completed.
- *Third*, under its AOI and Bylaws, the ICC lacked authority to adopt RE126 because the proposed code change is unlawful and, regardless, highly susceptible to legal challenge.

Each of these errors constitutes a material and significant irregularity of process or procedure that justifies sustaining this appeal. For these reasons, and to preserve the integrity of the ICC and its code development process, NAHB respectfully requests that the Appeals Board make the requisite findings to sustain NAHB's appeal and repeal RE126.

II. ARGUMENT

A. RE126 Should Be Repealed Because Neither Its Proposal Nor its Adoption Complied with CP#28-05.

CP#28-05 establishes certain threshold requirements for the submittal of code change proposals.² Under this policy, only code change proposals that are "in conformance to these" requirements "will be duly considered" by the ICC.³ In other words, CP#28-05 procedurally bars the consideration of code change proposals that do not meet any one of the threshold requirements.

Here, RE126 failed to satisfy a threshold requirement that must be met *before* the ICC even considers, let alone adopts, a code change proposal.⁴ To be considered by the ICC, CP#28-05 requires that "[a] standard or portions of a standard intended to be enforced shall be written in mandatory language,"⁵ and "[t]he standard **shall be appropriate** for the subject covered."⁶ Because RE126 does not meet the requirement of being "appropriate," the ICC was barred from considering and adopting the standard, necessitating the sustaining of this appeal and the repeal of RE126.

² CP#28-05, Part 3.0.

³ CP#28-05, Part 3.1 states that "[a]ny interested person, persons or group may submit a code change proposal which will be duly considered *when in conformance to these rules*" (emphasis added).

⁴ CP#28-05, Part 3.6.2.2.

⁵ CP#28-05, Part 3.6.2.1.

⁶ CP#28-05, Part 3.6.2.2.

For a standard "intended to be enforced" to be "appropriate" it must, at minimum, be **enforceable** (*i.e.*, lawful). Besides being common sense as states and localities cannot enforce illegal code provisions—this requirement provides an important procedural safeguard in the code development process that protects the integrity of the ICC and its model codes.

Satisfying CP#28-05's "appropriate" requirement necessarily involves two common-sense procedural steps. *First*, the proponent of a code change intended to be enforced must clearly show that the proposal is lawful and would not be highly susceptible to legal challenge if adopted by a state or locality. *Second*, the ICC must determine that the proponent has established both of these things. Skipping either of these procedural steps not only disregards a fundamental CP#28-05 safeguard, but also undermines the very purpose and value of the ICC and its model codes by placing unnecessary litigation risk and burdens on governments adopting model codes.

These two foundational requirements were not satisfied before the ICC considered or adopted RE126. Although the proponent of RE126 provided a "legal memorandum" ("Proponent's Memorandum") to support its proposal, that memorandum was incomplete, incorrect, and misleading. For example,

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the Proponent's Memorandum did not identify the right legal test, ignored cases contrary to its proposal, only discussed two of the seven requirements for an exemption from federal preemption,⁷ and relied on an obsolete example. In short, the Proponent's Memorandum did not come close to satisfying the "appropriate" requirement.⁸

Separately, the ICC had an independent obligation to validate the legality of RE126 before considering and adopting the proposal. Although legal issues were briefly discussed during the public comment process, the ICC did not provide an independent legal analysis or determination, as required by CP#28-05 before the Council could deem RE126 "appropriate" for consideration.

Absent the proponent demonstrating that RE126 is lawful and not highly susceptible to legal challenge, and absent the ICC independently determining the same, RE126 could not be deemed "appropriate" for consideration or adoption under CP#28-05. These failures incurably taint

⁷ The Energy Policy Conservation Act includes a general preemption provision that once triggered can only be avoided by showing that an exemption applies. To satisfy the exemption, the statute requires a showing of seven independent factors. 42 U.S.C. 6297(f)(3)(A)-(G). Copies of excerpts of the most relevant statutes and regulations referenced in this written statement are included in Exhibit A.

⁸ Part II.B of this written submission below explains why RE126 is unlawful.

RE126 and constitute material and significant irregularities of process and procedure that necessitate the repeal of RE126.

B. RE126 Should Be Repealed Because It Is Unlawful and Highly Susceptible to Federal Legal Challenges.

Had the procedural requirements of CP#28-05 discussed above been adhered to, the ICC never would have allowed RE126 to advance in the code development process because the Energy Policy Conservation Act ("EPCA") preempts the proposed code change. Although the Proponent's Memorandum included with RE126 claims the opposite, that memorandum applied the wrong legal standard and was otherwise incomplete. Determining whether EPCA would preempt a state or local regulation adopting RE126 involves two general questions:

(1) Does any standard in RE126 trigger EPCA's general preemption provision because it "concern[s] the energy efficiency . . . of [a] covered product" and exceeds the federal standard for that product?⁹
(2) If so, is the standard exempted from preemption because it satisfies *all seven mandatory statutory factors* set forth under 42 U.S.C. § 6297(f)(3)?¹⁰

⁹ See 42 U.S.C. § 6297(b), (c).

¹⁰ 42 U.S.C. § 6297(f)(3).

The Proponent's Memorandum completely bypasses this clear and wellestablished legal standard, even though this standard is laid out in the primary case that the memorandum repeatedly references: *Building Industry Association of Washington v. Washington State Building Code Council*, 683 F.3d 1144 (9th Cir. 2012).¹¹ When applying the proper legal standard, it is clear that EPCA preempts RE126.

First, RE 126 unquestionably triggers EPCA's general preemption provision. EPCA's general preemption provision applies to state and local energy efficiency standards for covered products that exceed federal standards.¹² There is no question that RE126 is subject to EPCA's general preemption provisions. EPCA and its implementing regulations establish that classes of water heating equipment are covered products,¹³ and RE126 concerns energy efficiency standards that exceed federal standards.¹⁴ The

¹¹ That case expressly states: "Federal regulations promulgated under EPCA provide minimum standards for the energy efficiency of such fixtures, *see* 42 U.S.C. § 6295; 10 C.F.R. § 430.32, and the federal statute preempts state attempts to impose minimum standards greater than the federal law, *see* 42 U.S.C. § 6297(c). States thus cannot, for example, require that any water heater sold or installed in the state meet energy-efficiency requirements more stringent than federal requirements. States seeking to implement energy conservation goals through their building codes must therefore ensure that the code satisfies the [seven] conditions established in EPCA for exemption from federal preemption" in 42 U.S.C. § 6297(f)(3). *Bldg. Indus. Ass'n of Washington v. Washington State Bldg. Code Council*, 683 F.3d 1144, 1148 (9th Cir. 2012).

¹² 42 U.S.C. § 6297(b), (c).

¹³ See 42 U.S.C. § 6291(2); 6292(a)(4); 10 C.F.R. § 430.32.

¹⁴ RE126, at 1-2.

Proponent's Memorandum does not dispute this, and instead only claims that RE126 falls within an exemption to the general preemption provisions.¹⁵

Second, the proponent's failure to show that RE126 clearly falls within an exemption creates a presumption that it does not. For EPCA's exemption to preemption to apply to RE126, there must be a showing that seven statutory factors are met.¹⁶ CP#28-05 required that the proponent show (and ICC verify) that RE126 satisfied each of these seven factors.¹⁷ Making that showing required the proponent to, at minimum, have considered and analyzed each of the seven requirements set forth in 42 U.S.C. § 6297(f)(3)(A)-(G).¹⁸ However, the Proponent's Memorandum failed to do so, touching on only two of the seven factors.¹⁹ Additionally, there is no public record of any independent ICC analysis of the legality of RE126. These failures alone-besides constituting material and significant irregularities of process or procedure-should create a presumption that RE126 is unlawful.

Third, no exemption to preemption applies to RE 126. Were an independent legal analysis completed, it would show that RE126 does not

¹⁵ RE126, at 3-5.

¹⁶ See 42 U.S.C. § 6297(f)(3).

¹⁷ *See* Part II.A of this written submission, which explains that CP#28-05 requires that any code change proposal be "appropriate" (*i.e.*, lawful and otherwise appropriate). ¹⁸ CP#28-05, Parts 3.6, 3.6.2.2.

¹⁹ RE126, at 3-5.

satisfy the seven elements of EPCA's exemption to preemption. If the proponent fails to satisfy *even one* of the seven exemption elements for RE126, the exemption does not apply, and the proposed code change is preempted by EPCA.²⁰ As explained below, because the Proponent's Memorandum fails to show that RE126 satisfies even the handpicked element discussed by the proponent, EPCA preempts RE126.

As a threshold matter, as stated above, the Proponent's Memorandum does not include the complete or correct legal standard for assessing preemption. Instead of using the required two-step analysis²¹ the proponent improperly conflates the two questions into one:²² the proponent incorrectly claims that the preemption test only requires determining whether RE126 "would effectively require builders to use products that are more efficient than required by federal efficiency standards."²³

Separately, the Proponent's Memorandum incorrectly claims that RE126 satisfies the second preemption exemption factor that "[t]he code does not require that the covered product have an energy efficiency

²⁰ Recognizing that other appellants have provided and will provide detailed preemption analyses, NAHB will not provide a separate comprehensive analysis in this written submission. Instead, NAHB agrees with and therefore incorporates by reference the preemption analyses of the other appellants.

²¹ See page 7, above.

²² See RE126, at 3-5.

²³ RE126, at 3.

exceeding" the federal standard.²⁴ According to the proponent, RE126 satisfies this factor because (1) all water heaters constitute one "covered product" for purposes of EPCA;²⁵ (2) satisfying this exemption factor only requires that a builder has options;²⁶ (3) a builder has options under RE126;²⁷ and (4) California's 2016 code included provisions "analogous" to RE126.²⁸ Each of these assertions is either plainly wrong or inapt:

• The U.S. Department of Energy does not treat all water heaters as a single "covered product." Instead, the Department's regulations have identified multiple classes of water heaters, where each class constitutes a distinct covered product with unique energy efficiency standards.²⁹ The Department's classification approach makes sense from a practical perspective because water heater classes are not interchangeable for every project. The Proponent's Memorandum

²⁴ 42 U.S.C. § 6972(f)(3)(B).

²⁵ RE126, at 4.

²⁶ RE126, at 3-5.

²⁷ RE126, at 3-5.

²⁸ RE126, at 4-5.

²⁹ 10 C.F.R. § 430.32(d) identifies seven distinct "product classes" or covered products for water heaters, which include (1) gas-fired storage water heaters; (2) oil-fired storage water heaters; (3) electric storage water heaters; (4) tabletop water heaters; (5) instantaneous gas-fired water heaters; (6) instantaneous electric water heaters; and (7) grid-enabled water heaters.

acknowledges as much, stating that "it is true that not every home may be able to utilize every option listed."³⁰

- The Proponent's Memorandum wrongly suggests that the availability of options in and of itself means that a proposed code change satisfies the second exemption factor. The U.S. District Court for the District of New Mexico **already has disagreed** with this blanket assertion, concluding that a locality had "not persuaded the Court that a local law is not preempted when it presents regulated parties with viable, non-preempted options."³¹ Tellingly, the Proponent's Memorandum did not address this decision.
- Even if the memorandum was correct (which it is not) that EPCA "only requires that the builder has options," RE126 would not meet this requirement because RE126 provides no options for any of the six covered products it addresses. As discussed above, each of RE126's six product classes of water heaters constitute a distinct covered product

³⁰ RE126, at 1.

³¹ Air Conditioning, Heating & Refrigeration Inst. v. City of Albuquerque, 835 F. Supp. 2d 1133, 1137 (D.N.M. 2010); Air Conditioning, Heating & Refrigeration Inst. v. City of Albuquerque, No. CIV. 08-633MV/RLP, 2008 WL 5586316 (D.N.M. Oct. 3, 2008). Copies of these cases and all other cases referenced are included in Exhibit B.

under EPCA.³² Four of these covered products exceed federal standards and include no options not exceeding federal standards.

The Proponent's Memorandum's heavy reliance on its allegation that RE126 is analogous to provisions in California's now obsolete 2016 Building Code is inapt. Even assuming that the proponent's allegation is correct, California's past adoption of "analogous" standards does not establish that either those standards or those different standards in For example, the Proponent's Memorandum RE126 are lawful.³³ identifies no decision affirming that California's 2016 standards were lawful. Additionally, California's *currently applicable 2019* standards clearly are not analogous to the obsolete 2016 standards because the 2019 standards do not deviate from the federal energy efficiency standards for each covered water heater product at all. According to the 2019 code provision, "Water heaters are regulated under California's Title 20 Appliance Efficiency Regulations, Section

³² See 10 C.F.R. § 430.32(d).

³³ The hyperlink to the alleged analogous 2016 California standards included in the legal memorandum does not work.

1605.1(f)," and "[t]hese regulations align with the federal efficiency standards."³⁴

Contrary to the assertion in the Proponent's Memorandum, RE126 does not "easily satisfy" the second exemption factor.³⁵ Rather, it clearly fails to satisfy this standard, and proponent's argument that the exemption from EPCA preemption should apply therefore likewise fails.

For these reasons, the memorandum could not, and did not, satisfy proponent's burden under CP#28-05 to demonstrate that the proposal was "appropriate." Thus, consideration and adoption of RE126 constitute material and significant irregularities of process or procedure, and the Appeals Board should sustain this appeal and repeal RE126.

C. RE126 Also Is Highly Susceptible to Legal Challenges Because It Likely Is Preempted by State Laws.

Besides EPCA preemption, if RE126 were adopted by localities it likely would face state law preemption challenges to the extent that it interferes with and limits the potential use of natural gas and natural gas appliances in new buildings.

³⁴ 2019 Residential Compliance Manual, Part 5.3.2, page 5-10 (emphasis added). Available for download at <u>https://www.energy.ca.gov/media/3986</u>. A comparative review of these energy efficiency standards for water heaters with the federal energy efficiency standards for water heaters confirms their consistency. *See* 10 C.F.R. § 430.32. ³⁵ RE126, at 3.

Recently, the Attorney General of Massachusetts concluded that the Town of Brookline's by-law prohibiting the construction of certain buildings with fossil fuel infrastructure was preempted because it conflicted with three uniform statewide regulatory schemes, including the state building code, the gas code, and the statute under which the Massachusetts Department of Public Utilities regulates the sale and distribution of natural gas.³⁶ The bylaw would have, with limited exception, prohibited the issuance of permits for the construction of new buildings or significant rehabilitations that include the installation of new on-site fossil fuel infrastructure.³⁷ Attorney General Healey stated her desire to uphold the by-law based on climate change concerns but recognized the law precluded her from doing so.³⁸

In addition to this example, a preemption challenge to the City of Berkeley's similar ordinance that, subject to certain exceptions, prohibits natural gas infrastructure in newly constructed buildings (*e.g.*, natural gas connections) is presently being litigated in the U.S. District Court for the Northern District of California. The ordinance is intended to "eliminate obsolete natural gas infrastructure and associated greenhouse gas emissions in new buildings where all-electric infrastructure can be most practicably

³⁶ See Exhibit C, at 1-2.

³⁷ Exhibit C, at 3.

³⁸ Exhibit C, at 1, 12

integrated, thereby reducing the environmental and health hazards produced by the consumption and transportation of natural gas."³⁹ The plaintiffs in that lawsuit contend that Berkeley's ordinance is preempted under both EPCA and various state laws.⁴⁰

Based on these examples, were a locality to adopt RE126, it is likely that a variety of state laws would preempt that code provision—potentially leading to a patchwork of litigation challenging the model code. This provides additional evidence of the legal susceptibility of RE126, even outside of the EPCA preemption context, and supports repeal of the code.

D. RE126 Should Be Repealed Because It Conflicts with the ICC's Purpose and Exceeds the Council's Authority Under Its Articles of Incorporation and Bylaws.

The ICC cannot and should not adopt proposed code changes that are of questionable legality, or those like RE126, that are clearly unlawful. Doing so not only impermissibly contravenes the ICC's limited purposes, but also impermissibly exceeds the ICC's authority under its AOI and Bylaws, and, by extension, California's law governing non-profit public benefit corporations. Any Council action contravening its AOI, Bylaws, or otherwise exceeding its authority constitutes

³⁹ Available at:

https://www.cityofberkeley.info/recordsonline/api/Document/AREyhJ1JdtQyMkp8db ovBNzZx2ki%C3%81E9pti4phWOvPfOF9osICfbjkJ1vbO6hQCu%C3%81gMNvOfpqA%C 3%81MJr83Sgx5wOyg=/ 4%Evkikit D. et 1, 2, 8, 10

⁴⁰ Exhibit D, at 1-2, 8-19.

a per se material and significant irregularity of process and procedure that requires intervention by the Appeals Board. Accordingly, the Appeals Board should sustain this appeal and repeal RE126.

The adoption of RE126 impermissibly contravenes the ICC's sole purpose of lessening the burdens of government as stated in its AOI and Bylaws. The ICC is a non-profit public benefit corporation established under California law.⁴¹ As such, the ICC's AOI and Bylaws define the Council's limited purposes and powers.⁴² Under the ICC AOI and Bylaws, the Council's with respect to buildings and structures are:

- "[T]he lessening of burdens of government through the development, maintenance and publication of model statutes and standards for the use by federal, state and local governments in connection with the administration of building laws and regulations"; and
- "[T]he lessening of the burdens of government through the performance of certain services for the benefit of federal, state and local governments in connection with the administration of building law and regulation."⁴³

⁴¹ ICC Bylaws Part 1.2.

⁴² Cal. Corp. Code § 5131.

⁴³ Exhibit E, ICC AOI, Amendment 3, Article 2; Bylaws, Part 1.2.

Under its AOI and Bylaws, the ICC (1) cannot adopt any proposed code change that conflicts with or significantly undermines the Council's limited purposes, and (2) should not adopt any proposed code change that may conflict with or undermine the Council's limited purposes.

Adopting a proposed code change that is unlawful or highly susceptible to legal challenges, such as RE126, does not lessen burdens on the governments who would potentially adopt that model code provision. Instead, *it increases their burdens* by requiring those governments to waste their limited resources vetting an unlawful code provision and by imposing legal risks for those localities who adopt the code provision because they trust the ICC's model code or fail to identify a legal problem. This confirms the importance of CP#28-05's threshold procedural requirements, discussed in Part II.A, above requiring the proponent of a code change the demonstrate that the change is "appropriate" (*i.e.*, legal and otherwise appropriate), and the Council to determine the same.

Further, the adoption of RE126 is not in harmony with California law and needlessly creates legal risk for the ICC itself. Under California law, ICC action that is inconsistent with its AOI and Bylaws is *ultra vires—i.e.*, "beyond the powers conferred upon a corporation by its charter or by the

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laws of the state of incorporation"—and therefore wholly void.⁴⁴ Wellestablished corporate legal principles provide that ""[a] corporation may exercise only those powers that are granted to it by law, by its charter or articles of incorporation, and by any bylaws made pursuant to the laws or charter."⁴⁵

In short, the ICC cannot "depart[] from the purposes for which it is formed" as defined in its AOI and Bylaws.⁴⁶ If it does, the California Attorney General has the power to initiate any "proceeding necessary to correct the noncompliance or departure,"⁴⁷ and other persons may "bring an action to enjoin, correct, obtain damages for or otherwise remedy" certain breaches.⁴⁸ The adoption of code change proposals that are inconsistent with the ICC's purpose as defined by its AOI and Bylaws constitutes a departure from the purposes for which it was formed and exposes the ICC to unnecessary risk.

For these reasons, the ICC's adoption of RE126, an inappropriate code change proposal, impermissibly conflicts with the AOI, Bylaws, and

⁴⁴ Sammis v. Stafford, 48 Cal. App. 4th 1935, 1942, 56 Cal. Rptr. 2d 589, 593 (1996) (quotation marks and citation omitted); Use of the term "ultra vires", 7A Fletcher Cyc. Corp. § 3399.

⁴⁵ Use of the term "ultra vires", 7A Fletcher Cyc. Corp. § 3399.

⁴⁶ *See* Cal. Corp. Code § 5250.

⁴⁷ See Cal. Corp. Code § 5250.

⁴⁸ Cal. Corp. Code § 5142.

California law, and therefore constitutes a material and significant irregularity of process and procedure that requires the repeal of RE126.

III. CONCLUSION

Based on the reasons explained above, the ICC's consideration and adoption of RE126 constitute material and significant irregularities of process or procedure that necessitate the sustaining of this appeal. No vote on an individual code change proposal can rewrite ICC's AOI, Bylaws, or policies; it certainly cannot rewrite California law. Accordingly, NAHB respectfully urges the Appeals Board to sustain this appeal and repeal RE126.

Dated: August 17, 2020

Respectfully submitted,

By: <u>/s/ S. Craig Drumheller</u>

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Exhibit A

42 U.S.C. § 6297

KeyCite Yellow Flag - Negative Treatment Proposed Legislation

United States Code Annotated Title 42. The Public Health and Welfare Chapter 77. Energy Conservation (Refs & Annos) Subchapter III. Improving Energy Efficiency Part A. Energy Conservation Program for Consumer Products Other than Automobiles (Refs & Annos)

42 U.S.C.A. § 6297

§ 6297. Effect on other law

Currentness

(a) Preemption of testing and labeling requirements

(1) Effective on March 17, 1987, this part supersedes any State regulation insofar as such State regulation provides at any time for the disclosure of information with respect to any measure of energy consumption or water use of any covered product if--

(A) such State regulation requires testing or the use of any measure of energy consumption, water use, or energy descriptor in any manner other than that provided under section 6293 of this title; or

(B) such State regulation requires disclosure of information with respect to the energy use, energy efficiency, or water use of any covered product other than information required under section 6294 of this title.

(2) For purposes of this section, the following definitions apply:

(A) The term "State regulation" means a law, regulation, or other requirement of a State or its political subdivisions. With respect to showerheads, faucets, water closets, and urinals, such term shall also mean a law, regulation, or other requirement of a river basin commission that has jurisdiction within a State.

(B) The term "river basin commission" means--

(i) a commission established by interstate compact to apportion, store, regulate, or otherwise manage or coordinate the management of the waters of a river basin; and

(ii) a commission established under section 1962b(a) of this title.

(b) General rule of preemption for energy conservation standards before Federal standard becomes effective for product

Effective on March 17, 1987, and ending on the effective date of an energy conservation standard established under section 6295 of this title for any covered product, no State regulation, or revision thereof, concerning the energy efficiency, energy use, or water use of the covered product shall be effective with respect to such covered product, unless the State regulation or revision-

(1)(A) was prescribed or enacted before January 8, 1987, and is applicable to products before January 3, 1988, or in the case of any portion of any regulation which establishes requirements for fluorescent lamp ballasts, was prescribed or enacted before June 28, 1988, or in the case of any portion of any regulation which establishes requirements for fluorescent or incandescent lamps, flow rate requirements for showerheads or faucets, or water use requirements for water closets or urinals, was prescribed or enacted before October 24, 1992; or

(B) in the case of any portion of any regulation that establishes requirements for general service incandescent lamps, intermediate base incandescent lamps, or candelabra base lamps, was enacted or adopted by the State of California or Nevada before December 4, 2007, except that--

(i) the regulation adopted by the California Energy Commission with an effective date of January 1, 2008, shall only be effective until the effective date of the Federal standard for the applicable lamp category under subparagraphs (A), (B), and (C) of section 6295(i)(1) of this title; and

(ii) the States of California and Nevada may, at any time, modify or adopt a State standard for general service lamps to conform with Federal standards with effective dates no earlier than 12 months prior to the Federal effective dates prescribed under subparagraphs (A), (B), and (C) of section 6295(i)(1) of this title, at which time any prior regulations adopted by the State of California or Nevada shall no longer be effective.

(iii) Repealed. Pub.L. 112-210, § 10(a)(9)(C), Dec. 18, 2012, 126 Stat. 1525

(2) is a State procurement regulation described in subsection (e);

(3) is a regulation described in subsection (f)(1) or is prescribed or enacted in a building code for new construction described in subsection (f)(2);

(4) is a regulation prohibiting the use in pool heaters of a constant burning pilot, or is a regulation (or portion thereof) regulating fluorescent lamp ballasts other than those to which paragraph (5) of section 6295(g) of this title is applicable, or is a regulation (or portion thereof) regulating fluorescent or incandescent lamps other than those to which section 6295(i) of this title is applicable, or is a regulation (or portion thereof) regulating showerheads or faucets other than those to which section 6295(j) of this title is applicable or regulating lavatory faucets (other than metering faucets) for installation in public places, or is a regulation (or portion thereof) regulating water closets or urinals other than those to which section 6295(k) of this title is applicable;

(5) is a regulation described in subsection (d)(5)(B) for which a waiver has been granted under subsection (d);

(6) is a regulation effective on or after January 1, 1992, concerning the energy efficiency or energy use of television sets; or

(7) is a regulation (or portion thereof) concerning the water efficiency or water use of low consumption flushometer valve water closets.

(c) General rule of preemption for energy conservation standards when Federal standard becomes effective for product

Except as provided in section 6295(b)(3)(A)(ii) of this title, subparagraphs (B) and (C) of section 6295(j)(3) of this title, and subparagraphs (B) and (C) of section 6295(k)(3) of this title and effective on the effective date of an energy conservation standard established in or prescribed under section 6295 of this title for any covered product, no State regulation concerning the energy efficiency, energy use, or water use of such covered product shall be effective with respect to such product unless the regulation--

(1) is a regulation described in paragraph (2) or (4) of subsection (b), except that a State regulation (or portion thereof) regulating fluorescent lamp ballasts other than those to which paragraph (5) of section 6295(g) of this title is applicable shall be effective only until the effective date of a standard that is prescribed by the Secretary under paragraph (7) of such section and is applicable to such ballasts, except that a State regulation (or portion thereof) regulating fluorescent or incandescent lamps other than those for which section 6295(i) of this title is applicable shall be effective only until the effective date of a standard that is prescribed by the Secretary under paragraph (7) of such section and is applicable to such ballasts, except that a State regulation (or portion thereof) regulating fluorescent or incandescent lamps other than those for which section 6295(i) of this title is applicable shall be effective only until the effective date of a standard that is prescribed by the Secretary and is applicable to such lamps;

(2) is a regulation which has been granted a waiver under subsection (d);

(3) is in a building code for new construction described in subsection (f)(3);

(4) is a regulation concerning the water use of lavatory faucets adopted by the State of New York or the State of Georgia before October 24, 1992;

(5) is a regulation concerning the water use of lavatory or kitchen faucets adopted by the State of Rhode Island prior to October 24, 1992;

(6) is a regulation (or portion thereof) concerning the water efficiency or water use of gravity tank-type low consumption water closets for installation in public places, except that such a regulation shall be effective only until January 1, 1997; or

(7)(A) is a regulation concerning standards for commercial prerinse spray valves adopted by the California Energy Commission before January 1, 2005; or

(B) is an amendment to a regulation described in subparagraph (A) that was developed to align California regulations with changes in American Society for Testing and Materials Standard F2324;

(8)(A) is a regulation concerning standards for pedestrian modules adopted by the California Energy Commission before January 1, 2005; or

(B) is an amendment to a regulation described in subparagraph (A) that was developed to align California regulations to changes in the Institute for Transportation Engineers standards, entitled "Performance Specification: Pedestrian Traffic Control Signal Indications"; and

(9) is a regulation concerning metal halide lamp fixtures adopted by the California Energy Commission on or before January 1, 2011, except that--

(A) if the Secretary fails to issue a final rule within 180 days after the deadlines for rulemakings in section 6295(hh) of this title, notwithstanding any other provision of this section, preemption shall not apply to a regulation concerning metal halide lamp fixtures adopted by the California Energy Commission--

(i) on or before July 1, 2015, if the Secretary fails to meet the deadline specified in section 6295(hh)(2) of this title; or

(ii) on or before July 1, 2022, if the Secretary fails to meet the deadline specified in section 6295(hh)(3) of this title.

(d) Waiver of Federal preemption

(1)(A) Any State or river basin commission with a State regulation which provides for any energy conservation standard or other requirement with respect to energy use, energy efficiency, or water use for any type (or class) of covered product for which there is a Federal energy conservation standard under section 6295 of this title may file a petition with the Secretary requesting a rule that such State regulation become effective with respect to such covered product.

(B) Subject to paragraphs (2) through (5), the Secretary shall, within the period described in paragraph (2) and after consideration of the petition and the comments of interested persons, prescribe such rule if the Secretary finds (and publishes such finding) that the State or river basin commission has established by a preponderance of the evidence that such State regulation is needed to meet unusual and compelling State or local energy or water interests.

(C) For purposes of this subsection, the term "unusual and compelling State or local energy or water interests" means interests which--

(i) are substantially different in nature or magnitude than those prevailing in the United States generally; and

(ii) are such that the costs, benefits, burdens, and reliability of energy or water savings resulting from the State regulation make such regulation preferable or necessary when measured against the costs, benefits, burdens, and reliability of alternative approaches to energy or water savings or production, including reliance on reasonably predictable market-induced improvements in efficiency of all products subject to the State regulation.

The factors described in clause (ii) shall be evaluated within the context of the State's energy plan and forecast, and, with respect to a State regulation for which a petition has been submitted to the Secretary which provides for any energy conservation standard or requirement with respect to water use of a covered product, within the context of the water supply and groundwater

management plan, water quality program, and comprehensive plan (if any) of the State or river basin commission for improving, developing, or conserving a waterway affected by water supply development.

(2) The Secretary shall give notice of any petition filed under paragraph (1)(A) and afford interested persons a reasonable opportunity to make written comments, including rebuttal comments, thereon. The Secretary shall, within the 6-month period beginning on the date on which any such petition is filed, deny such petition or prescribe the requested rule, except that the Secretary may publish a notice in the Federal Register extending such period to a date certain but no longer than one year after the date on which the petition was filed. Such notice shall include the reasons for delay. In the case of any denial of a petition under this subsection, the Secretary shall publish in the Federal Register notice of, and the reasons for, such denial.

(3) The Secretary may not prescribe a rule under this subsection if the Secretary finds (and publishes such finding) that interested persons have established, by a preponderance of the evidence, that such State regulation will significantly burden manufacturing, marketing, distribution, sale, or servicing of the covered product on a national basis. In determining whether to make such finding, the Secretary shall evaluate all relevant factors, including--

(A) the extent to which the State regulation will increase manufacturing or distribution costs of manufacturers, distributors, and others;

(B) the extent to which the State regulation will disadvantage smaller manufacturers, distributors, or dealers or lessen competition in the sale of the covered product in the State;

(C) the extent to which the State regulation would cause a burden to manufacturers to redesign and produce the covered product type (or class), taking into consideration the extent to which the regulation would result in a reduction--

(i) in the current models, or in the projected availability of models, that could be shipped on the effective date of the regulation to the State and within the United States; or

(ii) in the current or projected sales volume of the covered product type (or class) in the State and the United States; and

(**D**) the extent to which the State regulation is likely to contribute significantly to a proliferation of State appliance efficiency requirements and the cumulative impact such requirements would have.

(4) The Secretary may not prescribe a rule under this subsection if the Secretary finds (and publishes such finding) that interested persons have established, by a preponderance of the evidence, that the State regulation is likely to result in the unavailability in the State of any covered product type (or class) of performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those generally available in the State at the time of the Secretary's finding, except that the failure of some classes (or types) to meet this criterion shall not affect the Secretary's determination of whether to prescribe a rule for other classes (or types).

(5) No final rule prescribed by the Secretary under this subsection may--

(A) permit any State regulation to become effective with respect to any covered product manufactured within three years after such rule is published in the Federal Register or within five years if the Secretary finds that such additional time is necessary due to the substantial burdens of retooling, redesign, or distribution needed to comply with the State regulation; or

(B) become effective with respect to a covered product manufactured before the earliest possible effective date specified in section 6295 of this title for the initial amendment of the energy conservation standard established in such section for the covered product; except that such rule may become effective before such date if the Secretary finds (and publishes such finding) that, in addition to the other requirements of this subsection the State has established, by a preponderance of the evidence, that--

(i) there exists within the State an energy emergency condition or, if the State regulation provides for an energy conservation standard or other requirement with respect to the water use of a covered product for which there is a Federal energy conservation standard under subsection (j) or (k) of section 6295 of this title, a water emergency condition, which--

(I) imperils the health, safety, and welfare of its residents because of the inability of the State or utilities within the State to provide adequate quantities of gas or electric energy or, in the case of a water emergency condition, water or wastewater treatment, to its residents at less than prohibitive costs; and

(II) cannot be substantially alleviated by the importation of energy or, in the case of a water emergency condition, by the importation of water, or by the use of interconnection agreements; and

(ii) the State regulation is necessary to alleviate substantially such condition.

(6) In any case in which a State is issued a rule under paragraph (1) with respect to a covered product and subsequently a Federal energy conservation standard concerning such product is amended pursuant to section 6295 of this title, any person subject to such State regulation may file a petition with the Secretary requesting the Secretary to withdraw the rule issued under paragraph (1) with respect to such product in such State. The Secretary shall consider such petition in accordance with the requirements of paragraphs (1), (3), and (4), except that the burden shall be on the petitioner to show by a preponderance of the evidence that the rule received by the State under paragraph (1) should be withdrawn as a result of the amendment to the Federal standard. If the Secretary determines that the petitioner has shown that the rule issued by the State should be so withdrawn, the Secretary shall withdraw it.

(e) Exception for certain State procurement standards

Any State regulation which sets forth procurement standards for a State (or political subdivision thereof) shall not be superseded by the provisions of this part if such standards are more stringent than the corresponding Federal energy conservation standards.

(f) Exception for certain building code requirements

(1) A regulation or other requirement enacted or prescribed before January 8, 1987, that is contained in a State or local building code for new construction concerning the energy efficiency or energy use of a covered product is not superseded by this part

until the effective date of the energy conservation standard established in or prescribed under section 6295 of this title for such covered product.

(2) A regulation or other requirement, or revision thereof, enacted or prescribed on or after January 8, 1987, that is contained in a State or local building code for new construction concerning the energy efficiency or energy use of a covered product is not superseded by this part until the effective date of the energy conservation standard established in or prescribed under section 6295 of this title for such covered product if the code does not require that the energy efficiency of such covered product exceed--

(A) the applicable minimum efficiency requirement in a national voluntary consensus standard; or

(B) the minimum energy efficiency level in a regulation or other requirement of the State meeting the requirements of subsection (b)(1) or (b)(5),

whichever is higher.

(3) Effective on the effective date of an energy conservation standard for a covered product established in or prescribed under section 6295 of this title, a regulation or other requirement contained in a State or local building code for new construction concerning the energy efficiency or energy use of such covered product is not superseded by this part if the code complies with all of the following requirements:

(A) The code permits a builder to meet an energy consumption or conservation objective for a building by selecting items whose combined energy efficiencies meet the objective.

(B) The code does not require that the covered product have an energy efficiency exceeding the applicable energy conservation standard established in or prescribed under section 6295 of this title, except that the required efficiency may exceed such standard up to the level required by a regulation of that State for which the Secretary has issued a rule granting a waiver under subsection (d).

(C) The credit to the energy consumption or conservation objective allowed by the code for installing covered products having energy efficiencies exceeding such energy conservation standard established in or prescribed under section 6295 of this title or the efficiency level required in a State regulation referred to in subparagraph (B) is on a one-for-one equivalent energy use or equivalent cost basis.

(**D**) If the code uses one or more baseline building designs against which all submitted building designs are to be evaluated and such baseline building designs contain a covered product subject to an energy conservation standard established in or prescribed under section 6295 of this title, the baseline building designs are based on the efficiency level for such covered product which meets but does not exceed such standard or the efficiency level required by a regulation of that State for which the Secretary has issued a rule granting a waiver under subsection (d).

(E) If the code sets forth one or more optional combinations of items which meet the energy consumption or conservation objective, for every combination which includes a covered product the efficiency of which exceeds either standard or level referred to in subparagraph (D), there also shall be at least one combination which includes such covered product the efficiency

of which does not exceed such standard or level by more than 5 percent, except that at least one combination shall include such covered product the efficiency of which meets but does not exceed such standard.

(F) The energy consumption or conservation objective is specified in terms of an estimated total consumption of energy (which may be calculated from energy loss- or gain-based codes) utilizing an equivalent amount of energy (which may be specified in units of energy or its equivalent cost).

(G) The estimated energy use of any covered product permitted or required in the code, or used in calculating the objective, is determined using the applicable test procedures prescribed under section 6293 of this title, except that the State may permit the estimated energy use calculation to be adjusted to reflect the conditions of the areas where the code is being applied if such adjustment is based on the use of the applicable test procedures prescribed under section 6293 of this title or other technically accurate documented procedure.

(4)(A) Subject to subparagraph (B), a State or local government is not required to submit a petition to the Secretary in order to enforce or apply its building code or to establish that the code meets the conditions set forth in this subsection.

(B) If a building code requires the installation of covered products with efficiencies exceeding both the applicable Federal standard established in or prescribed under section 6295 of this title and the applicable standard of such State, if any, that has been granted a waiver under subsection (d), such requirement of the building code shall not be applicable unless the Secretary has granted a waiver for such requirement under subsection (d).

(g) No warranty

Any disclosure with respect to energy use, energy efficiency, or estimated annual operating cost which is required to be made under the provisions of this part shall not create an express or implied warranty under State or Federal law that such energy efficiency will be achieved or that such energy use or estimated annual operating cost will not be exceeded under conditions of actual use.

CREDIT(S)

(Pub.L. 94-163, Title III, § 327, Dec. 22, 1975, 89 Stat. 926; Pub.L. 95-619, Title IV, § 424, Nov. 9, 1978, 92 Stat. 3263; Pub.L. 100-12, § 7, Mar. 17, 1987, 101 Stat. 117; Pub.L. 100-357, § 2(f), June 28, 1988, 102 Stat. 674; Pub.L. 102-486, Title I, § 123(h), Oct. 24, 1992, 106 Stat. 2829; Pub.L. 109-58, Title I, § 135(d), Aug. 8, 2005, 119 Stat. 634; Pub.L. 110-140, Title III, § 321(d), 324(f), Dec. 19, 2007, 121 Stat. 1585, 1594; Pub.L. 112-210, § 10(a)(9), Dec. 18, 2012, 126 Stat. 1524.)

Notes of Decisions (5)

42 U.S.C.A. § 6297, 42 USCA § 6297 Current through P.L. 116-155.

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10 C.F.R. § 430.32 (Excerpts)

KeyCite Yellow Flag - Negative Treatment Proposed Regulation

Code of Federal Regulations Title 10. Energy Chapter II. Department of Energy Subchapter D. Energy Conservation Part 430. Energy Conservation Program for Consumer Products (Refs & Annos) Subpart C. Energy and Water Conservation Standards (Refs & Annos)

10 C.F.R. § 430.32

§ 430.32 Energy and water conservation standards and their compliance dates.

Effective: March 10, 2020 Currentness

<For compliance date(s) of amendment(s) to section, see 74 FR 34080; 75 FR 20112; 76 FR 22454; 76 FR 52852; 77 FR 59712; 77 FR 59719; 79 FR 7846; 79 FR 38130; 79 FR 40542; 80 FR 4042; 81 FR 2320; 82 FR 6826; 82 FR 23723; 82 FR 24211; 82 FR 24214; 85 FR 1378; 85 FR 1447. See also, Editorial Note regarding court order implementation by publication of final rules at 85 FR 1378-02 and 85 FR 1447-01.>

The energy and water (in the case of faucets, showerheads, water closets, and urinals) conservation standards for the covered product classes are:

(a) Refrigerators/refrigerator-freezers/freezers. These standards do not apply to refrigerators and refrigerator-freezers with total refrigerated volume exceeding 39 cubic feet (1104 liters) or freezers with total refrigerated volume exceeding 30 cubic feet (850 liters). The energy standards as determined by the equations of the following table(s) shall be rounded off to the nearest kWh per year. If the equation calculation is halfway between the nearest two kWh per year values, the standard shall be rounded up to the higher of these values.

The following standards remain in effect from July 1, 2001 until September 15, 2014:

Product class	Energy standard equations for maximum energy use (kWh/yr)	
1. Refrigerators and refrigerator-freezers with manual defrost.	8.82AV + 248.4	
	0.31 av + 248.4	
2. Refrigerator-freezers—partial automatic defrost	8.82AV + 248.4	
	0.31av + 248.4	
3. Refrigerator-freezers—automatic defrost with top-mounted freezer without through-the-door ice service and all-refrigerator—automatic defrost	9.80AV + 276.0	

§ 430.32 Energy and water conservation standards and	d their, 10 C.F.R. § 430.32
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(ii) Split systems—heat pumps	14.3	7.5
(iii) Single-package units—air conditioners	13.4	
(iv) Single-package units-heat pumps	13.4	6.7
(v) Small-duct, high-velocity systems	12	6.1
(vi)(A) Space-constrained products—air conditioners	11.7	
(vi)(B) Space-constrained products—heat pumps	11.9	6.3

(6)(i) In addition to meeting the applicable requirements in paragraph (c)(5) of this section, products in product classes (i) and (iii) of paragraph (c)(5) of this section (i.e., split systems—air conditioners and single-package units—air conditioners) that are installed on or after January 1, 2023, in the southeast or southwest must have a Seasonal Energy Efficiency Ratio 2 and a Energy Efficiency Ratio 2 not less than:

Product class	Southeast [*]		Southwest **	
	SEER2	SEER2	EER2 ***	
(i)(A) Split-systems—air conditioners with a certified cooling capacity less than 45,000 Btu/hr	14.3	14.3	11.7/9.8 ‡	
(i)(B) Split-systems—air conditioners with a certified cooling capacity equal to or greater than 45,000 Btu/hr	13.8	13.8	11.2/9.8 ‡	
(iii) Single-package units—air conditioners			10.6	

(ii) Any outdoor unit model that has a certified combination with a rating below the applicable standard level(s) for a region cannot be installed in that region. The least-efficient combination of each basic model must comply with this standard.

(d) Water heaters. The uniform energy factor of water heaters shall not be less than the following:

Product class	Rated storage volume and input rating (if applicable)	Draw pattern	Uniform energy factor
Gas-fired Storage Water Heater	\geq 20 gal and \leq 55 gal	Very Small	0.3456 - (0.0020 x V _r)
		Low	0.5982 - (0.0019 x V _r)
		Medium	0.6483 - (0.0017 x Vr—)

		High	0.6920 - (0.0013 x V _r)
	>55 gal and ≤ 100 gal	Very Small	0.6470 - (0.0006 x V _r)
		Low	0.7689 - (0.0005 x V _r)
		Medium	0.7897 - (0.0004 x V _r)
		High	0.8072 - (0.0003 x V _r)
Oil-fired Storage Water Heater	≤50 gal	Very Small	0.2509 - (0.0012 x V _r)
		Low	0.5330 - (0.0016 x V _r)
		Medium	0.6078 - (0.0016 x V _r)
		High	0.6815 - (0.0014 x V _r)
Electric Storage Water Heaters	\geq 20 gal and \leq 55 gal	Very Small	0.8808 - (0.0008 x V _r)
		Low	0.9254 - (0.0003 x V _r)
		Medium	0.9307 - (0.0002 x V _r)
		High	0.9349 - (0.0001 x V _r)
	>55 gal and ≤ 120 gal	Very Small	1.9236 - (0.0011 x V _r)
		Low	2.0440 - (0.0011 x V _r)
		Medium	2.1171 - (0.0011 x V _r)
		High	2.2418 - (0.0011 x V _r)
Tabletop Water Heater	≥ 20 gal and ≤ 120 gal	Very Small	0.6323 - (0.0058 x V _r)

		Low	0.9188 - (0.0031 x V _r)
		Medium	0.9577 - (0.0023 x V _r)
		High	0.9884 - (0.0016 x V _r)
Instantaneous Gas-fired Water Heater	<2 gal and >50,000 Btu/h	Very Small	0.80
		Low	0.81
		Medium	0.81
		High	0.81
Instantaneous Electric Water Heater	<2 gal	Very Small	0.91
		Low	0.91
		Medium	0.91
		High	0.92
Grid-Enabled Water Heater	>75 gal	Very Small	1.0136 - (0.0028 x V _r)
		Low	0.9984 - (0.0014 x V _r)
		Medium	0.9853 - (0.0010 x V _r)
		High	0.9720 - (0.0007 x V _r)

* V_r is the Rated Storage Volume (in gallons), as determined pursuant to 10 CFR 429.17.

(e) Furnaces and boilers.

(1) Furnaces.

(i) The Annual Fuel Utilization Efficiency (AFUE) of residential furnaces shall not be less than the following for non-weatherized gas furnaces manufactured before November 19, 2015, non-weatherized oil furnaces manufactured before May 1, 2013, and weatherized furnaces manufactured before January 1, 2015:

Product class

AFUE (percent)¹

Cal. Corp. Code § 5131

West's Annotated California Codes Corporations Code (Refs & Annos) Title 1. Corporations Division 2. Nonprofit Corporation Law (Refs & Annos) Part 2. Nonprofit Public Benefit Corporations (Refs & Annos) Chapter 1. Organization and Bylaws (Refs & Annos) Article 3. Articles of Incorporation (Refs & Annos)

West's Ann.Cal.Corp.Code § 5131

§ 5131. Purposes or powers; statement of limitation

Currentness

The articles of incorporation may set forth a further statement limiting the purposes or powers of the corporation.

Credits

(Added by Stats.1978, c. 567, p. 1750, § 5, operative Jan. 1, 1980.)

West's Ann. Cal. Corp. Code § 5131, CA CORP § 5131 Current with urgency legislation through Ch. 31 of 2020 Reg.Sess. Some statute sections may be more current, see credits for details.

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Cal. Corp. Code § 5142

West's Annotated California Codes Corporations Code (Refs & Annos) Title 1. Corporations Division 2. Nonprofit Corporation Law (Refs & Annos) Part 2. Nonprofit Public Benefit Corporations (Refs & Annos) Chapter 1. Organization and Bylaws (Refs & Annos) Article 4. Powers (Refs & Annos)

West's Ann.Cal.Corp.Code § 5142

§ 5142. Breach of charitable trust; actions; standing; notice to and intervention of attorney general; rescission or injunction of contractual performance

Currentness

(a) Notwithstanding Section 5141, any of the following may bring an action to enjoin, correct, obtain damages for or to otherwise remedy a breach of a charitable trust:

(1) The corporation, or a member in the name of the corporation pursuant to Section 5710.

- (2) An officer of the corporation.
- (3) A director of the corporation.

(4) A person with a reversionary, contractual, or property interest in the assets subject to such charitable trust.

(5) The Attorney General, or any person granted relator status by the Attorney General.

The Attorney General shall be given notice of any action brought by the persons specified in paragraphs (1) through (4), and may intervene.

(b) In an action under this section, the court may not rescind or enjoin the performance of a contract unless:

(1) All of the parties to the contract are parties to the action;

(2) No party to the contract has, in good faith, and without actual notice of the trust restriction, parted with value under the contract or in reliance upon it; and

(3) It is equitable to do so.

Credits

(Added by Stats.1978, c. 567, p. 1750, § 5, operative Jan. 1, 1980. Amended by Stats.1979, c. 724, p. 2235, § 15.5, operative Jan. 1, 1980.)

Notes of Decisions (3)

West's Ann. Cal. Corp. Code § 5142, CA CORP § 5142 Current with urgency legislation through Ch. 31 of 2020 Reg.Sess. Some statute sections may be more current, see credits for details.

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Cal. Corp. Code § 5250

West's Annotated California Codes Corporations Code (Refs & Annos) Title 1. Corporations Division 2. Nonprofit Corporation Law (Refs & Annos) Part 2. Nonprofit Public Benefit Corporations (Refs & Annos) Chapter 2. Directors and Management (Refs & Annos) Article 5. Examination by Attorney General (Refs & Annos)

West's Ann.Cal.Corp.Code § 5250

§ 5250. Purposes; proceedings to correct noncompliance

Currentness

A corporation is subject at all times to examination by the Attorney General, on behalf of the state, to ascertain the condition of its affairs and to what extent, if at all, it fails to comply with trusts which it has assumed or has departed from the purposes for which it is formed. In case of any such failure or departure the Attorney General may institute, in the name of the state, the proceeding necessary to correct the noncompliance or departure.

Credits

(Added by Stats.1978, c. 567, p. 1750, § 5, operative Jan. 1, 1980.)

West's Ann. Cal. Corp. Code § 5250, CA CORP § 5250 Current with urgency legislation through Ch. 31 of 2020 Reg.Sess. Some statute sections may be more current, see credits for details.

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Exhibit B

Air Conditioning, Heating & Refrigeration Inst. v. City of Albuquerque, 835 F. Supp. 2d 1133, 1137 (D.N.M. 2010)

835 F.Supp.2d 1133 United States District Court, D. New Mexico.

The AIR CONDITIONING, HEATING AND

REFRIGERATION INSTITUTE, et al., Plaintiffs,

v. CITY OF ALBUQUERQUE, Defendant.

> Civ. No. 08–633 MV/RLP. | Sept. 30, 2010.

Synopsis

Background: Trade associations representing manufacturers, distributors, and installers of heating, ventilation, air conditioning (HVAC) products and water heaters, and local distributors and contractors who sold and installed HVAC products brought action alleging that city's energy conservation code was preempted by federal law. Plaintiffs moved for partial summary judgment.

Holdings: The District Court, Martha Vazquez, J., held that:

[1] code provision requiring that HVAC systems and equipment in small retail and office buildings comply with minimum efficiency standards was preempted by federal law;

[2] fact issues remained as to whether code's performancebased compliance paths were preempted;

[3] code provision requiring that HVAC systems and equipment in one- and two-family detached dwellings and townhouses comply with minimum efficiency standards was preempted by federal law; and

[4] fact issues remained as to whether provision establishing voluntary rating systems was preempted.

Motions granted in part and denied in part.

Procedural Posture(s): Motion for Summary Judgment.

West Headnotes (7)

[1] States 🦛 Congressional intent

In determining whether statute preempts state law, court's primary task in interpreting statutes is to determine congressional intent, using traditional tools of statutory construction.

[2] Statutes - Purpose and intent; determination thereof

Statutes - Plain, literal, or clear meaning; ambiguity

If statute's plain language is ambiguous as to Congressional intent, court looks to statute's legislative history and underlying public policy.

[3] Electricity ← Environmental considerations in general

Municipal Corporations \leftarrow Political Status and Relations

Provision of city's energy conservation code, requiring that heating, ventilation, air conditioning (HVAC) systems and equipment in small retail and office buildings comply with minimum efficiency standards that were more stringent than applicable federal standards, was preempted by federal law, even though city permitted buildings to contain HVAC systems and equipment that did not meet those standards if buildings met minimum energy efficiency standards. Energy Policy and Conservation Act, § 345(b)(2)(A), 42 U.S.C.A. § 6316(b)(2)(A).

[4] Federal Civil Procedure - Environmental law, cases involving

Genuine issue of material fact as to whether performance-based compliance paths for city's energy conservation code for commercial and multi-family buildings were preempted by federal law precluded summary judgment in action brought by manufacturers, distributors, and installers of heating, ventilation, air conditioning (HVAC) products. Energy Policy and Conservation Act, § 345(b)(2)(A), 42 U.S.C.A. § 6316(b)(2)(A). [5] Electricity - Environmental considerations in general

Municipal Corporations \leftarrow Political Status and Relations

Provision of city's energy conservation code requiring that heating, ventilation, air conditioning (HVAC) systems and equipment in one- and two-family detached dwellings and townhouses comply with minimum efficiency standards that were more stringent than applicable federal standards was preempted by federal law, even though city permitted buildings to contain HVAC systems and equipment that did not meet those standards if buildings met minimum energy efficiency standards. Energy Policy and Conservation Act, § 345(b)(2)(A), 42 U.S.C.A. § 6316(b)(2)(A).

[6] Electricity - Environmental considerations in general

Municipal Corporations \leftarrow Political Status and Relations

Standard reference design in city's energy conservation code for heating, ventilation, air conditioning (HVAC) systems and equipment that was based on efficiency levels exceeding federal efficiency standards did not qualify for new building exception to Energy Policy and Conservation Act's preemption provision. Energy Policy and Conservation Act, § 327(f)(3),

² 42 U.S.C.A. § 6297(f)(3).

1 Cases that cite this headnote

[7] Federal Civil Procedure - Environmental law, cases involving

Genuine issue of material fact as to whether provision of city's energy conservation code establishing voluntary rating systems for "green" building certification was preempted by federal law precluded summary judgment in action brought by manufacturers, distributors, and installers of heating, ventilation, air conditioning (HVAC) products. Energy Policy and Conservation Act, §§ 327(f)(3), 345(b)(2) (A), 42 U.S.C.A. §§ 6297(f)(3), 6316(b)(2) (A).

Attorneys and Law Firms

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MEMORANDUM OPINION AND ORDER

MARTHA VAZQUEZ, District Judge.

THIS MATTER comes before the Court on Plaintiffs' Renewed Motion and Memorandum Brief in Support of Partial Summary Judgment as to Volume I of the Albuquerque Energy Conservation Code: Commercial Covered Products (Doc. No. 89, filed September 4, 2009) ("Volume I Motion"), Plaintiffs' Renewed Motion and Memorandum in Support for Partial Summary Judgment on Portions of Volume II (Doc. No. 90, filed September 4, 2009) ("Volume II Motion"), and Plaintiffs' Renewed Motion and Memorandum Brief for Partial Summary Judgment on Preemption of City of Albuquerque's Green Building Codes: Replacements (Doc. No. 91, filed September 4, 2009) ("Replacements Motion"). For the reasons stated below, the Volume I Motion will be **GRANTED in part and DENIED in part** without prejudice; the Volume II Motion will be GRANTED in part and DENIED in part without prejudice; and the Replacements *1135 Motion will be DENIED without prejudice.

Background

On September 17, 2007, the Albuquerque City Council passed a bill which adopted a number of uniform administrative and technical codes related to building and construction, including Volumes I and II of the 2007 Albuquerque Energy Conservation Code ("the Code"). (Volume I Motion ¶ 1 at 7). The Code "regulate[s] the design and construction of buildings for the effective use of energy." (Vol. I § 1.2 at 1, Doc. No. 39–2, filed September

12, 2008; Vol. II § 101.3 at 1, doc. No. 39–6, filed September 12, 2008). Volume I applies to commercial and multi-family buildings. (Vol. I § 2.2 at 2). Volume II applies to one- and two-family detached dwellings and townhouses. (Vol. II § 101.2 at 1).

Plaintiffs, three trade associations representing manufacturers, distributors and installers of heating, ventilation, air conditioning ("HVAC") products and water heaters, and twelve local distributors and contractors who sell and install HVAC products, assert that certain portions of the Code are preempted by federal law. (*See* Volume I Motion at 4).

Volume I Motion

Volume I provides three ways in which commercial and multi-family buildings can comply with the Code: two performance-based compliance paths and one prescriptive compliance path. Regarding the first performance-based compliance path, Volume I states that the provisions of the Code do not apply to buildings certified as LEED Silver or greater ("the LEED compliance path"). (See Vol. I § 2.4(b) at 2). Under the second performance-based compliance path, HVAC systems and equipment comply with the Code "if the proposed building is 30% more energy efficient than a *baseline building* that meets the minimum standards of ASHRAE Standard 90.1-1999" ("the 30% compliance path"). (See Vol. I §§ 6.2.1(b) and 6.5.1 at 13-14) (emphasis in original). The prescriptive compliance path, which is limited to small retail and office buildings, requires that the HVAC system and equipment comply with minimum efficiency standards. (See Vol. 1 §§ 6.2.1(a), 6.3, 7.2.1(a), 7.3.2). The prescriptive compliance path prescribes minimum efficiency standards for products that are more stringent than the applicable federal standards for those products and, in some cases, prescribes additional minimum efficiency requirements not required by federal law. (Motion ¶¶ 6–17 at 8-11).

Plaintiffs assert that Volume I is preempted by 42 U.S.C. § 6316(b)(2)(A) because "the provisions of Volume I of the 2007 Albuquerque Energy Conservation Code requir[e] the use of heating, ventilation, or air conditioning products or water heaters with energy efficiency standards more stringent than federal standards." (Volume I Motion at 3–4, 14–16).

[1] [2] In determining whether a statute preempts state law, the Court's "primary task in interpreting statutes [is] to determine congressional intent, using traditional tools

of statutory construction." *Russell v. United States*, 551 F.3d 1174, 1178 (10th Cir.2008). The Court "begin[s] by examining the statute's plain language, and if the statutory language is clear, [the] analysis ordinarily ends." *Id.* ("it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it"). "If the statute's plain language is ambiguous as to Congressional intent, [the Court] look[s] to the legislative history and the underlying public policy of the statute." *Id.*

The preemption statute states:

A standard prescribed or established under section 6313(a) of this title shall, ***1136** beginning on the effective date of such standard, supersede any State or local regulation concerning the energy efficiency or energy use of a product for which a standard is prescribed or established pursuant to such section.

42 U.S.C. § 6316(b)(2)(A). The plain language of the preemption statute makes clear that Congress intended the preemption to be broad in scope. (*See* Mem. Op. and Order at 12–13, Doc. No. 61, filed October 3, 2008, 2008 WL 5586316 (D.N.M. Oct. 03, 2008) (the use of the word "concerning" suggests that Congress intended the preemption provision to be expansive)). Congress recognized that the National Appliance Energy Conservation Act "preempts state law under most circumstances." H. Rep. 100–11 at 19H. Rep. 100–11 at 19 (March 3, 1987).

[3] The City argues the prescriptive compliance path is not preempted because there are other lawful compliance paths. According to the City, because the 30% compliance path is a lawful performance-based compliance path, "the prescriptive path—which is only available to buildings under 20,000 square feet—would be saved from preemption under the following case law as a lawful alternative." (Response at 39–41, Doc. No. 118, filed January 26, 2010). The City contends that the "optional prescriptive path merely provides guidance as to how the energy goals reflected in the two performance-based paths can be obtained." (*Id.* at 39). The Court disagrees that the prescriptive path merely provides guidance. The

prescriptive path sets forth specific requirements that HVAC systems and equipment must meet in order to comply with the Code if a building does not comply with the two performancebased compliance paths. (*See* Vol. I § 2.4(b) at 2, §§ 6.2.1(b) and 6.5.1 at 13–14, and §§ 6.2.1(a), 6.3, 7.2.1(a), 7.3.2).

The City cites two cases for the proposition that "a local law is not preempted when it presents regulated parties with viable, non-preempted options." (Response at 39–41). In the first case, the United States Supreme Court considered whether state statutes that required hospitals to collect surcharges from patients covered by commercial insurance purchased by health care plans governed by the Employee Retirement Income Security Act ("ERISA") were preempted by ERISA.

See New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995). The Supreme Court found that an indirect influence resulting from the surcharges does not bind plan administrators to any particular choice and consequently does not function as a regulation of an ERISA plan itself, and held that those statutes do not bear the requisite "connection

with" ERISA plans to trigger preemption. [1d. at 659–661, 115 S.Ct. 1671]. The City does not point to anywhere in the case where the Supreme Court stated that a local law is not preempted when it presents regulated parties with viable, non-preempted options.

The second case cited by the City, a district court case from the Southern District of New York, does state that "a local law is not preempted when it only indirectly regulates parties within a preempted field and presents regulated parties with viable, non-preempted options, as held in *Travelers*

Insurance and Dillingham Construction." Metropolitan Taxicab Bd. of Trade v. City of New York, 633 F.Supp.2d 83, 95–96 (S.D.N.Y.2009). However, the district court for the Southern District of New York does not indicate where Travelers Insurance and Dillingham Construction hold that a local law is not preempted if it presents "viable, nonpreempted options." Dillingham Construction, like Travelers Insurance, held only that the *1137 subject state laws were not preempted because they did not have a "connection with,"

and therefore did not "relate to," ERISA plans. *California* Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc., 519 U.S. 316, 334 (1997).

The City has not persuaded the Court that a local law is not preempted when it presents regulated parties with viable, nonpreempted options. (*See* Mem. Op. and Order at 14, Doc. No. 61, filed October 3, 2008, 2008 WL 5586316 ("the Court can find no support for the novel proposition that the inclusion of one or more alternatives for compliance in a regulation keeps each of the alternatives from being considered a regulation")). Moreover, concluding that the prescriptive standards in Volume I are not preempted would defeat the purpose behind **E** Section 6297's broad preemption provision. The legislative history indicates that during the 1970s, some states began enacting appliance efficiency standards. S.Rep. No. 110-6 at 3 (January 20, 1987). Consequently, "appliance manufacturers were confronted with the problem of a growing patchwork of differing State regulations which would increasingly complicate their design, production and marketing plans." S.Rep. No. 110-6 at 3 (January 20, 1987). One purpose of National Appliance Energy Conservation Act is to "reduce the regulatory and economic burdens on the appliance manufacturing industry through the establishment of national energy conservation standards for major residential appliances." S.Rep. No. 110-6 at 1 (January 20, 1987); H. Rep. No. 1000–11 at 24 (March 3, 1987) (legislation "designed to protect the appliance industry from having to comply with a patchwork of numerous conflicting State requirements"). The prescriptive standards in Volume I of the City of Albuquerque's Code, which are more stringent than the federal standards, could complicate the design, production and marketing plans of appliance manufacturers, thus thwarting Congressional intent.

The Court concludes that the prescriptive provisions of Volume I requiring the use of heating, ventilation, or air conditioning products or water heaters with energy efficiency standards more stringent than federal standards are regulations that concern the energy efficiency of covered products and, therefore, are preempted as a matter of law.

[4] Having ruled on that portion of the Motion relating to the prescriptive compliance path, the Court now turns to the two performance-based compliance paths. Plaintiffs contend that some of the performance standards in Volume I are preempted. Plaintiffs' Statement of Undisputed Material Facts contains only one fact that expressly relates to the two performance-based compliance paths. Undisputed Material Fact 17 states: "The City asserts that Volume I provides two 'performance-based' paths to compliance with the requirements of Volume I: LEED Silver certification and the 'performance rating method'." (*See* Motion at 11, Fact 17). Plaintiffs present a two-paragraph argument asserting that some of the performance standards and the performance-based compliance paths in Volume I are preempted. (*See* Motion at 15–16). Although Plaintiffs address the performance-based compliance paths in more detail in their Reply, the cursory argument in their Motion regarding the performance-based compliance paths, coupled with very few material facts regarding the performance-based compliance paths, has not shown the absence of genuine issues of material fact or demonstrated that Plaintiffs are

entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 330, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (the movant bears the initial burden of making a prima facie demonstration of the absence *1138 of a genuine issue of material fact and entitlement to judgment as a matter

of law); Beaird v. Seagate Tech., Inc., 145 F.3d 1159, 1164 (10th Cir.1998) (discussing general rule forbidding new arguments in reply); D.N.M.LR–Civ. 56.1(b) (memorandum in support of motion for summary judgment must contain a concise statement of the reasons in support of the motion with authorities and a statement of all of the material facts as to which movant contends no genuine issue exists). The Court will deny without prejudice that portion of Plaintiffs' Motion that seeks to have the performance-based compliance paths declared preempted as a matter of law.

Volume II Motion

Volume II, which applies to one- and two-family detached dwellings and townhouses, provides five options for compliance: (1) Prescriptive, (2) Section 404, (3) Section 405, (4) LEED Silver, and (5) Build Green New Mexico. In their Volume II Motion, Plaintiffs contend that all of the compliance paths, except Section 405, are preempted as a matter of law.

Prescriptive Provisions

[5] The Prescriptive provisions of Volume II are similar to the prescriptive provisions of Volume I which the Court concluded concerned the energy efficiency of covered products and, therefore, were preempted as a matter of law. The prescriptive provisions of Volume II require that certain HVAC equipment meet specified energy efficiency standards which exceed the federal standards. (*See* Volume II Motion $\P\P$ 5–7 at 7–9; Vol. II §§ 403.1–403.2, Table 403.2). The City, incorporating its argument from its Volume I response, argues that because Section 405 is a lawful performance-based path, the prescriptive provisions are saved from preemption as lawful alternatives. (*See* Volume II Response at 11, Doc. No. 116, filed January 26, 2010). The Court concludes, for the

same reasons that it did regarding the prescriptive provisions in Volume I, that the prescriptive provisions of Volume II are regulations that concern the energy efficiency of covered products and, therefore, are preempted as a matter of law.

Section 404

Section 404 uses a "standard reference design" which is based on HVAC products that exceed the federal energy efficiency standards for those products. (*See* Volume II Motion ¶ 10 at 10; Vol. II Table 404.5.2(1)). The Court is not persuaded by the City's contention that the standards in Section 404 are "used to calculate the baseline for a performance-based code [but] does not need to be followed when submitting a proposed design." (Volume II Response at 5). Volume II requires that projects comply with Section 404 or other prescriptive or performance provisions. (Volume II § 401.1 at 7). Section 404 is, therefore, a regulation which concerns the energy efficiency or energy use of a covered product.

[6] Under one exception to the preemption statute, "a regulation or other requirement contained in a State or local building code for new construction concerning the energy efficiency or energy use of such covered product is not superseded by this part if the code complies with all of the following requirements...." $\stackrel{\sim}{\sim}$ 42 U.S.C. § 6297(f)(3). One of those requirements states:

If the code uses one or more baseline building designs against which all submitted building designs are to be evaluated and such baseline building designs contain a covered product subject to an energy conservation standard ... the baseline building designs are based on the efficiency level for such covered product which meets but does not exceed such standard....

*1139 \mathbb{H} 42 U.S.C. § 6297(f)(3)(D). Because its standard reference design is based on efficiency levels which exceed the federal efficiency standards, Section 404 does not qualify for the new building exception to the preemption statute.

LEED Silver and Build Green New Mexico

Leadership in Energy and Environmental Design ("LEED") is a voluntary rating system for "green" building certification. *(See* Motion ¶ 11 at 10). Volume II provides that "LEED H Silver certification ... [is] deemed to meet, or exceed, the energy efficiency required by this code." (Volume II § 103.2 at 4). Build Green New Mexico is a voluntary program, similar to LEED for Homes. *(See* Motion ¶ 13 at 11). Volume II provides that "Build Green New Mexico Silver certification [is] deemed to meet, or exceed, the energy efficiency required by the energy efficiency required by the solution § 103.2 at 4).

The preemption statute preempts "any State or local regulation concerning the energy efficiency or energy use of *a product* for which a standard is prescribed or established pursuant to such section." 42 U.S.C. § 6316(b) (2)(A) (*emphasis added*). The National Appliance Energy Conservation Act provides for three possible exceptions from preemption, two of which the Parties agree do not apply in this case. The third possible exception to preemption applies if the regulation is in a building code for new construction. *See*

42 U.S.C. § 6297(f)(3). Section 6297(f)(3) provides that "a regulation or other requirement contained in a State or local building code for new construction concerning the energy efficiency or energy use of such covered product is not superseded by this part if the code complies with [seven specified requirements]."

[7] Plaintiffs set forth facts to support their contention that LEED Silver and Build Green New Mexico do not comply with the building code exception to preemption. (See Volume II Motion ¶ 11-14 at 10-11, 18). However, Plaintiffs do not set forth any facts to show that LEED Silver and Build Green New Mexico fall within the scope of the preemption statute. The preemption statute applies to "products." 42 U.S.C. § 6316(b)(2)(A). In their Reply (Doc. No. 125 at 6, filed March 12, 2010), Plaintiffs state that LEED Silver (Exhibit 4) and Build Green New Mexico (Exhibit 9), both of which were admitted into evidence during the preliminary injunction hearing (October 1, 2008, Tr. at 126:15-127:24, 194:7–195:9), are regulations concerning energy efficiency or energy use of covered products but do not point to the relevant provisions of LEED Silver or Build Green New Mexico. LEED Silver (Exhibit 4) is 114 pages; Build Green New Mexico (Exhibit 9) is 193 pages. The Court is not obligated to comb the record in order to make a party's arguments for the

party. See Mitchell v. City of Moore, 218 F.3d 1190, 1199 (10th Cir.2000).

In their Motion for summary judgment now before the Court, Plaintiffs seek a declaration that the LEED Silver and Build Green New Mexico paths in Volume II are preempted as a matter of law. (*See* Volume II Motion at 1). Plaintiffs ultimately seek a permanent injunction enjoining the City from enforcing the provisions of Volume II. (*See* Second Amended Complaint at 37, Doc. No. 77, filed January 13, 2009). Plaintiffs rely on the conclusions in the Court's Memorandum Opinion and Order (Doc. No. 61, filed October

3, 2008, 2008 WL 5586316) in which the Court granted Plaintiff's motion for a preliminary injunction. (*See* Volume II Motion at 18; Mem. Op. and Order, Doc. No. 61 at 21 (stating "*Based on the limited evidence before the Court*," it *appears* that every performance-based option in Volume II of the Code fails to meet at least one of ***1140** the seven requirements for an exemption from preemption) (*emphasis added*)). Plaintiff's reliance on the Court's Order granting their motion for a preliminary injunction is unavailing because the Court's Order was based on the standard for granting a preliminary injunction rather than the standard for a motion for summary judgment. A preliminary injunction requires showing only a substantial likelihood of success on the merits whereas a party seeking summary judgment must demonstrate that they

are entitled to judgment as a matter of law. See Prairie Band Potawatomi Nation v. Wagnon, 476 F.3d 818, 822 (10th Cir.2007) ("a permanent injunction requires showing actual success on the merits, whereas a preliminary injunction requires showing a substantial likelihood of success on the merits"); Fed.R.Civ.P. 56.

Plaintiffs have not met their initial burden of demonstrating the absence of a genuine issue of material fact and entitlement to judgment as a matter of law as to whether the LEED Silver and Build Green New Mexico compliance paths are preempted. The Court will deny without prejudice that portion of Plaintiffs' Volume II Motion that seeks a declaration that the LEED Silver and Build Green New Mexico paths are preempted.

Replacements Motion

Plaintiffs filed their Renewed Motion (Doc. No. 91, filed September 4, 2009 ("Replacements Motion")) seeking a partial summary judgment declaring that the City of Albuquerque 2007 Energy Conservation Code, Volumes I and II, to the extent they apply to replacements, repairs, renovations, changes in space conditioning, changes in occupancy, and alterations that would require use of HVAC products or water heaters at energy efficiency levels more stringent than the applicable federal standards, are preempted by federal law.

The Court has concluded that the prescriptive provisions of Volumes I and II are preempted by federal law. Volumes I and II are, therefore, partially invalid. "[B]efore a partially invalid statute ... can be held to still be in force it must satisfy three tests." *State v. Spearman,* 84 N.M. 366, 503 P.2d 649, 651 (1972). The Parties have not addressed whether the prescriptive provisions of Volumes I and II are severable, that is whether the remainder of Volumes I and II can be held

to still be in force. See *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 191, 119 S.Ct. 1187, 143 L.Ed.2d 270 (1999) ("The inquiry into whether a statute is severable is essentially an inquiry into legislative intent").

The Court declines to rule on Plaintiffs' Replacements Motion until after it determines whether the preempted prescriptive

provisions are severable. *See Stafford v. United States*, 208 F.3d 1177, 1179 (10th Cir.2000) (court has inherent power to regulate docket and promote judicial efficiency). The Court will deny Plaintiffs' Replacements Motion without prejudice. Plaintiffs may refile their Replacements Motion if the Court determines that the prescriptive provisions are severable.

IT IS SO ORDERED.

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Air Conditioning, Heating & Refrigeration Inst. v. City of Albuquerque, No. CIV. 08-633MV/RLP, 2008 WL 5586316 (D.N.M. Oct. 3, 2008)

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The AIR CONDITIONING, HEATING AND REFRIGERATION INSTITUTE, et al., Plaintiffs, v.

CITY OF ALBUQUERQUE, Defendant.

Civ. No. 08–633 MV/RLP. | Oct. 3, 2008.

West KeySummary

1 Injunction - Injury to or restraint of trade or business in general

A company's motion for a preliminary injunction against a city was granted when the company would have faced irreparable harm without the injunction. The company sought to enjoin the city from enforcing ordinances that impose minimum energy efficiency standards for commercial and residential buildings as they were preempted by federal law. The company argued that it would be irreparably harmed in that it would have to increase warehouse space to carry additional stock and suffer loss of reputation. While the loss was characterized as economic the court found it persuasive that the company would be unable to recover economic damages from the city based on sovereign immunity.

2 Cases that cite this headnote

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MEMORANDUM OPINION AND ORDER

MARTHA VÁZQUEZ, Chief Judge.

*1 THIS MATTER comes before the Court on Plaintiffs' Motion for Preliminary Injunction, filed August 29, 2008, [Doc. No. 30]. The Court, having considered the briefs, relevant law, the evidence presented at the hearing held on October 1, 2008, and being otherwise fully informed, finds that Plaintiffs' motion is well-taken and will be **GRANTED**.

BACKGROUND

Plaintiffs, local and regional distributors of heating, ventilation, air conditioning, and water heating products and three national trade associations that represent the manufacturers, contractors, and distributors of these products, assert that certain portions of three City of Albuquerque ordinances that impose minimum energy efficiency standards for commercial and residential buildings are preempted by the Energy Policy and Conservation Act ("EPCA"), 42 U.S.C. 6201, *et seq.*, as amended by the National Appliance Energy Conservation Act ("NAECA"), Pub.L. No. 100–102 (1987), and the Energy Policy Act of 1992 ("EPACT"), 42 U.S.C. §§ 6311–17. In the instant motion, Plaintiffs seek a preliminary injunction prohibiting the City of Albuquerque from enforcing the challenged sections of the regulations until this case is resolved.

I. Energy Policy and Conservation Act and the Energy Policy Act of 1992

The EPCA was designed, in part, to reduce the United States' "domestic energy consumption through the operation of specific voluntary and mandatory energy conservation programs." S.Rep. No. 94–516, at 117 (1975)S.Rep. No. 94–516, at 117 (1975), reprinted in 1975 U.S.C.C.A.N.1956, 1957. Part of EPCA's energy conservation program was to "authorize energy efficiency standards for major appliances." *Id.* at 118, reprinted in 1975 U.S.C.C.A.N. at 1959. The EPCA, as amended by the NAECA and the EPACT, establishes nationwide standards for the energy efficiency and

energy use of major residential and commercial appliances and equipment, including heating, ventilating, and air conditioning ("HVAC") products and water heaters. Principal responsibility for maintaining, and, if necessary, amending these standards was given to the U.S. Department of Energy ("DOE").

The EPCA, as amended, contains a preemption provision that prohibits state regulation "concerning" the energy efficiency, energy use, or water use of any covered product with limited exceptions. 42 U.S.C. § 6297(c). A "state regulation" is defined as any "law, regulation, or other requirement of a State and its political subdivisions." 42 U.S.C. § 6297(a) (2)(A). EPCA provides a number of exceptions from federal preemption. *Id.* at § 6297(f) The only exception relevant to this case applies when the regulation is in a building code for new construction and certain conditions are met. 42 U.S.C. § 6297(f)(3).

EPACT expanded the EPCA's federal appliance program to include energy efficiency standards for commercial and industrial appliances. 42 U.S.C. §§ 6295(j)-(k), 6313. EPACT incorporated the preemption provisions of 42 U.S.C. § 6297, with a few distinctions that are not relevant to this case. 42 U.S.C. § 6316(a)-(b). EPACT, however, only provides one exemption from preemption.

II. City of Albuquerque's Energy Conservation Code

*2 In 2007, the Mayor of Albuquerque formed the Green Ribbon Task Force to develop and implement changes to the City's building regulations to significantly reduce carbon dioxide and green house gas emissions while providing industry with the flexibility to use innovative designs and techniques to achieve the effective use of energy. The Green Ribbon Task Force was composed of builders, developers, architects, unions and various companies, organizations and individuals. After months of consideration, the Green Ribbon Task Force proposed a combination of performancebased and prescriptive options to achieve increased energy efficiency in the building industry. The City's Green Building Manager then drafted Volumes I and II of the Albuquerque Energy Conservation Code ("Code") based on the options developed by the Green Ribbon Task Force. At the time the Code was drafted, the Green Building Manager, by his own admission, was unaware of federal statutes governing the energy efficiency of HVAC products and water heaters and the City attorneys who reviewed the Code did not raise the preemption issue. The Code was approved by the City Council and became effective on October 1, 2008.

A. Volume I of the Albuquerque Energy Conservation Code

Volume I of the Code applies to commercial and multi-family residential buildings. Volume I adopts and incorporates by reference the American Society of Heating, Refrigeration, and Air Conditioning ("ASHRAE") Standard 90.1–2004, with a few amendments. Volume I applies to new buildings, additions to existing buildings, and alterations of existing buildings. It does not apply to repairs, provided that there is no increase in the annual energy consumption of the equipment following the repair. Volume I also addresses the replacement of HVAC equipment in existing buildings. In single unit replacements, building owners who replace an existing HVAC unit with a unit that meets federal energy efficiency requirements must replace or modify other components in the building to make up for the energy efficiency loss resulting from the decision not to use a higher efficiency unit.

Consistent with the Green Ribbon Task Force's recommendations, Volume I provides two performance-based paths to compliance—LEED certification at the silver level and 30% efficiency improvement—as well as a prescriptive option.

The LEED rating system was devised by the United States Green Building Council. In the context of new construction and major renovations, LEED evaluates buildings in six areas: sustainable sites, water efficiency, energy and atmosphere, materials and resources, indoor environmental quality, and innovation and design process. LEED provides four progressive levels of certification: certified (26–32 points), silver (33–38) points), gold (39–51 points) and platinum (52– 69 points). The Code requires LEED certification at the silver level for buildings covered by Volume I.

In addition to LEED, the Code provides a second performance-based option. Under this second option, industry can choose to make proposed commercial and residential designs 30% more energy efficient than a "baseline building" set forth in ASHRAE 90.1. The baseline building design set forth in ASHRAE 90.1 utilizes HVAC and water heating products that do not exceed the federal efficiency levels for these products.

***3** As a third option, the Code sets forth prescriptive standards for individual components of a building, including HVAC and water heaters. Many, if not all, of these prescriptive standards exceed the federal standards. The prescriptive option is limited to small retail and office buildings.

B. Volume II of the Albuquerque Energy Conservation Code

Volume II of the Code applies to one and two family detached dwellings and townhouses. Volume II applies to new construction, additions, alterations and renovations. It does not apply to repairs; the replacement of furnaces and air conditioners before July 1, 2009; and the replacement of an existing furnace where such replacement would require "extensive revisions" to other systems or elements of a building.

Volume II adopts and incorporates by reference the 2006 International Energy Conservation Code ("IECC"). Volume II contains the same two performance-based options as Volume I -LEED silver certification and 30% energy reduction option (referred to as Section 405)-as well as two additional performance-based options. The third performance-based option is compliance with Build Green New Mexico. The fourth performance-based option, referred to as Section 404, is an option relative to a standard reference design. Section 404 requires the use of HVAC and water heating products with energy efficiencies in excess of federal standards for those products. In order to take advantage of any of the performance-based options, the owners must comply with certain mandatory requirements such as caulking and sealing around doors, adequately supporting the joints in the ductwork, and other construction quality issues.

In addition to the four performance-based options, Volume II also contains a prescriptive option. The prescriptive option provides for energy efficiency standards for HVAC and water heating products in excess of federal standards.¹

C. The High Performance Building Ordinance

In 2007, the Albuquerque City Council adopted the Albuquerque High Performance Buildings Ordinance ("Ordinance"), which applies to new buildings and existing buildings undergoing alteration when the work area of the alteration exceeds 50% of the building area. The Ordinance sets several prescriptive standards for energy efficiency that are in excess of federal standards. In addition, the

Ordinance requires the Green Building Manager to "establish alternative performance-based criteria for overall building energy conservation which may be used for compliance in lieu of standards prescribed therein." *See* Ordinance at § 3(A)(2). Mr. Bucholz, the current Green Building Manager, interprets this provision as requiring compliance with Volumes I and II of the Code.

LEGAL ANALYSIS

I. Ripeness

As an initial matter, Defendant asserts that Plaintiffs' claims are not ripe because the Code has not yet gone into effect, much less been applied to Plaintiffs. The ripeness doctrine prevents "courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and ... protect[s] the agencies from judicial interference until an administrative decision has been formalized and its effects

felt in a concrete way by the challenging parties." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148–49, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). The ripeness inquiry involves examining both "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149.

*4 Plaintiffs are making a challenge to the facial validity of the Code and Ordinance, which are predominantly legal questions. When a question is "predominantly legal," there is generally no need to await further factual development.

Pacific Gas and Electric Co. v. State Energy Resources Conservation and Dev. Comm'n, 461 U.S. 190, 201, 103 S.Ct.

1713, 75 L.Ed.2d 752 (1983); see also California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 107 S.Ct. 1419, 94 L.Ed.2d 577 (1987) (no ripeness problem noted in suit seeking declaration that federal law preempted a state agency from imposing any environmental standards in a mining permit, even though plaintiff had not secured a permit);

National Ass'n of Home Builders v. U.S. Army Corps of Eng'rs, 417 F.3d 1272, 1282 (D.C.Cir.2005) ("a purely legal claim in the context of a facial challenge ... is 'presumptively reviewable.'")(quoting National Mining Ass'n v. Fowler, 324

F.3d 752, 757 (D.C.Cir.2003)); City of Auburn v. Qwest Corp., 260 F.3d 1160, 1172 (9th Cir.2001) (question whether states are preempted by federal law from promulgating any regulations regarding free air time for candidates did not raise

ripeness issues because preemption is a question of law). Because the issues raised in this case are predominantly legal, Plaintiffs' facial challenge is ripe for review.

II. PRELIMINARY INJUNCTION

The main purpose of a preliminary injunction is simply to preserve the *status quo* pending the outcome of the case.

Penn v. San Juan Hospital, Inc., 528 F.2d 1181, 1185 (10th Cir.1975). In issuing a preliminary injunction, a court is attempting to preserve the power to render a meaningful

decision on the merits. *Compact Van Equipment Co. v. Leggett & Platt, Inc.,* 566 F.2d 952, 954 (5th Cir.1978).

In determining whether, in the interests of effective justice, a preliminary injunction should issue, the Court must consider four factors: (1) whether the moving party will suffer irreparable injury unless the injunction issues; (2) whether the threatened injury to the moving party outweighs whatever damage the proposed injunction may cause the opposing party; (3) whether the injunction is adverse to the public interest; and (4) whether there is a substantial likelihood that the moving party will eventually prevail on the merits.²

Lundgrin v. Claytor, 619 F.2d 61, 63 (10th Cir.1980);
 Dominion Video Satellite, Inc. v. Echostar Satellite Corp., 269 F.3d 1149, 1154 (10th Cir.2001).

A. Irreparable Injury

In federal court, the moving party must show irreparable injury in order to obtain a preliminary injunction. *Sampson v. Murray*, 415 U.S. 61, 88, 94 S.Ct. 937, 39 L.Ed.2d 166 (1974). "A plaintiff suffers irreparable injury when the court would be unable to grant an effective monetary remedy after a full trial because such damages would be inadequate or difficult to ascertain." *Dominion Video*, 269 F.3d at 1156. Injury is generally not irreparable if compensatory relief would be adequate. *Enterprise International, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 472–73 (5th Cir.1985).

***5** Plaintiffs assert five categories of irreparable injuries that they will suffer if enforcement of the Code and Ordinance is not enjoined: 1) being forced to comply with federally preempted regulations is *per se* irreparable harm; 2) Plaintiffs will lose customer base, reputation, and customer goodwill; 3) Plaintiffs will be exposed to the threat of criminal and

civil sanctions; 4) Plaintiffs' economic harm is difficult, if not impossible, to quantify; 5) it may be impossible to collect any damages due to sovereign immunity.

The Court shares Defendant's view that much of Plaintiffs' alleged harm is speculative and/or unsupported. Plaintiffs, however, have provided evidence establishing that they will suffer economic harm if they are forced to comply with the regulations, including having to increase warehouse space to carry additional stock and larger stock, being unable to supply certain equipment, and being unable to decipher the Code in a way that allows them to meaningfully assist customers in selecting equipment that will comply with the Code.

This harm, while only economic, is irreparable because even if Plaintiffs prevail, it may be impossible to obtain damages from the City due to sovereign immunity. The New Mexico Tort Claims Act grants immunity to government entities and public employees acting within the scope of their duties from any tort liability, except as explicitly waived. *See* NMSA 1978, § 41–4–4(A). A city is a "governmental entity" within the context of the Tort Claims Act. *See Cole v. City of Las Cruces*, 1983, 99 N.M. 302, 657 P.2d 629 (1983). None of the Tort Claims Act's waiver provisions appears to apply to this case. *Id.* at §§ 41–4–5 to 41–4–12. Where a plaintiff cannot recover damages from the defendant due to the defendant's sovereign immunity, any economic loss suffered by a plaintiff

is irreparable *per se. See, e.g., Kansas Health Care Ass'n, Inc. v. Kansas Dep't of Soc. and Rehab. Servs.,* 31 F.3d 1536, 1543 (10th Cir.1994) ("Because the Eleventh Amendment bars a legal remedy in damages, and the [district] court concluded no adequate state administrative remedy existed ...

plaintiff's injury was irreparable"); *United States v. State* of New York, 708 F.2d 92, 93–94 (2d Cir.1983) (finding irreparable injury where plaintiff was unable to recover damages in federal court due to the defendant's invocation of the protections of the Eleventh Amendment).³

B. Balance of Hardships

Defendant argues that the balance of hardships favors it because a delay in implementing the regulations will result in the City losing the ability to control emissions from inefficient buildings built during that delay over the entire life of the buildings. Plaintiffs, on the other hand, cite to the hardships imposed on them by being required to attempt to comply with regulations that are vague, complex, and preempted by federal law. The balance of hardships favors Plaintiffs because the proposed injunction will maintain the *status quo* of not requiring products that exceed the requirements of federal law. Plaintiffs' harm in being forced to comply with complex and arguably preempted regulations is greater than the harm to Defendant from a minimal delay in implementing the regulations, particularly when Defendant has already voluntarily delayed implementation for over a year.

C. Public Interest

*6 A plaintiff seeking a preliminary injunction must demonstrate that issuance of the preliminary injunction is not adverse to the public interest. *City of Chanute v. Kansas Gas & Electric Co.*, 754 F.2d 310, 312 (10th Cir.1985). Defendant argues that an injunction is against the public interest because it would continue the practice of forcing the public to internalize the costs of Plaintiffs' current environmentally-damaging business practices. Weighing against Defendant's argument, however, is the fact that Congress has determined in the EPCA (and its various amendments) that the public interest favors uniform national requirements for certain appliances. The Court finds that Congress's determination of the public interest controls in this situation and supports the requested injunction.

D. Success on the Merits

The fourth prerequisite for obtaining a preliminary injunction is a showing of a likelihood of success on the merits. In

Otero Savings & Loan Association v. Federal Reserve Bank, 665 F.2d 275 (10th Cir. 1981), the Tenth Circuit adopted the Second Circuit's liberal definition of the "probability of success" requirement. When the other three requirements for a preliminary injunction are satisfied, "it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation." *Id.* at 278 (quoting

Continental Oil Co. v. Frontier Refining Co., 338 F.2d 780, 782 (10th Cir.1964)).

Preemption can occur in one of three ways: express preemption by statute, occupation of the field, or conflict between state and federal regulation. *English v. General Elec. Co.*, 496 U.S. 72, 78–79, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990). This case presents a question of express preemption. An express preemption analysis turns on the interpretation of the statutory provision that allegedly preempts state law. *See* *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484–85, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996)("The purpose of Congress is the ultimate touchstone in every preemption case.") (internal

quotations marks omitted); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 530, n. 27, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992) (any understanding of the scope of a preemption statute must rest primarily on "a fair understanding of congressional purpose"). Consequently, the Court begins with the text of the provision in question and then moves on to the

structure and purpose of the act in which it occurs. See New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995).

Section 6297 contains a "general rule of preemption," which states that, subject to certain specified exceptions, when a federal energy conservation standard is established for a covered product, "no State regulation concerning the energy efficiency, energy use, or water use of such covered product

shall be effective with respect to such product." 242 U.S.C. § 6297(c). The use of the word "concerning" suggests that Congress intended the preemption provision to be expansive.

*7 "Concerning" is defined as "relating to." Black's Law Dictionary 289 (6th ed.1990). The Supreme Court has repeatedly emphasized that the words "relating to" express a broad pre-emptive purpose. In the context of the Employee

Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1144(a), which preempts all state laws "insofar as they ... relate to any employee benefit plan," the Supreme Court has stated that the "breadth of [that provision's] preemptive reach is apparent from [its] language," *Shaw*, 463

U.S., at 96; that it has a "broad scope," *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739, 105 S.Ct. 2380,

85 L.Ed.2d 728 (1985), and an "expansive sweep," *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47, 107 S.Ct. 1549, 95

L.Ed.2d 39, (1987); that it is "broadly worded," *Ingersoll– Rand Co. v. McClendon*, 498 U.S. 133, 138, 111 S.Ct. 478,

112 L.Ed.2d 474 (1990), "deliberately expansive," *Pilot Life*, 481 U.S., at 46; and "conspicuous for its breadth,"

Holliday, 498 U.S., at 58. Accordingly, the Supreme Court has held that a state law "relates to" an employee benefit plan, and is pre-empted by ERISA, "if it has a connection with, or reference to, such a plan." *Shaw*, 463 U.S. at 97.

The legislative history makes it clear that the purpose behind

★ 6297's broad preemption provision was to eliminate the systems of separate state appliance standards that had emerged as a result of the DOE's "general policy of granting petitions from States requesting waivers from preemption," that caused appliance manufacturers to be confronted with "a growing patchwork of differing State regulations which would increasingly complicate their design, production and marketing plans." S.Rep. No. 100–6, at 4. Congress intended that \$ 6297 would "preempt[] State law under most

circumstances." H.R. Rep. 100–11 at 19H.R. Rep. 100–11 at 19. There is no doubt that Congress intended to preempt state regulation of the energy efficiency of certain building appliances in order to have uniform, express, national energy efficiency standards.

The legislative history of NAECA provides insight on Congress's purpose in including the "building code" exception for residential products at $\begin{array}{l} \begin{array}{l} \\ \\ \\ \end{array}$ § 6297(f)(3). $\begin{array}{l} \\ \\ \end{array}$ The House Report states that the building code exception was intended to "prevent[] State building codes from being used as a means of setting mandatory State appliance standards in excess of the Federal Standards." H.R. Rep. 100-11 at 26H.R. Rep. 100-11 at 26. The building code exception was intended to give states flexibility, but this flexibility was "limited" to "ensure that performance-based codes cannot expressly or effectively require the installation of covered products whose efficiencies exceed ... the applicable Federal standard ..." H.R. Rep. 100-11 at 26H.R. Rep. 100-11 at 26 (emphasis added). It was Congress's intent that a qualifying building code "follow a one-for-one equivalency as closely as possible, to assure that the credits for exceeding Federal standards are even-handed and are not unfairly weighted resulting in undue pressure on builders to install covered products exceeding Federal standards." S. Rep. 100-6 at 11.

*8 The Court must now consider whether the City's Code and Ordinance are "regulation[s] concerning the energy efficiency, energy use, or water use" of a covered product and, if so, if the Code and Ordinance qualify for an exemption from the preemption provision.

1. The Code is a regulation concerning the energy efficiency, energy use, or water use of covered products.

Defendant first argues that Plaintiffs are unlikely to succeed on the merits because the prescriptive standards within the Code are optional avenues for compliance, not mandatory requirements, and the EPCA preemption provision only applies to mandatory requirements. Defendant's argument fails for two independent reasons. First, Defendant construes Plaintiffs' challenge too narrowly. Plaintiffs are challenging whether the entire Code, including both performance-based and prescriptive options, violates the EPCA by requiring, either implicitly or explicitly, the installation of appliances with energy efficiencies greater than federal standards. There is no question that the Code is a regulation subject to the EPCA preemption provision. Second, the Court can find no support for the novel proposition that the inclusion of one or more alternatives for compliance in a regulation keeps each of the alternatives from being considered a regulation.

There is no question that the prescriptive alternatives, which explicitly require covered products in excess of federal standards, are regulations that "concern" the energy efficiency of covered products. The performance-based alternatives, while not as obvious, are also regulations that, directly or indirectly, concern the energy efficiency, energy use, or water use of covered products. The City admits that the performance-based alternatives, while not explicitly requiring a homeowner to install products that exceed federal energy standards, do require a homeowner to incur additional expense (and the testimony suggests that this expense can be substantial) if the homeowner chooses to install products that meet, but do not exceed, federal energy standards. This requirement is most stark in the provisions addressing replacement of products. If a homeowner chooses to replace an existing furnace with a federally-compliant furnace, that homeowner must make other revisions to the home to make up the energy differential between a federally-compliant furnace and a furnace that meets the requirements of the Code. The fact that the Code imposes additional expenses if federally-compliant products are used strongly suggests that the Code "concerns" the energy efficiency of covered products. Consequently, the Code, and each of the alternatives within the Code, are preempted by EPCA and EPACT unless they qualify for a preemption exception.

2. Is the Code excepted from preemption under EPCA and EPACT?

Aside from obtaining a waiver from preemption, the only alternative to preemption provided by EPACT for commercial products is when a state or local building code adopts standards for commercial covered products at the minimum efficiency levels of the current ASHRAE Standard 90.1. *See* 42 U.S.C. 6316(b)(2)(B)(ii). Volume I is based on ASHRAE standards that do not become effective until 2010 and cannot be imposed now without a waiver. Consequently, Volume I is not excepted from preemption.

***9** The EPCA provides an exemption from preemption for residential building codes that meet certain requirements.

Section 6297(f)(3) provides that "a regulation or other requirement contained in a State or local building code *for new construction* concerning the energy efficiency or energy use of such covered product is not superseded by this part if the code complies with [seven specified requirements]." ⁵ (emphasis added). Volume II of the Code applies to replacement of covered products as well as new construction and renovations. As replacement of a covered product and at least some renovations cannot fairly be considered new construction, they are not excepted from EPCA's preemption provision. Consequently, the Court will confine its analysis to whether Volume II, as applied to new construction only, qualifies for an exemption from preemption.

a. 8 6297(f)(3)(A)

The first requirement is that the "code permits a builder to meet an energy consumption or conservation objective for a building by selecting items whose combined energy efficiencies meet the objective."⁶ \gtrsim 6297(f)(3)(A). Plaintiffs assert that the Code does not satisfy this requirement because it does not provide a method for selecting items to meet an energy objective. There is no requirement, however, that the building code provide a list of items from which a builder may select options; it simply requires that the building code allow a builder to select various items whose combined energy efficiencies meet the objective. All the performancebased options arguably satisfy this requirement.

b. 8 6297(f)(3)(B)

The second requirement is that the building code does not require that any covered product have an energy efficiency exceeding the applicable federal energy conservation standard. Clearly the prescriptive option does not meet this requirement. Section 404 also fails this requirement because it explicitly requires the use of appliances that exceed federal energy standards. Defendant contends that this requirement is met for the remaining performance-based standards—LEED silver, Build Green New Mexico, and Section 405—because they do not require the use of any product, let alone a product with a specific energy efficiency.

Plaintiffs have provided evidence that these performancebased alternatives, as a practical matter, cannot be met with products that meet, but do not exceed, the federal energy conservation standards.⁷ Furthermore, it is undisputed that if products at the federal efficiency standard are used, a building owner must make other modifications to the home to increase its energy efficiency in order to comply with the Code. Thus, in effect, there is a penalty imposed for selecting products that meet, but do not exceed, federal energy standards. A building code that effectively requires the installation of products that exceed federal energy standards cannot satisfy this provision. See, e.g., H.R. Rep. 100-11 at 26H.R. Rep. 100-11 at 26 (building code exception intended to "ensure that performance-based codes cannot expressly or effectively require the installation of covered products whose efficiencies exceed ... the applicable Federal standard ...") (emphasis added).

c. 8 6297(f)(3)(C)

*10 The third requirement is that the code provide a one-for-one equivalent energy use for installing covered products having energy efficiencies exceeding federal energy conservation standards. Defendant asserts that the performance-based plans provide one-for-one credit for covered products that contain equivalent energy efficiencies but do not point to anywhere in the Code or its underlying documents where this is stated. Plaintiffs have provided testimony that Build Green New Mexico and LEED silver do not state an energy consumption goal, and, consequently, there is no way to do a one-for-one equivalent energy use calculation.

d. 8 6297(f)(3)(D)

The fourth requirement is that if the code uses one or more baseline building designs against which all submitted building designs are to be evaluated, such baseline building designs must be based on products that meet but do not exceed the federal energy efficiency standards. Defendant argues that this requirement does not apply because the Code includes two options for compliance that do not include baseline designs, therefore, it does not compare *all* building designs to a baseline building. The Court is unpersuaded by Defendant's interpretation. The fact that there are alternative paths to compliance that do not utilize a baseline design does not exempt a baseline building design alternative from the requirement that it be based on products meeting federal efficiency standards. The Court believes that the intent of this requirement was to ensure that baseline building designs, even if they are one of several options in a building code, be based on products that meet but do not exceed federal energy efficiency standards in order to ensure that building codes do not require efficiency levels for covered products above federal standards.

Section 404 and Section 405 both utilize baseline building designs. The baseline building design in Section 404 is based on products that exceed the federal energy efficiency

standards, making it ineligible for 56297(f)(3)'s exception from preemption. Section 405 incorporates a baseline building design set forth in IECC 2003. While the IECC 2003 baseline building design utilizes HVAC and water heating products that do not exceed the federal efficiency levels for these products, Section 405 requires a 30% improvement over this design. Consequently, the effective baseline building design for purposes of Section 405 is a building that is 30% more efficiency levels. It is unclear where this 30% increase in efficiency will require products in excess of federal standards. As a result, the Court cannot determine if Section 405 satisfies the requirement that the baseline building design be based on products that meet but do not exceed the federal energy efficiency standards.

e. [] § 6297(f)(3)(E)

Subsection E applies if the code sets forth one or more optional combinations of items that meet the energy consumption or conservation objective. The parties agree that Volume II does not set forth one or more optional combinations of items and that this requirement does not apply.

f. . § 6297(f)(3)(F)

*11 The sixth requirement is that the code must state energy consumption or conservation in terms of estimated total consumption of energy. Plaintiffs assert that the Code does not specify how energy consumption is to be measured. Defendant asserts that the Code complies with this requirement for Section 405 and Section 404 because they are based on the IECC, which specifies energy in terms of annual energy consumption. Defendant has not refuted Plaintiffs' evidence that LEED silver and Build Green New Mexico options do not state energy consumption or conservation in terms of estimated total consumption of energy.

g. 8 6297(f)(3)(G)

The final requirement is that the code's testing procedures comply with the applicable test procedures prescribed under § 6293. The Code does not address testing procedures but Chapter 6 of the 2006 IECC, which is incorporated into the Code, explicitly adopts the relevant testing procedures established in § 6293.

Based on the limited evidence before the Court, it appears that every performance-based option in Volume II of the Code fails to meet at least one of the seven requirements for an exemption from preemption.

Plaintiffs are likely to prevail on their challenge to the portions of the Code that explicitly require the use of appliances with standards in excess of federal efficiency standards. These portions include, at a minimum, the prescriptive options in Volume I and Volume II, Section 404 of Volume II, and the provisions in both volumes that address the replacement of HVAC and water heaters. Plaintiffs are also likely to prevail on their challenge to the portions of the Code that

address renovations and replacements because $[]{}$ § 6297(f) (3) only provides an exemption for building codes for new construction. While it is less clear that Plaintiffs will prevail on their challenge to the performance-based options, Plaintiffs, at a minimum, have raised questions that are "serious, substantial, difficult and doubtful."

3. Does the High Performance Buildings Ordinance

comply with **6297(f)(3)**?

Defendant argues that because the Ordinance does not extend any further than the Code, it satisfies 56297(f)(3) to the same extent that Volume II does for purposes of new residential construction. The Ordinance sets several prescriptive standards for energy efficiency that are in excess of federal standards and are preempted for the same reasons the prescriptive standards in the Code are preempted. In addition, the Ordinance requires the Green Building Manager to "establish alternative performance-based criteria for overall building energy conservation which may be used for compliance in lieu of standards prescribed therein." *See* Ordinance at § 3(A)(2). The Green Building Manager has informally adopted the Code as his alternative performancebased criteria. Consequently, for the same reasons stated above, Plaintiffs are likely to prevail on their challenge to the Ordinance as well.

*12 While the issues are complex and the information before the Court is limited, the Court finds that Plaintiffs have satisfied their burden of demonstrating that (1) Plaintiffs will suffer irreparable injury unless the injunction issues; (2) the threatened injury to Plaintiffs outweighs whatever damage the proposed injunction may cause Defendant; (3) the injunction is not adverse to the public interest; and (4) there is a substantial likelihood that Plaintiffs will eventually prevail on it challenge that the Code and the Ordinance are preempted by federal law and invalid in the vast majority of their intended applications. Because the Court concludes that an injunction is warranted on federal preemption grounds, the Court does not reach Plaintiffs' additional grounds for the injunction.

Volume 1 and Volume II of the Code contain severability clauses. Pursuant to these clauses, Defendant requests that any injunction be narrowly tailored to the portions of the Code upon which the Court finds Plaintiffs are likely to prevail in their challenge. As the Court has found that Plaintiffs are likely to succeed on their challenge to each compliance alternative provided by the Code, it is not clear that there are any provisions of the Code that survive the injunction. However, if there are portions of the Code that are not implicated by the claims in this case, the parties are encouraged to submit an agreed order narrowing the scope of the preliminary injunction. The City's goals in enacting Albuquerque's Energy Conservation Code and the Albuquerque High Performance Buildings Ordinance are laudable. Unfortunately, the drafters of the Code were unaware of the long-standing federal statutes governing the energy efficiency of certain HVAC and water heating products and expressly preempting state regulation of these products when the Code was drafted and, as a result, the Code, as enacted, infringes on an area preempted by federal law. The extent to which the Code and the Ordinance are preempted will be determined after development of a full record.

CONCLUSION

IT IS THEREFORE ORDERED that Plaintiffs' Motion for Preliminary Injunction, filed August 29, 2008, **[Doc. No. 30],** is **GRANTED.** Defendant City of Albuquerque is hereby enjoined from enforcing Volumes I and II of the Albuquerque Energy Conservation Code and the High Performance Building Ordinance pending resolution of this case. If there are portions of the Albuquerque Energy Conservation Code that are not implicated by the claims in this case, the parties are encouraged to submit an agreed order narrowing the scope of this preliminary injunction.

All Citations

Not Reported in F.Supp.2d, 2008 WL 5586316

Footnotes

- 1 The prescriptive standards are consistent with the most recent ASHRAE standards, which will become the federal standards on January 1, 2010.
- If a preliminary injunction alters the status quo, a plaintiff must show that on balance, the four preliminary injunction factors weigh heavily and compellingly in its favor. See SCFC ILC, Inc. v. Visa USA, Inc., 936 F.2d 1096, 1099 (10th Cir.1991). Altering the status quo requires a court to grant mandatory relief under which the non-moving party must take affirmative action, whereas prohibitory injunctive relief simply preserves the
- status quo. See id. In this case, Plaintiffs are seeking to preserve the status quo and therefore are not subject to the heightened burden imposed when a plaintiff seeks to alter the status quo.
 In addition, the Supreme Court has left open the question of whether "irreparable injury" may be established

by a "facially conclusive" claim of preemption. *New Orleans Pub. Serv., Inc. v. Council of New Orleans,* 491 U.S. 350, 366, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989).

⁴ Defendant, citing to ¹/₄₂ U.S.C. § 6322, argues that performance-based codes operate outside of EPCA.

Section 6322 encourages states to develop and implement state energy conservation plans and provides federal funding to develop such plans. These plans are to be designed to reach certain energy goals by implementing such measures as encouraging carpooling, allowing right turns on red lights, and regulating lighting in public buildings. As an option, the plans could contain programs to promote energy efficiency in residential housing, such as "(A) programs for development and promotion of energy efficiency rating systems for newly constructed housing and existing housing so that consumers can compare the energy efficiency of different housing; and (B) programs for the adoption of incentives for builders, utilities, and mortgage lenders

to build, service, or finance energy efficient housing." ⁴² U.S.C. § 6322(d)(7). Nothing in this section authorizes a state to implement a building code that mandates energy efficiencies in residential housing construction that require, implicitly or explicitly, covered products in excess of federal energy standards, and nothing in this section removes residential building codes from EPCA coverage.

5 The reference to footnote 5 is a typographical error.

6

§ 6297(f)(3) provides that:

Effective on the effective date of an energy conservation standard for a covered product established in or

prescribed under section 6295 of this title, a regulation or other requirement contained in a State or local building code for new construction concerning the energy efficiency or energy use of such covered product is not superseded by this part if the code complies with all of the following requirements:

(A) The code permits a builder to meet an energy consumption or conservation objective for a building by selecting items whose combined energy efficiencies meet the objective.

(B) The code does not require that the covered product have an energy efficiency exceeding the applicable

energy conservation standard established in or prescribed under **established** established established in or prescribed under **established** established in or prescribed under **established** established established in or prescribed under **established** established established established in or prescribed under **established** established established established established up to the level required by a regulation of that State for which the Secretary has issued a rule granting a waiver under subsection (d) of this section.

(C) The credit to the energy consumption or conservation objective allowed by the code for installing covered products having energy efficiencies exceeding such energy conservation standard established in or

prescribed under **content** section 6295 of this title or the efficiency level required in a State regulation referred to in subparagraph (B) is on a one-for-one equivalent energy use or equivalent cost basis.

(D) If the code uses one or more baseline building designs against which all submitted building designs are to be evaluated and such baseline building designs contain a covered product subject to an energy conservation

standard established in or prescribed under section 6295 of this title, the baseline building designs are based on the efficiency level for such covered product which meets but does not exceed such standard or the efficiency level required by a regulation of that State for which the Secretary has issued a rule granting a waiver under subsection (d) of this section.

(E) If the code sets forth one or more optional combinations of items which meet the energy consumption or conservation objective, for every combination which includes a covered product the efficiency of which exceeds either standard or level referred to in subparagraph (D), there also shall be at least one combination which includes such covered product the efficiency of which does not exceed such standard or level by more than 5 percent, except that at least one combination shall include such covered product the efficiency of which meets but does not exceed such standard.

(F) The energy consumption or conservation objective is specified in terms of an estimated total consumption of energy (which may be calculated from energy loss- or gain-based codes) utilizing an equivalent amount of energy (which may be specified in units of energy or its equivalent cost).

(G) The estimated energy use of any covered product permitted or required in the code, or used in calculating the objective, is determined using the applicable test procedures prescribed under section 6293 of this title, except that the State may permit the estimated energy use calculation to be adjusted to reflect the conditions

of the areas where the code is being applied if such adjustment is based on the use of the applicable test procedures prescribed under section 6293 of this title or other technically accurate documented procedure.

7 Defendant provided testimony from Stace McGee that it was possible to build or renovate a home to the LEED silver standard without using HVAC and water heating systems that exceed the federal energy standards. Mr. McGee's testimony, however, is undermined by the fact that to date not a single home in New Mexico has been certified as LEED silver. Furthermore, Mr. McGee's testimony did not establish that it was practical to build a home to LEED silver standards using only federally compliant HVAC and water heating products. To the contrary, Mr. McGee testified that he met LEED standards in his own home using federally compliant products by replacing the roof, installing additional insulation, and making other modifications.

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Bldg. Indus. Ass'n of Washington v. Washington State Bldg. Code Council, 683 F.3d 1144 (9th Cir. 2012) 683 F.3d 1144 United States Court of Appeals, Ninth Circuit.

BUILDING INDUSTRY ASSOCIATION OF

WASHINGTON; Air America Inc.; BOA

Construction Co.; Complete Design Inc.; Airefco Inc.; CVH Inc.; Entek Corp.; Family Home Investments Corp.; Sadler Construction Inc.; Tracy Construction Co., Plaintiffs–Appellants,

v.

WASHINGTON STATE BUILDING CODE COUNCIL, Defendant–Appellee, NW Energy Coalition; Sierra Club; Washington Environmental Council; Natural Resources Defense Council, Intervenor–Defendants–Appellees.

> No. 11–35207. | Argued and Submitted Feb. 9, 2012. | Filed June 25, 2012.

Synopsis

Background: Trade association and individual builders and contractors brought action challenging Washington's building code requirement that new building construction meet heightened energy conservation goals. The United States District Court for the Western District of Washington, Robert J. Bryan, Senior District Judge, 2011 WL 485895, entered judgment in favor of the state, and plaintiffs appealed.

[Holding:] The Court of Appeals, Schroeder, Circuit Judge, held that Washington building code satisfied the conditions Congress set forth in Energy Policy and Conservation Act (EPCA) for exemption from federal preemption.

Affirmed.

Procedural Posture(s): On Appeal.

West Headnotes (3)

[1] Electricity - Regulation in general; statutes and ordinances

States 🧼 Energy and public utilities

Washington building code complied with subsection of Energy Policy and Conservation Act (EPCA) requiring that, to survive federal preemption, the covered product have an energy efficiency exceeding the applicable energy conservation standard established under federal law; code did not create any penalty or legal compulsion to use higher efficiency products. Energy Policy and Conservation Act, § 327(f)(3)

(B), 42 U.S.C.A. § 6297(f)(3)(B).

[2] Electricity - Regulation in general; statutes and ordinances

States 🦛 Energy and public utilities

Washington building code complied with subsection of Energy Policy and Conservation Act (EPCA) authorizing a state or local building code to allow builders to meet energy efficiency objectives through a system of credits for alternative methods to reduce energy use; the credit values in code were closely proportional to the average reduction in equivalent energy use across a variety of climatic and other environmental situations. Energy Policy and Conservation Act, § 327(f)(3)

(C), 42 U.S.C.A. § 6297(f)(3)(C).

[3] Evidence - Preliminary evidence as to competency

Party offering expert testimony has the burden of establishing its admissibility.

10 Cases that cite this headnote

Attorneys and Law Firms

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Appeal from the United States District Court for the Western District of Washington, Robert J. Bryan, Senior District *1145 Judge, Presiding. D.C. No. 3:10–cv–05373–RJB.

Before: MARY M. SCHROEDER and RONALD M. GOULD, Circuit Judges, and RALPH R. BEISTLINE, Chief District Judge. *

OPINION

SCHROEDER, Circuit Judge:

The Energy Policy and Conservation Act of 1975 ("EPCA"),

42 U.S.C. § 6295 *et seq.*, as amended, establishes nationwide energy efficiency standards for certain residential home appliances, and expressly preempts state standards requiring greater efficiency than the federal standards. It nonetheless exempts from preemption state building codes promoting energy efficiency, so long as those codes meet certain statutory conditions.

This case is a challenge to the State of Washington's Building Code, *see* Wash. Admin. Code § 51–11–0100 *et seq.*, brought by the Building Industry Association of Washington ("BIAW"), along with individual builders and contractors. The impetus for this challenge is the State's 2009 requirement that new building construction meet heightened energy conservation goals. This is the first case at the appellate level to consider EPCA's preemption-exemption provision. Plaintiffs–Appellants ("Plaintiffs") argue that the Building Code does not satisfy EPCA's conditions for exemption. The district court, however, held that Washington had satisfied EPCA's conditions, and therefore was not preempted. We affirm. To escape preemption, a state's building code must satisfy the seven conditions codified in 22 U.S.C. § 6297(f) (3). The two at issue here are \mathbb{E}_{\S} 6297(f)(3)(B) and (C). Under subsection (B), a state's building code cannot require a covered product-energy consuming fixtures such as water heaters and refrigerators-to be more efficient than the standards established by the United States Department of Energy ("DOE"). The State of Washington's Building Code requires builders to reduce a building's energy use by a certain amount, and provides a number of options from which a builder may choose how to meet that requirement. Some of the options involve the installation of products that have an efficiency that exceeds the federal standards. These options, according to the builders, also happen to be cheaper than the other options. The builders contend that they are therefore being "required" to use products that exceed the federal standards, in violation of subsection (B). We hold that a builder is not "required" to select an option, within the meaning of subsection (B), simply because there is an

economic incentive to do so. Section 6297(f)(3)(B) is violated when the code requires a builder, as a matter of law, to select a particular product or option. The Supreme Court has

recognized this to be what a requirement entails. *See Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 445, 125 S.Ct. 1788, 161 L.Ed.2d 687 (2005) (rejecting a preemption challenge, and holding that the term "requirement" in a different statute means "a rule of law that must be obeyed"). Plaintiffs in this case are thus not "required" to choose the less expensive, more efficient option.

Plaintiffs' challenge under § 6297(f)(3)(C) of the federal law is more factual in nature. Subsection (C) contemplates that building codes will allow builders to meet energy efficiency objectives through a system of credits for implementing solutions that save on either energy *1146 use or energy cost. It provides that a building code must grant credits on the basis of how much each option reduces energy use or cost, without favoring particular products or methods. It requires that the credits be allowed on the basis of "one-forone equivalent energy use or equivalent cost." Plaintiffs argue that the Building Code here does not satisfy this condition, because they contend its credits are not granted on a onefor-one equivalent energy use basis. Their argument relies solely upon a BIAW member's declaration. The district court rejected the declaration after finding that the witness was not qualified as an expert to challenge the state's calculations of equivalent energy use savings produced by using particular

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products or building methods. We hold there was no abuse of discretion in disallowing that evidence.

The evidence that is in the record supports the district court's conclusion that the state-assigned credit values satisfy the "one-for-one equivalent energy use" requirement of subsection (C). The district court admitted the State's expert testimony and documentation because the court found the State's computer models for assigning credit values used sound data and methodology, and that they were reliably applied. See Daubert v. Merrell Dow Pharmaceuticals,

509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). The district court properly held that Plaintiffs could not show that the Building Code violated subsection (C).

Plaintiffs do correctly note that even where the State gives two options the same credit, there may not be an exact match between the energy savings produced by each option. This is an inevitable result, however, when comparing methods that use different products to obtain an energy conservation goal. Some approximation is necessarily included in the concept of equivalence, as Congress and the district court have recognized. *See, e.g.*, S.Rep. No. 100–6 at 10 (1987), 1987 U.S.C.C.A.N. 52, 61 ("The Committee recognizes that in some cases, exact equivalency is not possible.").

We therefore hold that the Washington Building Code satisfies the conditions Congress established for enforcement of state and local building codes consistent with federal energy law and we affirm the judgment of the district court in favor of the State.

BACKGROUND

The Federal Regulatory Framework

Congress enacted EPCA as a comprehensive federal regime regulating energy and water conservation standards for certain consumer appliances. Congress gave DOE primary responsibility for promulgating regulations prescribing a "minimum level of energy efficiency or a maximum quantity of energy use" for the covered consumer products. 42

EPCA defines a "consumer product," in relevant part, as "any article ... of a type—(A) which in operation consumes, or is designed to consume, energy or, with respect to showerheads, faucets, water closets, and urinals, water; and (B) which,

to any significant extent, is distributed in commerce for personal use or consumption by individuals...." \searrow § 6291(1). Consumer products covered by EPCA's energy-efficiency provisions are identified in § 6292, and include durable goods such as refrigerators, air conditioners, water heaters, furnaces, dishwashers, clothes washers and driers, kitchen ranges and ovens, faucets, and showerheads. § 6292(a). These covered consumer products are typically installed in new home construction.

As initially enacted in 1975, EPCA provided that federal energy efficiency standards *1147 be established for covered products, and it preempted all state "efficiency standard[s] or similar requirement[s]" for covered products. Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, sec. 327, 89 Stat. 871, 926-27. Congress modified the blanket preemption in 1987, when it amended EPCA to carve out an explicit exemption from preemption for certain efficiency standards in state and local building codes. See National Appliance Energy Conservation Act of 1987, Pub. L. No. 100-12, sec. 7, 101 Stat. 103, 117-22 (codified as amended at 22 U.S.C. § 6297). EPCA thus now expressly exempts from preemption any regulation or other requirement contained in a state or local building code for new construction concerning the energy efficiency or energy use of covered products, but only if the provisions of the code

satisfy seven statutory conditions. 42 U.S.C. § 6297(f)(3). The conditions are as follows:

(A) The code permits a builder to meet an energy consumption or conservation objective for a building by selecting items whose combined energy efficiencies meet the objective.

(B) The code does not require that the covered product have an energy efficiency exceeding the applicable energy conservation standard established in or prescribed under

efficiency may exceed such standard up to the level required by a regulation of that State for which the Secretary has issued a rule granting a waiver under subsection (d) of this section.

(C) The credit to the energy consumption or conservation objective allowed by the code for installing covered products having energy efficiencies exceeding such energy conservation standard established in or prescribed under

section 6295 of this title or the efficiency level required

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in a State regulation referred to in subparagraph (B) is on a one-for-one equivalent energy use or equivalent cost basis.

(D) If the code uses one or more baseline building designs against which all submitted building designs are to be evaluated and such baseline building designs contain a covered product subject to an energy conservation standard

established in or prescribed under established in or prescribed under established in 6295 of this title, the baseline building designs are based on the efficiency level for such covered product which meets but does not exceed such standard or the efficiency level required by a regulation of that State for which the Secretary has issued a rule granting a waiver under subsection (d) of this section.

(E) If the code sets forth one or more optional combinations of items which meet the energy consumption or conservation objective, for every combination which includes a covered product the efficiency of which exceeds either standard or level referred to in subparagraph (D), there also shall be at least one combination which includes such covered product the efficiency of which does not exceed such standard or level by more than 5 percent, except that at least one combination shall include such covered product the efficiency of which meets but does not exceed such standard.

(F) The energy consumption or conservation objective is specified in terms of an estimated total consumption of energy (which may be calculated from energy loss- or gain-based codes) utilizing an equivalent amount of energy (which may be specified in units of energy or its equivalent cost).

(G) The estimated energy use of any covered product permitted or required in the code, or used in calculating the objective, is determined using the applicable test procedures prescribed under *1148 section 6293 of this title, except that the State may permit the estimated energy use calculation to be adjusted to reflect the conditions of the areas where the code is being applied if such adjustment is based on the use of the applicable test procedures prescribed under section 6293 of this title or other technically accurate documented procedure.

 2 42 U.S.C. § 6297(f)(3)(A)-(G). As long as a state building code meets these conditions, the state does not need to petition

for the DOE's approval to enforce its building code. See \mathbb{E} § 6297(f)(4)(A).

Behind the 1987 preemption exemption lies Congressional recognition that state and local building codes have a major impact on energy consumption. Buildings, and the fixtures installed in them, make up a large proportion of energy and electricity use throughout the country. See 2010 Buildings Energy Data Book *1-2, 1-6 (DOE 2010See 2010 Buildings Energy Data Book *1-2, 1-6 (DOE 2010), online at http://buildingsdatabook.eren.doe. gov/docs/Data Books/2010 BEDB.pdf (nearly 40% of energy use, and over 70% of electricity use) (accessed June 18, 2012). Buildings and fixtures tend to have long lifespans, so choices made at the outset during construction are likely to have farreaching future effects on energy consumption. It is for this reason that Congress, in EPCA, has permitted states some limited means of regulating these choices. Federal regulations promulgated under EPCA provide minimum standards for

the energy efficiency of such fixtures, *see* 42 U.S.C. § 6295; 10 C.F.R. § 430.32, and the federal statute preempts state attempts to impose minimum standards greater than the federal law, *see* 42 U.S.C. § 6297(c). States thus cannot, for example, require that any water heater sold or installed in the state meet energy-efficiency requirements more stringent than federal requirements. States seeking to implement energy conservation goals through their building codes must therefore ensure that the code satisfies the conditions established in EPCA for exemption from federal preemption. There is no dispute that Washington's building code is "a State or local building code for new construction concerning the energy efficiency regulations. § 6297(f)(3). If

covered by EPCA's efficiency regulations. \bigcirc § 629/(f)(3). If the code does not meet EPCA's conditions, it is preempted.

The Washington State Building Code

Washington's legislature has opted to use its regulatory police power to enact a statewide code for building construction to promote, inter alia, energy efficiency goals. The development of the code before us reveals the State's sensitivity to EPCA's conditions. The Washington legislature identified energy consumption patterns in new building construction as an area in which it could create incentives for energy efficiency, and enacted a regulatory regime that meets specific efficiency goals over the next two decades. The legislature explained that it enacted energy conservation mandates to balance "flexibility in building design" against "the broader goal of building zero fossil-fuel greenhouse gas emission homes and buildings by the year 2031." Rev.Code Wash. § 19.27A.020(2)(a); see also id. § 19.27A.130 ("Washington can spur its economy and assert its regional and national clean energy leadership by putting efficiency first.").

While the legislature has mandated the goals, it has delegated authority to Defendant–Appellee Washington State Building Code Council ("Council"), to promulgate and update the statewide building code. Rev.Code Wash. § 19.27A.045. The Council must review and may amend the state Building Code periodically, *id.*, and between 2013 and 2031 it will have to amend the Code progressively to implement the legislature's mandated goals, *id.* *1149 § 19.27A.160. The Building Code that will be effective in 2031 will have to achieve a "seventy percent reduction in annual net energy consumption" compared to the Building Code effective in 2006, the baseline year. § 19.27A.160(1).

The Council amended the Code effective in 2009 to implement a 15% reduction in new buildings' energy consumption, compared to the 2006 baseline. The 2009 amendments, a precursor to those expected to take effect in 2013, are the subject of Plaintiffs' challenge here.

In the 2009 Code, the Council offered builders three methods, termed "pathways," for achieving the 15% reduction in energy consumption. Each such pathway to compliance is codified under one of three chapters of the Code. See Wash. Admin. Code §§ 51-11-0401 (Chapter 4); 51-11-0501 (Chapter 5), 51-11-0601 (Chapter 6). A builder who elects the Chapters 5 or 6 pathways will not fully achieve the 15% reduction in energy consumption. The Building Code therefore requires a builder electing Chapters 5 or 6 to earn one "credit" under Chapter 9, which provides alternative methods for further reducing energy consumption by the necessary amount. § 51-11-0900. As the Defendants explained to the district court, the options set forth in Chapter 9 address different ways of achieving more efficient residential building energy use, by addressing the "efficiency of a building's shell," or "efficiency of a home's heating equipment," or "efficiency of other energy consuming devices." The credit system in Chapter 9 is the subject of the preemption challenge in this case, because some of its provisions involve use of EPCA covered products.

Chapter 9 assesses a certain credit value to each option available to builders who elect the Chapters 5 or 6 pathways. Chapter 9 contains a menu of options, "Table 9–1," from which each builder can choose how best to secure its required one credit. Wash. Admin. Code § 51–11–0900. Some options are worth one credit, while others are worth half, one-anda half, or two credits each. Large home construction is penalized, because if a builder constructs a home larger than 5000 square feet of floor area, one credit is deducted. *Id.* A builder must implement sufficient options in order both to cancel out the penalty, if applicable, and to earn one net credit.

The Council's 2009 proposed changes that added Chapter 9 were controversial from the beginning. Industry groups offered criticism during the period leading up to the Council's adoption of the revisions, and objected to what they perceived as coercion. In a letter to the Council in November 2009, for example, the Air Conditioning, Heating, and Refrigeration Institute said that unless the Council supplemented Table 9-1 with additional options, Chapter 9 "could indirectly force homebuilders to install high efficiency HVAC and water heating equipment" in order to earn the required credit. Other criticisms focused on the cost to builders of complying with Chapter 9. After the Council adopted the changes, the state Joint Administrative Rules Review Committee faulted it for providing what it considered an inadequate costbenefit analysis. See Wash. Admin. Code § 51-11-0900 note. That Committee recommended that the effective date of the amendments be delayed. Washington's Governor, Christine Gregoire, took up the Committee's recommendation. Citing the importance of the construction industry to the recovery of the state's economy during a time of deep recession, the Governor asked the Council to delay implementing the amendments from July 2010 until April 2011. The Council filed an emergency rule delaying the effective date, but only until October 29, 2010. Emergency Rule, Wash. St. *1150 Reg. 10-13-114 (June 21, 2010). Plaintiffs determined litigation was necessary.

This Litigation

Plaintiffs filed this action in May 2010 in the Western District of Washington. In their complaint, Plaintiffs alleged their businesses would be harmed if the 2009 revisions to the Building Code were allowed to go into effect, because the revisions would increase costs of installing appliances and thereby reduce demand for new home construction. Plaintiffs sought declaratory and injunctive relief on their claim that the Building Code was expressly preempted by EPCA, and they argued it did not satisfy the statutory conditions that

provide a safe harbor from preemption under 2 § 6297(f) (3). Environmental groups supportive of the 2009 revisions

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moved to intervene on behalf of the Council. In July 2010, the district court granted a motion to intervene filed by the Northwest Energy Coalition, Sierra Club, Washington Environmental Council, and Natural Resources Defense Council.

Defendants and intervenors (collectively "Defendants") then filed a joint motion for summary judgment, arguing that the Washington Building Code met all seven statutory conditions for exemption from preemption. The district court summarized the Defendants' position with respect to each of the seven conditions as follows:

> 1) the Washington Code offers builders numerous options to meet the overall 15% reduction and the 8% energy efficiency requirement, 2) the Washington Code does not expressly or effectively require efficiency levels beyond the federal minimum standards, 3) the Washington Code assigns credits that are even-handed and not unfairly weighted, 4) the Code does not require the use of single baseline building design, 5) the Code offers an evenly balanced range of options, 6) energy savings goal of the Washington Code is measured in energy use, and 7) the Code uses federal test procedures to measure energy use.

Plaintiffs cross-moved for summary judgment, arguing that Chapter 9 failed to satisfy four of the seven statutory conditions. *See* \bigotimes 6297(f)(3)(B), (C), (E), (F). In addition to challenging compliance with conditions (B) and (C), they also argued before the district court that Chapter 9 failed conditions (E) and (F), but Plaintiffs do not pursue those latter challenges on appeal.

The district court disagreed with Plaintiffs and granted summary judgment to Defendants. All the parties agreed that Plaintiffs were challenging the enforceability of the Washington Building Code on the ground that it was preempted because it failed to satisfy the statutory conditions. There was no dispute that the Washington Building Code "concern[s] the energy efficiency or energy use of [EPCA] covered product[s]" and therefore must satisfy all seven conditions to avoid preemption. § 6297(f)(3). The district court found that the Building Code satisfied those conditions and thus was exempt from preemption. The court rejected Plaintiffs' argument concerning subsection (B), noting that Chapter 9 did not require products "with higher efficiency than mandated by federal standards as the only way to comply with the Code." It also rejected Plaintiffs' argument concerning subsection (C), explaining that "[w]hile there is some disparity in credits, the EPCA does not require identical energy savings.... Plaintiffs have not shown that the variation is so great that the Code does not meet the requirements of factor (C)."

Plaintiffs timely appeal.

DISCUSSION

This appeal solely concerns whether the Washington Building Code's provisions satisfy two of EPCA's statutory conditions *1151 to avoid preemption. Subsection (B) provides that the code must not require builders to install products more efficient than federal standards would require, while subsection (C) provides that where a building code grants credits for reducing energy use, the code must give credit in proportion to energy use savings, without favoring certain options over others. We turn first to subsection (B).

Subsection B

[1] Plaintiffs argue that the Building Code's Chapter 9 does not satisfy EPCA subsection (B), which provides in relevant part that, to survive preemption, the Building Code cannot "require that the covered product have an energy efficiency exceeding the applicable energy conservation standard" established under federal law. 242 U.S.C. § 6297(f)(3)(B). Several options under Chapter 9 call for higher efficiency covered products (options 1a, 2, 5a, and 5b), and the remaining options do not. Builders can choose. They do not have to use higher efficiency products.

Plaintiffs acknowledge that Chapter 9 does not legally mandate use of higher efficiency covered products. Their contention is, rather, that the other options are so costly that builders are economically coerced and hence "required" to select the higher efficiency options. Defendants counter

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that an economic incentive is not a requirement. We agree that allowing less expensive, more efficient options does not require builders to use more efficient products within the meaning of the federal statute. This is apparent from an analysis of the language of EPCA, as well as the Supreme Court's interpretation of similar language in the preemption clause of another environmental statute.

Congress's use of the word "require" in the statutory text of

\$ 6297(f)(3)(B) indicates it intended compulsion backed by force of law. The dictionary definition of the verb "require" is to "impose a compulsion or command upon (as a person) to do something; demand of (one) that something be done or some action taken; enjoin, command, or authoritatively insist (that someone do something)." Webster's Third New International Dictionary 1929 (1971). This definition leaves no room for the Plaintiffs' argument that cost considerations outside the Building Code itself force them to select higher efficiency options and hence "require" those options. A requirement would have to be in the Code. The Washington Building Code itself does not command, demand, or insist that builders select higher efficiency options. We thus must conclude that Chapter 9 satisfies subsection (B) in that it does not require such options.

Plaintiffs nevertheless point to language in the legislative history, in particular House Report 100–11House Report 100–

11, stating that the provisions of \$ 6297(f)(3) "are designed to ensure that performance-based codes cannot expressly or effectively" require installation of higher efficiency products. H.R. Rep. 100–11 at 26 (1987)H.R. Rep. 100–11 at 26 (1987). Plaintiffs argue that the House Report's reference to an "effective" requirement means Congress wanted to bar states from adopting building codes that exert even indirect economic pressure to install higher efficiency options. Congress was concerned, however, with the content of a regulation that was within state or local control. The market costs of products fluctuate outside the control of those who promulgate the codes. Congress cannot preempt market costs. The fact that certain options may end up being less costly to builders than others does not mean the state is, expressly or effectively, requiring those options.

The state would effectively require higher efficiency products, in violation of subsection (B), if the code itself imposed a penalty for not using higher efficiency products. This is what a building code *1152 ordinance for the city of Albuquerque, New Mexico did. The federal district

court for the District of New Mexico therefore granted a preliminary injunction against enforcing that ordinance. See

Air Conditioning, Heating, and Refrigeration Institute v. City of Albuquerque, 2008 WL 5586316 (D.N.M.2008). That court held, in relevant part, that the ordinance did not satisfy EPCA's subsection (B), because the ordinance itself had created a situation in which the builder had no choice. Albuquerque's ordinance imposed costs, as a matter of law, on builders who installed certain covered products meeting federal standards, by requiring the builder to install additional products that would compensate for not using a higher efficiency product. *Id.* at *2. As the court explained, "if products at the federal efficiency standard are used, a building owner must make other modifications to the home to increase its energy efficiency." *Id.* at *9. The Albuquerque

increase its energy efficiency." *Id.* at *9. The Albuquerque ordinance thus effectively required use of higher efficiency products by imposing a penalty through the code itself.

Here, by contrast, the Washington Building Code itself imposes no additional costs on builders. The district court noted that there are "substantial differences" between the Washington Building Code and Albuquerque's ordinance. It correctly rejected the Plaintiffs' argument concerning subsection (B), explaining that the Washington Building Code created no penalties, and did not require higher efficiency products as the "only way to comply with the code." We hold the Washington Building Code complies with subsection (B) because it does not create any penalty or legal compulsion to use higher efficiency products.

This conclusion draws support from the Supreme Court's interpretation of another statutory preemption clause intended to prevent states from creating higher, or additional, requirements than those created by federal law. In *Bates v. Dow Agrosciences, LLC,* 544 U.S. 431, 125 S.Ct. 1788, 161 L.Ed.2d 687 (2005), the Supreme Court considered the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). FIFRA contained a preemption provision mandating that state law not "impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under [FIFRA]." 7 U.S.C. § 136v(b).

The issue in *Bates* was whether that provision preempted state common law claims for strict liability, negligence, fraud, and breach of warranty. The Fifth Circuit had held that the state tort claims were preempted on the theory that a jury verdict in favor of the plaintiffs would create an incentive

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for the manufacturer to change its label in ways that were in addition to, or different from, those required under FIFRA.

See Bates, 544 U.S. at 436, 125 S.Ct. 1788 (citing Dow Agrosciences LLC v. Bates, 332 F.3d 323 (5th Cir.2003)). The Supreme Court reversed, rejecting the Circuit's conclusion that an incentive for change constituted a "requirement." The Court said that an event like a jury verdict might induce a label change, but "[t]he Court of Appeals was ... quite wrong when it assumed that any event, such as a jury verdict, that might 'induce' a pesticide manufacturer to change its

label should be viewed as a requirement." *Id.* at 443, 125 S.Ct. 1788. The Court concluded that common law rules governing strict products liability, negligence, and fraud, may affect the choices that manufacturers make, but are not state requirements for labeling or packaging, and are

thus not preempted. *Id.* at 444, 125 S.Ct. 1788. Even though verdicts on state tort claims might create economic incentives to reach the outcome otherwise forbidden, the Court explained, those incentives do not "require[] that manufacturers label or *1153 package their products in any

particular way." *Id. Bates* effectively forecloses Plaintiff's argument in this case.

Subsection C

Plaintiffs argued to the district court that Chapter 9 does not satisfy subsection (C), because the state has assigned the same value to several options that do not reduce energy use by equivalent amounts. In support of their motion for summary judgment, Plaintiffs offered a declaration purporting to show that the state had assigned credit values that were incorrect or not equivalent. Ted Clifton, a builder affiliated with one of the Plaintiff corporations, submitted the declaration stating his conclusion that options in Chapter 9 would reduce energy consumption by amounts other than the amounts the state had assigned. Although the declaration was purportedly based on Clifton's experience as a builder, it did not describe how he reached his conclusions. He opined that the computer models the State used to estimate and assign credit values were "inconsisten[t]," used "rough approximations and rounding," and were based on "flawed" assumptions.

Defendants, by contrast, offered evidence to show that the Council used computer models to assign credit values proportional to the equivalent amount by which each Chapter 9 option would reduce the building's energy use. The Council explained it used a model developed by Dave Baylon, an energy efficiency expert with an energy consulting firm, to estimate how a building's energy use will change when different components and products are installed. According to the State's declarations, that model, known as SEEM, has been used since 1982 by entities such as the Northwest Power and Conservation Council ("NWPCC"), and is described as "the industry standard."

To explain the use of the model, Defendants provided the declaration of Tom Eckman, manager of conservation resources at NWPCC and chair of the Regional Technical Forum. He described the latter organization as having been "established by the NWPCC at the request of Congress to develop standardized methods for verifying conservation savings." The State uses computer simulations, Eckman explained, because "it is not practical to build homes with every potential combination of energy efficiency measures being considered for code adoption in order to test their effect on energy use." The SEEM model "simulat[es] the impact on energy use of each of the efficiency options under consideration across a range of home sizes and designs that are representative of those being constructed in Washington state." According to Eckman, the SEEM model allows the Council to determine how installing different components and products in the new building will affect its energy use in many situations. It therefore also allows the State to isolate the energy-reducing effect of any given component, and assign a credit value to that component.

[3] The district court, in rejecting Clifton's declaration, ruled correctly that Clifton *1154 had established no qualifications to provide expert testimony about the accuracy of the SEEM model. The party offering expert testimony

has the burden of establishing its admissibility. United States v. 87.98 Acres of Land More or Less in the County of Merced, 530 F.3d 899, 904 (9th Cir.2008). Plaintiffs

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do not seriously contend on appeal that the district court should have admitted Clifton's declaration. Clifton offered unsupported assertions that the computer models were wrong, but Plaintiffs offered no data forming the basis for Clifton's assumptions or conclusions. They made no attempt to show his testimony was scientifically or otherwise reliable. *See*

United States v. Redlightning, 624 F.3d 1090, 1111 (9th Cir.2010). There was no abuse of discretion in rejecting the declaration.

Defendants, on the other hand, offered expert declarations that explained the quantitative computer models used in assigning credit values. The district court considered the Defendants' evidence after it found Eckman qualified to offer expert opinion regarding energy efficiency modeling. It also concluded that the data that went into the SEEM model was shown to be accurate. On the basis of the Eckman evidence, the district court found that the credit of each option is weighted "based on the energy use saved by each option on average." This finding is supported by the expert declarations and is not clearly erroneous.

Plaintiffs are thus left to quibble over whether the credit values for Chapter 9's options are sufficiently proportional to the amount by which the State's numbers indicate they reduce energy use. Plaintiffs, for example, take issue with the Code's assigning the same credit value, one credit, to a geothermal heat pump (option 1b) and a system for ventilating and preventing leakage of climate-controlled air (option 4a). The State has estimated that, on average, the one-credit options in Chapter 9 reduce a building's energy use by eight percent. Option 1b reduces energy use by six percent, a figure below the average, and option 4a reduces energy use by about ten percent, a figure above the average. Plaintiffs appear to contend this is too much variation to satisfy the statute's requirement that credits be awarded on a "one-for-one" basis.

Any credit-based system that involves comparing different methods of reducing energy, however, may seem like comparing apples and oranges. Option 1b, geothermal heat pump, uses the ground to help heat or cool the house in different seasons. Option 4a, ventilator system, supplies an otherwise well-sealed house with fresh air, while avoiding using energy unnecessarily to maintain internal climate control. It is unsurprising that these methods do not produce identical results in energy savings.

Indeed, in EPCA, Congress recognized that some variation will be inevitable, for it speaks in terms of equivalencies.

The statute in subsection (C) requires that the credits be awarded "one-for-one" where different options bring about savings in "equivalent energy use or equivalent cost."

§ 6297(f)(3)(C). The covered consumer products differ in many ways, including in the kind of energy used -such as gas, electricity, or geothermal heat. Therefore reductions of energy consumption in different contexts can be compared meaningfully only through quantitative estimates. By requiring credits to be awarded for equivalent energy savings on a "one-for-one" basis, Congress intended state and local building codes to assign credit values proportional to the amount of energy saved, without regard to the method chosen. Plaintiffs suggest, implausibly, that Congress intended a perfect correspondence between energy use saved and credit value awarded. Yet Congress recognized *1155 there are different methods and measures, and it did not want codes to assign credit values disproportionately, thereby influencing builders' choices where options reduced energy consumption by equivalent amounts. The Senate Committee Report thus explained that credits are to be given, "to the greatest degree possible, one-for-one equivalency between the energy efficiency of these differing measures." S.Rep. No. 100-6 at 10.

The district court correctly ruled that the credit values in Chapter 9 are closely proportional to the average reduction in equivalent energy use across a variety of climatic and other environmental situations. Certain installation options may result in greater energy savings than other options in certain climates or certain size buildings. In requiring that credits be awarded on a one-for-one equivalent energy use basis, Congress intended not mathematical perfection, but rather preventing the building code from discriminating between products and building methods. Chapter 9 of the 2009 Washington Building Code achieves this objective by awarding credits for average equivalent energy use for each option in different use situations. Chapter 9 of the Washington Building Code thus satisfies EPCA subsection (C).

CONCLUSION

The district court did not err in granting summary judgment to Defendants. The Washington Building Code satisfies the conditions Congress set forth in EPCA for exemption from federal preemption.

AFFIRMED.

All Citations

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Footnotes

* The Honorable Ralph R. Beistline, Chief United States District Judge for the District of Alaska, sitting by designation.

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Exhibit C



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July 21, 2020

Patrick J. Ward, Town Clerk Linda Goldburgh, Assistant Town Clerk Town of Brookline 333 Washington Street Brookline, MA 02445

Re: Brookline Special Town Meeting of November 19, 2019 -- Case # 9725 Warrant Article # 21 (General)¹

Dear Mr. Ward and Ms. Goldburgh:

In this Case we must determine whether a Brookline by-law prohibiting any permits for construction of certain buildings with fossil fuel infrastructure (Article 21 of the Brookline Special Town Meeting of November 19, 2019) conflicts with the laws or Constitution of the Commonwealth. Because the State Building Code, the Gas Code, and G.L. c. 164 occupy the field of regulation and preempt local by-laws in their respective fields, we must disapprove the by-law.

If we were permitted to base our determination on policy considerations, we would approve the by-law. Much of the work of this Office reflects the Attorney General's commitment to reducing greenhouse gas emissions and other dangerous pollution from fossil fuels, in the Commonwealth and beyond. ² The Brookline by-law is clearly consistent with this policy goal. During our review of the

¹ In a decision issued July 17, 2020 we approved the remaining Articles from Case # 9725.

² For example, citing the threats of dangerous climate change to the Commonwealth, the Attorney General has filed and joined legal actions seeking to compel the U.S. Environmental Protection Administration to secure greater reductions of greenhouse gas emissions from the electric power, oil and gas, and transportation sectors. As the state's ratepayer advocate, the Attorney General has advanced the transition of the Commonwealth's electricity supply to renewable, non-carbon emitting sources of electric generation and the electrification of the heating sector. In 2016, the Office opposed attempts by the state's electric utilities to contract for gas pipeline capacity to anchor the construction of an unnecessary new interstate gas pipeline. *See NSTAR Electric Company and Western Massachusetts Electric Company d/b/a Eversource Energy*, D.P.U. 15-181; *Massachusetts Electric Company d/b/a* D.P.U. 16-05/ 16-07. Most recently, the Attorney General petitioned the Department of Public Utilities to investigate and plan for an energy future that includes an electrified heating sector (*see Petition of Attorney General to Investigate Local Gas Distribution Companies*, D.P.U. 20-80) and executed a settlement agreement that requires Eversource Gas to study and report on the steps necessary for gas distribution companies to comply with the emission

by-law we received numerous letters from interested parties urging our approval of the by-law for both policy and legal reasons. We appreciate this input as it has demonstrated the importance of the environmental policy goal that prompted the Town to adopt the by-law.³

However, in carrying out her statutory obligation of by-law review under G.L. c. 40, § 32, the Attorney General is precluded from taking policy issues into account. <u>Amherst v. Attorney General</u>, 398 Mass. 793, 798-99 (1986) ("Neither we nor the Attorney General may comment on the wisdom of the town's by-law."). Pursuant to G.L. c. 40, § 32, the Attorney General's by-law review is limited in scope to determining whether the by-law conflicts with the laws or Constitution of the Commonwealth. If it does conflict, the Attorney General must disapprove the by-law, regardless of the policy views that she may hold on the matter. <u>Id.</u>

Under this standard we must disapprove the by-law adopted under Article 21 because it conflicts with the laws of the Commonwealth in three ways:

- The by-law is preempted by the State Building Code, which establishes comprehensive statewide standards for building construction and is "intended to occupy the field of building regulation." <u>St. George Greek Orthodox Cathedral of Western Massachusetts</u>, Inc. v. Fire <u>Dep't of Springfield</u>, 462 Mass. 120, 130 n. 14 (2012);
- 2. The by-law is preempted by the Gas Code and G.L. c. 142, §13 in that it creates a new reason to deny a gas permit and would "allow a locality to impose additional requirements and second-guess the determination of the State [Plumbing] board." <u>St. George</u>, 462 Mass. at 128; and
- 3. The by-law is preempted by G.L. c. 164 through which the Massachusetts Department of Public Utilities (DPU) comprehensively regulates the sale and distribution of natural gas in the Commonwealth. See Boston Gas Co. v. City of Somerville, 420 Mass. 702, 706 (1995) ("[T]he [city] cannot use its limited authority to enact an ordinance which has the practical effect of frustrating the fundamental State policy of ensuring <u>uniform</u> and efficient utility services to the public.") (emphasis added).

In this decision we briefly describe the by-law; discuss the Attorney General's limited standard of review of town by-laws under G.L. c. 40, § 32; and then explain why, governed as we are by that standard, we must disapprove the by-law adopted under Article 21. ⁴

reduction mandates of the Global Warming Solutions Act (see Joint Petition of Eversource Energy, NiSource Inc., and Bay State Gas Company d/b/a Columbia Gas of Massachusetts, D.P.U, 20-59).

³ We appreciate the letters we received from, among others, Town Counsel Joslin Murphy and Jonathan Simpson on behalf of the Town; Attorney Raymond Miyares on behalf of the petitioners; Attorney Sarah Krame on behalf of The Sierra Club; Attorney Aladdine D. Joroff on behalf of Mothers Out Front Massachusetts and others; and Attorney Alyssa Rayman-Read on behalf of the Conservation Law Foundation.

⁴ As we have done in the past, our Office conferred with certain petitioners and opponents at their request regarding procedural matters in connection with the by-law. As is our practice, at no time did we offer an opinion as to the viability of the by-law or whether we would approve it.

I. Summary of Article 21

Under Article 21 the Town voted to adopt a new general by-law, 8.39 "Prohibition on New Fossil Fuel Infrastructure in Major Construction." The by-law establishes that "no permits shall be issued by the Town for the construction of New Buildings or Significant Rehabilitations that include the installation of new On-Site Fossil Fuel Infrastructure" with certain exceptions outlined in the by-law.

The by-law defines "On-Site Fossil Fuel Infrastructure" as:

[F]uel gas or fuel oil piping that is in a building, in connection with a building, or otherwise within the property lines of premises, extending from a supply tank or from the point of delivery behind a gas meter (customer-side of gas meter).

(Section 8.40.2, Definitions). The term "permits" is not defined but the by-law applies broadly to "to all permit applications for New Buildings and Significant Rehabilitations proposed to be located in whole or in part within the Town," with certain exemptions as listed in the by-law (Section 8.40.3 Applicability).

The by-law includes a process by which applicants may request a waiver on the grounds of "financial infeasibility" or "impracticability of implementation." (Section 8.40.5, Waivers). The bylaw directs the Selectboard to establish a "Sustainability Review Board," comprised of at least three members representing expertise in affordable housing, commercial development, architecture etc., to review and decide on waiver applications. (Sections 8.40.2, Definitions and 8.40.5, Waivers). The by-law also establishes an appeal process for denial of a building permit: "An appeal may be sought from the SRB following a denial of a building permit." (Section 8.40.6 Appeals).

II. Attorney General's Standard of Review and Preemption

Pursuant to G.L. c. 40, § 32, the Attorney General has a "limited power of disapproval," and "[i]t is fundamental that every presumption is to be made in favor of the validity of municipal bylaws." <u>Amherst v. Attorney General</u>, 398 Mass. 793, 795-96 (1986). The Attorney General does not review the policy arguments for or against the enactment. <u>Id.</u> at 798-99 ("Neither we nor the Attorney General may comment on the wisdom of the town's by-law.") Rather, in order to disapprove a bylaw (or any portion thereof), the Attorney General must cite an inconsistency between the by-law and the state Constitution or laws. <u>Id.</u> at 796. Where the Legislature intended to preempt the field on a topic, a municipal by-law on that topic is invalid and must be disapproved. <u>Wendell v. Attorney General</u>, 394 Mass. 518, 524 (1985).

In determining whether a by-law is inconsistent with a state statute, the "question is not whether the Legislature intended to grant authority to municipalities to act...but rather whether the Legislature intended to deny [a municipality] the right to legislate on the subject [in question]." <u>Wendell</u>, 394 Mass. at 524 (1985). "This intent can be either express or inferred." <u>St. George</u>, 462 Mass. at 125-26. Local action is precluded in three instances, paralleling the three categories of federal preemption: (1) where the "Legislature has made an explicit indication of its intention in this respect"; (2) where "the State legislative purpose can[not] be achieved in the face of a local by-law on the same subject"; and (3) where "legislation on a subject is so comprehensive that an inference would be

justified that the Legislature intended to preempt the field." <u>Wendell</u>, 394 Mass. at 524. "The existence of legislation on a subject, however, is not necessarily a bar to the enactment of local ordinances and by-laws exercising powers or functions with respect to the same subject[, if] the State legislative purpose can be achieved in the face of a local ordinance or by-law on the same subject[.]" <u>Bloom v. Worcester</u>, 363 Mass. 136, 156 (1973); <u>see Wendell</u>, 394 Mass. at 527-28 ("It is not the comprehensiveness of legislation alone that makes local regulation inconsistent with a statute. . . . The question . . . is whether the local enactment will clearly frustrate a statutory purpose.").

III. The By-law is Preempted Because it Conflicts with Three Uniform Statewide Regulatory Schemes

The Supreme Judicial Court has frequently held that in determining whether a statute "impliedly preclude[s] regulation by municipalities," a court must examine "whether there is a need for uniformity in the subject of the legislation." <u>Golden v. Selectmen of Falmouth</u>, 358 Mass. 519, 524 (1970). Where there is "importance in uniformity in the law to govern the administration of the subject[, a] statute of that nature displays on its face an intent to supersede local and special laws and to repeal inconsistent special statutes." <u>McDonald v. Justices of the Superior Court</u>, 299 Mass. 321 (1938) (discussing statute imposing uniform statewide regulation of alcoholic beverage sales). Where a state statutory scheme demonstrates an intention to create a uniform statewide regulatory system, municipal enactments in the area are invalid.

Brookline's by-law implicates three statutory schemes that preempt local regulation: G.L. c. 143, § 95(c) (creating the State Building Code); G.L. c. 142, §13 (charging the Plumbing Board with administration of the Gas Code regulating "gas fitting in buildings throughout the commonwealth"); and G.L. c. 164 (through which the DPU comprehensively regulates the sale and distribution of natural gas in the Commonwealth).

A. <u>The By-law is Preempted Because it Interferes with the Express Statutory Goal of Uniformity</u> in the State Building Code.

General Laws G.L. c. 143, § 95(c) expressly states a goal of uniformity with which the bylaw interferes. In addition, the state Board of Building Regulations and Standards ("BBRS") has exercised its statutory authority to prescribe the process for issuance and denial of permits, and the process for waivers and appeals from building officials' decisions. The by-law here purports to create a new basis for denial of permits, and a new waiver and appeal process, all of which conflict with the Building Code and state law.

1. State Building Code and Board of Building Regulations and Standards.

The BBRS is established by G.L. c. 143, § 93, and charged with adopting and regularly updating the Building Code. <u>Id</u>. § 94(a), (c,) (h). The BBRS must administer the Building Code so as to further three "general objectives," the first of which is: "<u>Uniform standards and requirements</u> for construction and construction materials, compatible with accepted standards of engineering and fire prevention practices, energy conservation and public safety." <u>Id</u>. § 95(a) (emphasis added). "In authorizing the development of the [C]ode, the Legislature has expressly stated its intention: to ensure '[u]niform standards and requirements for construction materials." <u>St. George</u>, 462 Mass. at 126 (<u>citing</u> G.L. c. 143, § 95(c).). As such, the Legislature established the Building Code as the one state-wide building code and rejected the premise of each municipality having its own

requirements. "All by-laws and ordinances of cities and towns...in conflict with the state building code shall cease to be effective on January [1, 1975]." St. 1972, c. 802, § 75 as appearing in St. 1975, c. 144, § 1. Based on this express legislative goal of uniformity, and the abolition of local by-law requirements, the <u>St. George</u> court found "the Legislature [had] demonstrate[d] its express intention to preempt local action." <u>Id</u>. at 129.

The Building Code has broad application regarding building construction, including (most relevant here) the issuance of building and occupancy permits:

780 CMR, and other referenced specialized codes as applicable, shall apply to:

1. the construction, reconstruction, alteration, repair, demolition, removal, inspection, <u>issuance and revocation of permits or licenses</u>, installation of equipment, classification and definition of any building or structure <u>and use or occupancy of all</u> <u>buildings and structures or parts</u> thereof...;

101.2 Scope (emphasis supplied).

It is the local building official who makes the determination whether a building or occupancy permit application complies with the Building Code requirements and thus whether a permit should issue:

104.2 Applications and Permits. The building official shall receive applications, review construction documents and issue permits for the erection, and alteration, demolition and moving of buildings and structures, inspect the premises for which such permits have been issued and enforce compliance with the provisions of 780 CMR.

105.1 Required. It shall be unlawful to construct, reconstruct, alter, repair, remove or demolish a building or structure; or to change the use or occupancy of a building or structure; or to install or alter any equipment for which provision is made or the installation of which is regulated by 780 CMR without first filing an application with the building official and obtaining the required permit.

Further, the Building Code establishes the local building official as the decision-maker regarding any requested waivers:

104.10 Modifications. Wherever there are practical difficulties involved in carrying out the provisions of 780 CMR, the building official shall have the authority to grant modifications for individual cases, upon application of the owner or owner's representative, provided the building official shall first find that special individual reason makes the strict letter of 780 CMR impractical and the modification is in compliance with the intent and purpose of 780 CMR and that such modification does not lessen health, accessibility, life and fire safety, or structural requirements.

Finally, the Legislature has designated the BBRS, sitting as the State Building Code Appeals Board, as the entity to hear appeals from local and state enforcement officials' orders under and interpretations of the Building Code. G.L. c. 143, § 100:

There shall be in the division of professional licensure a building code appeals board, hereinafter called the appeals board, to consist of the board established under the provisions of section ninety-three.

Whoever is aggrieved by an interpretation, order, requirement, direction or failure to act by any state or local agency or any person or state or local agency charged with the administration or enforcement of the state building code or any of its rules and regulations, except any specialized codes as described in section ninety-six, may within forty-five days after the service of notice thereof appeal from such interpretation, order, requirement, direction, or failure to act to the appeals board.

2. G.L. c. 143, § 95(c)'s Stated Intention of Uniform Standards Preempts Additional Local Requirements.

Where (as here) a statute authorizes a state agency to make a uniform statewide determination of what products and practices <u>should</u> (as well as should not) be allowed, a local by-law imposing an additional layer of regulation of the same subject is invalid. <u>Wendell v. Attorney General</u>, 394 Mass. 518 (1985). In <u>Wendell</u>, the statute established a "pesticide board" within the state Department of Food and Agriculture and empowered a subcommittee of the board to "register" a pesticide for general or restricted use if the subcommittee found that the pesticide met specific statutory criteria. <u>Id</u>. at 526, 528-29. In the face of this scheme, "[t]he Wendell by-law contemplate[d] the possibility of local imposition of conditions on the use of a pesticide beyond those established on a Statewide basis under the act." <u>Id</u>. at 528. The court held that "[a]n additional layer of regulation at the local level, in effect second-guessing the subcommittee, would prevent the achievement of the identifiable statutory purpose of having a centralized, Statewide determination [and] …frustrate the purpose of the act." <u>Wendell</u>, 394 Mass. at 529.

In determining that Springfield's ordinance was preempted by the Building Code, the <u>St.</u> <u>George</u> court relied on the reasoning of the <u>Wendell</u> decision:

The same reasoning applies here. The Legislature intended to occupy the field by promulgating comprehensive legislation and delegating further regulation to a State board. The board's regulations, in turn, set a Statewide standard as to what products and practices were permissible in a particular field, a process involving a discretionary weighing of relevant factors, such as cost and safety. In response the local government created an additional layer of regulation imposing requirements beyond those contemplated by the board. There is no meaningful distinction between these cases, and we reach the same conclusion here: the code preempts inconsistent local regulations.

St. George, 462 Mass. at 133-134.

Just as in <u>St. George</u> and <u>Wendell</u>, it is ultimately the BBBRS -- not any city or town -- that is charged with determining the process by which a building or occupancy permit is granted or withheld.⁵ Local ordinances and by-laws that second-guess the BBBRS' determination of when a

⁵ As explained above, the initial determination is made by the local building official but any appeal from that decision goes to the Board sitting as the State Building Code Appeals Board. G.L. c. 143,

permit should (or should not) be allowed would frustrate the statutory purpose of having a centralized, statewide process for such matters. <u>See Wendell</u>, 394 Mass. at 529. The Town's attempt to second-guess the BBRS, by prohibiting the issuance of a permit in a circumstance where the Building Code does not prohibit a permit, and assigning the waiver and appeal decision to a town board instead of the local building official and State Building Code Appeals Board, frustrates the purposes of § 95 -- including the purpose of uniformity -- and is therefore invalid.⁶ As the <u>St. George</u> court stated in rejecting Springfield's ordinance:

If all municipalities in the Commonwealth were allowed to enact similarly restrictive ordinances and bylaws, a patchwork of building regulations would ensue...Allowing the city's ordinance to stand would...sanction[] the development of different applicable building codes in each of the Commonwealth's 351 cities and towns, precisely the result that promulgation of the code was meant to foreclose.

St. George, 462 Mass. at 135.⁷

The proponents and the Town err in arguing that the Town's additional layer of regulation is authorized by cases like <u>Lovequist v. Conservation Commission of Town of Dennis</u>, 379 Mass. 7 (1979), which held that "[s]ince the language of the [challenged] by-law parallels that of the statute, it appears plain that [the by-law] furthers rather than derogates from the legislative purpose embodied in the Wetlands Protection Act." <u>Id</u>. at 15. That principle is inapposite here, because, as the <u>Lovequist</u> court emphasized, "we have specifically held that [the Wetlands Protection Act] sets forth minimum standards only, 'leaving local communities free to adopt more stringent controls."" <u>Id</u>. (quoting <u>Golden v. Selectmen of Falmouth</u>, 358 Mass. 519, 526 (1970)).

Essential to the <u>Golden</u> court's holding was its recognition that whether a statute preempted local regulation depended in part on whether the statute demonstrated "a need for uniformity in the subject," <u>id</u>. at 524; and its conclusion that the Wetlands Protection "Act does <u>not</u> attempt to create a uniform statutory scheme." <u>Golden</u>, 358 Mass. at 526 (emphasis added). Thus <u>Golden</u> and <u>Lovequist</u> cannot be applied here, where the statute authorizing the State Building Code expressly makes "[u]niform standards and requirements" a principal objective. G.L. c. 143, § 95(a).

⁷ To illustrate how the by-law undermines the Code's uniformity requirements: imagine one building project in Newton and one building project in Brookline, each with the same proposed architectural plans, construction and construction materials, and both proposing on-site fossil fuel infrastructure. Assuming the projects complied with the Building Code (and local zoning requirements) in all other respects, the Newton project would be entitled to a building permit, but the Brookline project would not.

^{§ 100.}

⁶ Although G.L. c. 40A, § 7 and the Code (at Section105.3.1) authorize the local building inspector to withhold a building permit for non-compliance with local *zoning* by-laws or ordinances, they do not authorize the withholding of a permit for non-compliance with a general (non-zoning) by-law such as Brookline's.

The proponents and the Town are correct that the Building Code does not directly regulate fossil fuel infrastructure as defined in the by-law. However, the by-law's enforcement and waiver/appeal mechanism -- withholding of a permit and waivers/appeals therefrom -- is directly and comprehensively regulated by the Code. The BBRS asserts that "the Legislature has intended, by M.G.L. c. 143, § 94, for the Building Code to govern the issuance of permits" [and] "a local ordinance creating a new basis for denial of permits would conflict with the Building Code." (Letter from DPL Office of Legal Counsel to Hurley, p. 4). ⁸ As such, the by-law cannot stand.

It is true that, with the 2008 passage of the Global Warming Solutions Act ("GWSA") the Legislature has also mandated economy-wide greenhouse gas emissions reductions, and the Supreme Judicial Court has twice affirmed that the emission reduction limits of the GWSA are mandatory and enforceable, <u>Kain et al. v. Department of Environmental Protection</u>, 474 Mass. 278 (2016); <u>NEPGA v. Department of Environmental Protection</u>. 480 Mass. 398 (2018) (upholding power sector emission limits). Indeed, in <u>NEPGA</u>, the court observed:

Its name bespeaks its ambitions. The Global Warming Solutions Act, St.2008, c.298 (act), was passed to address the grave threats that climate change poses to the health, economy, and natural resources of the Commonwealth. The act is designed to make Massachusetts a national, and even international, leader in the efforts to reduce the greenhouse gas emissions that cause climate change.

<u>Id</u>. at 399 (internal citations omitted). While the by-law would further the purpose of the GWSA, it would, nevertheless, frustrate other express statutory purposes, uniformity in the Building Code, Gas Code and Chapter 164, and the by-law is thus invalid. <u>See Take Five Vending, Ltd. v. Town of Provincetown</u>, 415 Mass. 741, 744 (1993) (stating general standards for determining whether statute preempts local ordinance or by-law)); <u>see also Boston Gas Company v. City of Somerville</u>, 420 Mass. 702, 705-06 (1995) (local ordinance in furtherance of a valid legislative delegation must nonetheless yield to state superintendence if the ordinance has the practical effect of frustrating fundamental State policy). During the unprecedented reality of climate disruption, the Town has acted in an exemplary manner to attempt a bold step to tackle the problem locally. Yet, to the extent the Commonwealth has not yet taken the necessary steps to ensure the state will achieve the 2050 net zero emissions limit, the by-law proponents' remedy lies with the Legislature and the courts.

B. <u>The By-law is Preempted Because it Interferes with the Express Statutory Goal of Uniformity</u> in the State Gas Code.

Just as with the State Building Code, the by-law is also preempted by the State Gas Code. The Gas Code is comprehensive, uniform, and directly regulates the gas piping targeted by the Brookline

⁸ As does the court, "[w]e afford substantial deference to an agency's interpretation of a statute that it is charged with administering." <u>Boston Edison Co. v. Town of Bedford</u>, 444 Mass. 775, 783 (2005) (internal citations and quotations omitted). Thus, where the BBRS, Plumbing Board (see pp. 16-19 below), and DPU all concur that the by-law is preempted by the statutes and regulations each Board administers, those interpretations are entitled to great deference, particularly "[w]here, as here, the case involves interpretation of a complex statutory and regulatory framework." <u>MCI Telecomm.</u> <u>Corp. v. Dep't of Telecomm. & Energy</u>, 435 Mass. 144, 150-151 (2001) (internal quotations and citations omitted).

by-law. The Gas Code regulates when a permit may be issued and the waiver/appeal process for denial of a permit. Because the by-law creates an additional layer of regulation, a new ground for denial of a permit, and a new waiver/appeal procedure, all not found in the Gas Code, the by-law interferes with the express legislative goal of uniformity in the Gas Code.

1. The Fuel Gas Code and the Plumbing Board.

The Massachusetts Fuel Gas Code (Gas Code) is comprised of a series of regulations adopted by the Board of State Examiners of Plumbers and Gas Fitters (Plumbing Board), specifically 248 CMR 4.00 through 8.00. The Gas Code's authorizing legislation is G.L. c. 142, §13 which charges the Board with the duty to "alter, amend, and repeal rules and regulations relative to gas fitting in buildings throughout the commonwealth." <u>Id.</u> Further said regulations "shall be reasonable, <u>uniform</u>, based on generally accepted standards of engineering practice, and designed to prevent fire, explosion, injury and death." <u>Id.</u> (emphasis added).

Chapter 142, Section 1 defines "gas fitting" as:

[A]ny work which includes the installation, alteration, and replacement of a piping system beyond the gas meter outlet or regulator through which is conveyed or intended to be conveyed fuel gas of any kind for power, refrigeration, heating or illuminating purposes including the connection therewith and testing of gas fixtures, ranges, refrigerators, stoves, water heaters, house heating boilers, and any other gas using appliances, and the maintenance in good and safe condition of said systems, and the making of necessary repairs and changes.

Thus, in regulating "fossil fuel infrastructure" (as defined in the by-law), the Brookline by-law directly regulates the same gas piping regulated by Chapter 142 and the Gas Code.

The Gas Code is enforced by Inspectors of Plumbing and/or Inspectors of Gas Fitting, individuals who personally hold licenses issued by the Plumbing Board. G.L. c. 142, §11. Prior to commencing most work governed by the Gas Code, a permit must be issued by the plumbing and/or gas inspector. See 248 CMR 3.05. The Gas Code designates who may obtain a gas permit (a licensed plumber or gas fitter) as well as describes how permits are issued and, if necessary, terminated. Id. Finally, a plumbing inspector's determination that a permit should be denied is appealed to the Plumbing Board per G.L. c. 142, §13 and 248 CMR 3.05, not a locally created entity as contemplated by the Brookline by-law.

2. G.L. c. 142, § 13's Stated Intention of Uniform Standards Preempts Additional Local Requirements.

As an initial matter, pursuant to G.L. c. 143, §96, the State Gas Code is incorporated into the State Building Code. <u>Id</u>. ("The state building code shall incorporate any specialized construction codes...") Thus, the Building Code field preemption found by the <u>St. George</u> court applies with equal measure to the State Gas Code. <u>See St. George</u>, 462 Mass. at 133-134 ("[T]he Legislature intended to occupy the field by passing comprehensive legislation and delegating further regulation to a State board.").

In addition, G.L. c. 142, §13 mandates creation of uniform, statewide standards for gas fittings with which the Brookline by-law interferes. By restricting the installation of "On-Site Fossil Fuel Infrastructure" (By-law, Section 8.40.2), the Brookline by-law is in reality restricting the installation of "gas fitting" -- work governed by the Gas Code. By way of example, if a consumer in Brookline decided to replace an aging oil heater with a new gas furnace, the consumer could have the gas furnace installed and have a local gas utility bring a new gas line into the property to a gas meter, all without interference by the by-law. Where the Brookline by-law directly applies is when the consumer then hires a licensed plumber or gas fitter to install gas piping connecting the new gas furnace to the meter installed by the utility company. For that step, the consumer needs a licensed plumber or gas fitter to apply for a locally issued -- but state regulated -- gas permit and perform work exclusively governed by the Gas Code. The Brookline by-law would prohibit the state regulated gas permit and bar the state regulated plumbing work.

The <u>St. George</u> court's reasoning applies here and dictates the conclusion that the Brookline by-law is preempted by the Gas Code. The by-law and the Gas Code have different requirements for when gas fitting work can occur and have different appellate/waiver procedures governing relief from denial of a permit. As a result, "the [by-law] would frustrate the achievement of the stated statutory purpose of having centralized, Statewide standards in this area." <u>Id</u>. at 129-130. The Gas Board asserts that the by-law is preempted by the Gas Code and G.L. c. 142, §13 because the by-law "attempt[s] to supplement the rules for permits governed by the Gas Code" and "attempts to regulate the performance of work that the legislature has deemed exclusively governed by the Gas Code." (Letter from Plumbing Board Executive Director to Hurley, p. 6). As such the by-law is preempted by the Gas Code.

C. <u>The By-law is Preempted by Chapter 164</u>, Which Reflects the Fundamental State Policy of Ensuring Uniform Utility Services to the Public.

The by-law is also preempted by G.L. c. 164, through which the DPU comprehensively regulates the sale and distribution of natural gas in the Commonwealth. The Supreme Judicial Court has repeatedly recognized "the desirability of uniformity of standards applicable to utilities regulated by the Department of Public Utilities." <u>New England Tel. & Tel. Co. v. City of Lowell</u>, 369 Mass. 831, 834 (1976) (citing cases). In that case, a city ordinance created "a burden for the [utility] company additional to those which it carries elsewhere. To the extent that this is so, there is a variation from the uniformity desirable in the regulation of utilities throughout the Commonwealth," and accordingly the ordinance was invalid. <u>Id</u>. (invalidating ordinance requiring registered engineer to stamp utility's street-opening plans, where state statute exempted companies under DPU jurisdiction from requirement that company's engineers be registered).

Similarly, in <u>Boston Gas Co. v. City of Somerville</u>, 420 Mass. 702 (1995), the court invalidated a city ordinance regulating repair of street openings by utilities because "the [city] cannot use its limited authority to enact an ordinance which has the practical effect of frustrating the fundamental State policy of ensuring <u>uniform</u> and efficient utility services to the public." <u>Id</u>. at 706 (emphasis added). In <u>Boston Gas Co. v. City of Newton</u>, 425 Mass. 697 (1997), the court invalidated a city ordinance imposing street-opening fees on utilities, where it "would impose an additional burden on the plaintiff, a burden which undermines the 'fundamental State policy of ensuring uniform and efficient utility services to the public." <u>Id</u>. at 703 (quoting <u>Boston Gas Co. v. Somerville</u>). And in <u>Boston Edison Co. v. Town of Bedford</u>, 444 Mass. 775 (2005) the court invalidated a town by-law that would have imposed a penalty on pole owners for having double poles in the town, concluding

that, "[a]lthough there is no express legislative intent to forbid local activity regarding double pole removal, the 'comprehensive nature' of G.L. c. 164 implies that the Legislature intended to preempt municipalities from enacting legislation on the subject." <u>Id.</u> at 781.

The Superior Court recently applied the <u>Boston Gas</u> line of cases in overturning a Boston ordinance regulating the inspection, maintenance, and repair of natural gas leaks within the city. <u>Boston Gas Company v. City of Boston</u>, 35 Mass.L. Rptr.141, 2018 WL 4198962. The court ruled that "the [Supreme Judicial Court]'s decisions in <u>City of Somerville</u> and <u>City of Newton</u> make it plain that, with limited exceptions, non-incidental local rules and ordinances affecting the manufacture and sale of gas and electricity are preempted by Chapter 164." <u>Id.</u> The court rejected the City's argument that because the City ordinance was a "permitting" requirement (like the Brookline by-law here) the ordinance was not preempted:

The fact that the City couches its inconsistent obligations as "permitting" requirements does not make them any less objectionable, or any less subject to preemption, because the net effect on Boston Gas is the same as if the obligations had been imposed directly. *Cf.* <u>City of Newton</u>, 425 Mass. at 699-706 (portion of ordinance charging inspection and maintenance fees as a prerequisite to acquiring a permit to excavate public ways and sidewalk was invalid).

<u>Id</u>.

Just as in <u>Wendell and St. George</u>, the Legislature here has granted to the DPU, not to individual cities and towns, the authority to regulate the sale and distribution of natural gas throughout the Commonwealth. The DPU views the by-law as conflicting with this legislative grant of authority because, "[i]n effect, the [by-law] restricts National Grid's ability to add new customers in Brookline (particularly heating customers) and restricts National Grid's ability to serve existing customers who perform significant renovations on their buildings." (Letter from DPU General Counsel to Hurley, p. 2). Clearly the Town could not directly prohibit National Grid from adding new customers in Brookline because such a move would directly interfere with the DPU's authority. As in the <u>City of Boston</u>, the Town cannot do indirectly (through a permitting requirement) what it is prohibited from doing directly. <u>See Boston Gas Company v. City of Boston</u>, 35 Mass.L.Rptr.141, 2018 WL 4198962 ("The fact that the City couches its inconsistent obligations as 'permitting' requirements does not make them any less objectionable, or any less subject to preemption, because the net effect on Boston Gas is the same as if the obligations had been imposed directly.")

The by-law also interferes with the express legislative objective in Chapter 164 for uniform service throughout the Commonwealth. As the DPU explains:

[The by-law] would impose non-uniform service among its residents with new customers forced to become residential non-heating customers (Rate Class R-1), rather than having the option to become residential heating customers (Rate Class R-3). Article 21 prevents the uniform service that G.L. c. requires and, therefore, Article 21 is preempted by the well-established, comprehensive scope of G.L. c. 164.

Letter from DPU General Counsel to Hurley, p. 3. By prohibiting gas and oil service to the Town's residents, the by-law interferes with the legislative intent in G.L. c. 164, § 105A that there be "absolute interdependence of all parts of the Commonwealth and all of its inhabitants in the matter of availability of public utility services, [so that] all may obtain a reasonable measure of such services." <u>Pereira v. New England LNG Co., Inc.</u>, 364 Mass. 109, 120-121 (1973). To be sure, even without the

by-law, residential and commercial property owners may choose energy systems that do not rely on fossil fuels. And the Town may consider adopting incentive programs to nudge property owners in that direction. However, the by-law here forces a decision on property owners and thereby interferes with the legislative goal in Chapter 164 of uniform utility options statewide. The Town is thus preempted from utilizing this method to achieve its stated goals.⁹

IV. CONCLUSION

The Attorney General agrees with the policy goals behind the Town's attempt to reduce the use of fossil fuels within the Town. However, the Legislature (and the courts) have made plain that the Town cannot utilize the method it selected to achieve those goals. The Town cannot add an additional layer of regulation to the comprehensive scope of regulation in the State Building Code, State Gas Code, and Chapter 164. This is true no matter how well-intentioned the Town's action, and no matter how strong the Town's belief that its favored option best serves the public health of its residents. Because the by-law adopted under Article 21 is preempted, we must disapprove it.

<u>Note</u>: Pursuant to G.L. c. 40, § 32, neither general nor zoning by-laws take effect unless the Town has first satisfied the posting/publishing requirements of that statute. Once this statutory duty is fulfilled, (1) <u>general</u> by-laws and amendments take effect on the date these posting and publishing requirements are satisfied unless a later effective date is prescribed in the by-law, and (2) <u>zoning</u> by-laws and amendments are deemed to have taken effect from the date they were approved by the Town Meeting, unless a later effective date is prescribed in the by-law.

Very truly yours, MAURA HEALEY ATTORNEY GENERAL

Margaret J. Hurley

By: Margaret J. Hurley Chief, Central Massachusetts Division Director, Municipal Law Unit 10 Mechanic Street, Suite 301 Worcester, MA 01608 (508) 792-7600 ext. 4402

cc: Town Counsel Joslin Murphy and Assoc. Town Counsel Jonathan Simpson

⁹ We considered whether we could disapprove only the offending text (the withholding of a building permit and appeal/waiver scheme) and approve the remaining text. When a portion of a law or regulation is found to be invalid, "[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." <u>Alaska Airlines, Inc. v. Brock</u>, 480 U.S. 678, 684 (1987). Here no fully operable by-law would remain if we excised only the offending text. Therefore, we determine that the offending text is non-severable, and we must disapprove the entire by-law.

Exhibit D

	Case 4:19-cv-07668-YGR Documer	nt 1	Filed 11/21/19	Page 1 of 22		
1	Courtland L. Reichman (CA Bar No. 268873) REICHMAN JORGENSEN LLP					
2	100 Marine Parkway, Suite 300 Redwood Shores, CA 94065					
3	Telephone: (650) 623-1401					
4	Facsimile: (650) 623-1449 creichman@reichmanjorgensen.com					
5	Sarah Jorgensen (<i>Pro Hac Vice</i> Pending)					
6	REICHMAN JORGENSEN LLP 1201 West Peachtree Street, Suite 2300					
7	Atlanta, GA 30309					
8	Telephone: (404) 609-1040 Facsimile: (650) 623-1449					
9	sjorgensen@reichmanjorgensen.com					
10	Gary J. Toman (<i>Pro Hac Vice</i> Pending)					
11	WEINBERG, WHEELER, HUDGINS, GUNN & DIAL LLP 3344 Peachtree Road NE, Suite 2400 Atlanta, GA 30326 Telephone: (404) 876-2700					
12						
13	Facsimile: (404) 875-9433					
14	gtoman@wwhgd.com					
15	Attorneys for Plaintiff California Restaurant Association					
16						
17	UNITED STATES DISTRICT COURT					
18	FOR THE NORTHERN DISTRICT OF CALIFORNIA					
19	CALIFORNIA RESTAURANTASSOCIATIO	N,	Case No. 3:1	9-cv-07668		
20	a California nonprofit mutual benefit corporation		-			
21	Plaintiff,	,	CALIFORNIA RESTAURANT ASSOCIATION'S COMPLAINT FOR			
22	V.		DECLARA' RELIEF	FORY AND INJUNCTIVE		
23	CITY OF BERKELEY,					
24	Defendant.					
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Plaintiff California Restaurant Association ("CRA" or "Plaintiff") brings this Complaint for Declaratory and Injunctive Relief ("Complaint") against the City of Berkeley ("Berkeley" or "Defendant"), alleging as follows:

INTRODUCTION

 Berkeley banned natural gas infrastructure in newly constructed buildings beginning in 2020. With millions of Californians sitting in the dark to avoid wildfires, and California's energy grid under historic strain, banning the use of natural gas is irresponsible and does little to advance climate goals. California's recent large-scale blackouts bring into sharp focus the need for a workable approach to California's energy infrastructure and energy needs. Banning natural gas is not the solution, and is at odds with citizens' needs for reliable, resilient, and affordable energy.
 Prohibiting natural gas cooking ranges, water heaters, fireplaces, space heaters, and backup electrical generation is fundamentally inconsistent with the public interest, and is a violation of both federal and state law.

2. In its rush to be the first all-electric city in California, Berkeley bypassed clear federal 14 and state law. These laws were designed to promote uniform standards regarding energy use in 15 appliances and buildings. They require a practical approach to energy regulation, maintaining 16 neutrality and recognizing the need for a diverse energy supply. This is for good reason: a patchwork 17 approach is unworkable, undercuts California's need for reliable and resilient energy, increases the 18 cost of housing, and denies consumers choice. Taking away the ability to use natural gas cooking 19 ranges, water heaters, heat, and fireplaces, as well as backup electric supply during power outages, is 20 contrary to the state and federal legislative schemes. 21

3. If a municipality chooses to enact more stringent energy use standards, it is required to follow state and federal statutes and regulations governing such mandates. The federal Energy Policy and Conservation Act ("EPCA") regulates the energy efficiency of appliances. EPCA preempts state and local regulations concerning the energy efficiency and energy use of products for which EPCA sets energy efficiency standards. EPCA does not permit one type of energy to be favored over another in the areas it regulates. Similarly, state law expressly preempts the Berkeley Ordinance,

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requiring specific procedures to be followed if a city seeks to impose more stringent regulations on building standards and energy usage. Berkeley bypassed these state procedures in its rush to mandate all-electric new buildings. And in violation of state precedent, Defendant adopted the Berkeley Ordinance under Berkeley's general police powers. Because it failed to comply with State procedures, the Berkeley Ordinance is preempted by California law and is void and unenforceable.

4. Berkeley's ordinance is premised on the conclusory assertion that use of electricity is better for the environment than use of alternative forms of energy, such as gas. Such a policy decision should be based on reliable studies – the actual facts as opposed to assumptions. Berkeley in substance assumes its conclusion about the environmental impacts of gas versus electric without credible scientific support. This is part and parcel of why the federal and state regulatory frameworks impose specific requirements on the regulation of energy use – requirements that were completely bypassed by Berkeley. The CRA welcomes a legitimate public debate on environmental impacts, reliability and resilience of the energy grid, affordability, and other policy considerations.

5. The CRA nevertheless is compelled to bring this action on behalf of itself and its 14 members because the Berkeley Ordinance's unlawful natural gas ban impacts the CRA. Restaurants 15 rely on natural gas for such things as food preparation and heating space and water, and even 16 providing backup power during electrical outages. Many of these restaurants rely on gas for cooking 17 particular types of food, whether it be flame-seared meats, charred vegetables, or the use of intense 18 heat from a flame under a wok. Indeed, restaurants specializing in international foods so prized in the 19 Bay Area will be unable to prepare many of their specialties without natural gas. Many chefs are 20 trained using natural gas stoves, and losing natural gas will slow down the process of cooking, reduce 21 a chef's control over the amount and intensity of heat, and affect the manner and flavor of food 22 23 preparation. Restaurant owners and employees as well as restaurant customers also will be denied the use of gas appliances to prepare food, heat their homes or water, or use gas fireplaces in newly 24 25 constructed buildings. And a shift to "all electric" also will impose greater costs on Berkeley businesses and consumers, in the midst of an affordable housing crisis. 26

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In short, Berkeley's natural gas ban will do little to advance environmental goals but

will cause substantial adverse consequences for CRA's members and the public. While CRA 1 supports the State's climate goals, it must speak out against the harm to its members from this one-2 sided ban. 3

7. Berkeley's effort to establish at a local level far-reaching energy policy and building standards conflicts with federal and state law, is contrary to the public interest, and imposes 5 6 irreparable harm on CRA and its members. The CRA, on behalf of its members, thus brings this 7 action seeking a declaration that the Berkeley Ordinance is void and unenforceable and to enjoin its enforcement. 8

PARTIES

8. Plaintiff California Restaurant Association ("CRA") is a nonprofit mutual benefit corporation organized under the laws of California with its principal office in the County of Sacramento, California. As an association of members in the restaurant industry, it has a substantial interest in having the laws relating to building standards executed and the duties at issue here enforced. Plaintiff has members that do business in Berkeley, California, whose interests will be directly affected by this ordinance. Its members will be irreparably harmed by the Berkeley Ordinance through the loss of the ability to use natural gas appliances in newly constructed buildings.

9. CRA has standing to bring this action because some of its members would have independent standing as they are denied constitutional and statutory rights, the interests that CRA seeks to address by this action are germane to its fundamental purpose, and the claims asserted seek only declaratory and injunctive relief and therefore do not require participation of individual members.

10. Defendant City of Berkeley is, and was at all relevant times, a municipal corporation 22 existing under the laws of the State of California. 23

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JURISDICTION AND VENUE

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11. 25 This court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331 as it asserts claims under federal law and under 28 U.S.C. § 2201(a) to the extent that it seeks declaratory relief. 26 To the extent that this Complaint asserts claims under California law, this court has supplemental 27

jurisdiction over such claims pursuant to 28 U.S.C. § 1367(a) as such claims are part of the same case
 or controversy as the federal claims.

12. Venue is proper under 28 U.S.C. § 1391 in this Court as Berkeley is located within this district within the County of Alameda and the acts and events giving rise to the claims occurred at least in part in this district.

BACKGROUND

The California Building Standards Law

13. The California Building Standards Law, Sections 18901 *et seq.* of the California Health and Safety Code ("HSC"), provides for the adoption of statewide building standards in California.

14. Section 18949.31 grants authority to the California Building Standards Commission ("CBSC") to oversee processes related to the California building codes.

15. By adopting the 1970 amendments to the Building Standards Law, the Legislature demonstrated its intent to occupy the field of building standards.

16. HSC § 18915 defines a "local agency" as "a city, county, and city and county, whether general law or chartered, district agency, authority, board, bureau, department, commission, or other governmental entity of less than statewide jurisdiction."

17. HSC § 18915 defines a "regulation" as "any rule, regulation, ordinance, or order promulgated by a state or local agency, including rules, regulations, or orders relating to occupancy or the use of land," including, specifically, "building standards."

18. HSC § 18909(a) defines a "building standard" as "any rule, regulation, order, or other requirement, including any amendment or repeal of that requirement, that specifically regulates, requires, or forbids the method of use, properties, performance, or types of materials used in the construction, alteration, improvement, repair, or rehabilitation of a building, structure, factory-built housing, or other improvement to real property, including fixtures therein, and as determined by the commission."

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1	The California Building Standards Code					
2	19.	19. The California Building Standards Code is set forth in Title 24 of the California Code				
3	of Regulations and provides for a statewide building standards code.					
4	20.	Part 2.5 of the Building Standards Code is known as the California Residential Code.				
5	21.	Section R1003.11.3 of the Residential Code allows natural gas appliances for				
6	fireplaces consistent with the California Mechanical Code.					
7	22. Part 4 of the Building Standards Code is known as the California Mechanical Code.					
8	23.	The California Mechanical Code contains a number of standards relating to the use of				
9	natural gas in structures. These include:					
10	a.	Section 1301.1 regulating the maximum pressure for natural gas in piping in a				
11		structure;				
12	b.	Section 1308.4 regulating the sizing of gas piping in the structure;				
13	с.	Section 1308.4.1 regulating the volumetric flow rate for gas in a structure;				
14	d.	Section 1308.7 regulating requirements for gas pressure regulators in a structure;				
15	e.	Section 1310.2.3 specifying prohibited locations for gas piping in a structure;				
16	f.	Section 1312 regulating appliance connections to gas piping in a structure;				
17	g.	Section 1314.1 regulating general requirements for natural gas supply to structures;				
18	h.	Section 1314.2 regulating the required volume of gas at each piping outlet within a				
19		structure; and				
20	i.	Section 1314.4 regulating the size of supply piping outlets for gas appliances within a				
21		structure.				
22	24.	Part 5 of the Building Standards Code is known as the California Plumbing Code.				
23	25.	The California Plumbing Code contains a number of standards relating to the use of				
24	natural gas in structures. These include:					
25	a.	Section 507.7 requiring that water heaters be connected to the type of fuel gas for				
26		which it was designed;				
27	b.	Section 1201.1 regulating the gas pressure within piping systems in connection with a				
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	CAL. RE	STAURANT ASS'N COMPL. 3:19-cv-07668				

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1		building or structure;		
2	c.	c. Section 1202.0 regulating the coverage of gas piping systems in a structure;		
3	d. Section 1202.2 regulating gas piping system requirements in a structure;			
4	e.	Section 1208.1 regulating the installation of gas piping in a structure;		
5	f.	Section 1208.4 regulating the sizing of gas piping systems in a structure;		
6	g.	Section 1208.6 regulating acceptable piping materials and joining methods for gas		
7	piping systems;			
8	h. Section 1210.1.7 regulating the use of plastic piping for gas;			
9	i.	Section 1210.2.2.1 regulating gas piping in ceiling locations; and		
10	j.	Section 1210.2.3 regulating prohibited locations for gas piping inside a building.		
11	26. Part 6 of the Building Standards Code is known as the California Energy Code.			
12	27.	The California Energy Code establishes certain energy standards and includes		
13	requirements applicable to natural gas devices and appliances. These include:			
14	a.	Section 110.1 establishing mandatory requirements for appliances in newly		
15		constructed buildings;		
16	b.	Section 110.2(a) and Tables 110.2-C, 110.2-D and 110.2-J establishing efficiency		
17		standards for gas engine heat pumps, water-cooled gas engine driven chillers, and gas-		
18		fired warm air furnaces;		
19	с.	Section 110.2(d) regulating gas-fired furnace standby loss controls;		
20	d.	Section 110.4 establishing requirements where gas pool heaters are used;		
21	e.	Section 110.5 regulating gas central furnace and cooking appliance pilot lights;		
22	f.	Section 120.9 regulating gas commercial boilers;		
23	g.	Section 140.4 establishing prescriptive requirements for space conditioning systems;		
24	h.	Section 140.4(g) permitting certain back-up systems for gas heating equipment;		
25	i.	Section 150.0(e) requiring standards for fireplaces, decorative gas appliances, and gas		
26		logs;		
27	j.	Section 150.0(n) requiring standards for gas water heaters;		
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k. Section 150.1(c)(8) specifying requirements for gas water heating systems.

Requirements for Local Amendments to State Building Standards Code

28. HSC §§ 17958, 17958.5, and 17958.7 permit cities and counties to make local amendments or modifications to the Building Standards Code under specified circumstances.

5 29. HSC § 17958.7 requires that before making any such modifications or changes, the 6 governing body of the city or county must "make an express finding that such modifications or 7 changes are reasonably necessary because of local climatic, geological or topographical conditions" 8 and the modifications or changes must be "expressly marked and identified to which each finding 9 refers" and must be submitted to the CBSC for approval.

30. HSC § 17958.7(b) provides that the CBSC may reject a modification or change if no finding is submitted.

31. Various provisions of the Building Standards Code provide for consistent
requirements for more restrictive local amendments or modifications to the Building Standards Code.
The California Residential Code, Title 24, Part 2.5, § 1.1.8 and § 1.1.8.1 require compliance with
HSC § 17958 and that the municipality "make express findings for each amendment, addition or
deletion based upon climatic, topographical, or geological conditions" and "file the amendments,
additions or deletions expressly marked and identified as to the applicable findings" with the CBSC.

32. The California Mechanical Code, Title 24, Part 4, § 1.1.8 and § 1.1.8.1, and the California Plumbing Code, Title 24, Part 5, § 1.1.8.1, likewise require compliance with HSC § 17958 and that the municipality "make express findings for each amendment, addition or deletion based upon climatic, topographical, or geological conditions" and "file the amendments, additions or deletions expressly marked and identified as to the applicable findings" with the CBSC.

33. Moreover, in order for local governmental agencies to adopt energy standards, Title
24, Part 1, § 10-106 requires that the California Energy Commission find that the standards will
require buildings to be designed to consume less energy than permitted by Title 24, Part 6. The local
government must submit an application to the Energy Commission for approval including the
"proposed energy standards; [t]he local governmental agency's findings and supporting analyses on

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the energy savings and cost effectiveness of the proposed energy standards; [a] statement or finding
by the local governmental agency that the proposed energy standards will require buildings to be
designed to consume less energy than permitted by Part 6; and [a]ny findings, determinations,
declarations or reports, including any negative declaration or environmental impact report, required
pursuant to the California Environmental Quality Act, Pub. Resources Code Section 21000 et seq." *Id.* § 10-106(b). The California Energy Commission must approve the standards before they are
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Federal Law Regarding Appliance Energy Efficiency

34. The federal government also regulates the energy efficiency of appliances through the Energy Policy and Conservation Act ("EPCA"). 42 U.S.C. § 6201 *et seq*.

35. The EPCA regulates the energy efficiency of consumer products including air
conditioners, water heaters, furnaces, clothes washers and dryers, and stoves. *See* 42 U.S.C. §§ 6292,
6295.

36. The EPCA's consumer standards explicitly preempt state and local regulations "concerning the energy efficiency" and "energy use" of the products for which the EPCA sets its own energy efficiency standards. 42 U.S.C. § 6297(c).

37. The EPCA contains only limited exceptions to this general rule of preemption. In particular, a regulation is not preempted if it "is in a building code for new construction" and meets seven specific requirements. 42 U.S.C. §§ 6297(c)(3), (f)(3).

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38. These requirements to avoid preemption include, among others:

 a. That the local regulation "permits a building to meet an energy consumption or conservation objective for a building by selecting items whose combined energy efficiencies meet the objective." 42 U.S.C. § 6297(f)(3)(A).

b. That the local regulation gives "credit to the energy consumption or conservation objective" on "a one-for-one equivalent energy use or equivalent cost basis" for whatever products have "energy efficiencies exceeding" the federal standards. 42 U.S.C. § 6297(f)(3)(C).

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c. That the "energy consumption or conservation objective" is "specified in terms of an estimated total consumption of energy." 42 U.S.C. § 6297(f)(3)(F).

39. The EPCA also governs the energy efficiency of certain commercial appliances, including air conditioners, furnaces, water heaters, and clothes washers. 42 U.S.C. § 6313.

40. These standards also explicitly "supersede any State or local regulation concerning the energy efficiency or energy use of a product for which a standard is prescribed or established" in the federal statute. 42 U.S.C. § 6316(b)(2)(A).

41. As with the consumer standards, there are only limited exceptions to the rule of preemption for commercial appliances. In particular, a local regulation "contained in a State or local building code for new construction" is not preempted if it does "not require that the energy efficiency of" a product covered in the federal statute "exceed[s] the applicable minimum energy efficiency requirement." 42 U.S.C. § 6316(b)(2)(B).

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The Berkeley Ordinance

42. The Berkeley City Council passed Berkeley Ordinance No. 7,672-N.S. (the "Ordinance") on July 23, 2019. It was signed into law by the Berkeley Mayor, Jesse Arreguin, on August 6, 2019.

43. The Berkeley Ordinance amends the Berkeley Municipal Code, adding a new Chapter
12.80 prohibiting natural gas infrastructure in new buildings effective January 1, 2020. The
Ordinance prohibits "Natural Gas Infrastructure" in "Newly Constructed Buildings." Natural Gas
Infrastructure is defined as "fuel gas piping, other than service pipe, in or in connection with a
building, structure or within the property lines of premises, extending from the point of delivery at
the gas meter."

44. The Berkeley Ordinance was enacted as part of Berkeley's Municipal Code and provides that its requirements "shall apply to Use Permit or Zoning Certificate applications submitted on or after the effective date of this Chapter for all Newly Constructed Buildings proposed to be located in whole or in part within the City," and accordingly relies on Berkeley's general police power as the source of its authority. The supporting documentation in the administrative record

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1 asserts that Berkeley may rely on its general police power for the ordinance.

45. The Berkeley Ordinance is part of Title 12 of the Berkeley Municipal Code, which concerns "Health and Safety." The Berkeley Municipal Code contains a separate section, Title 19, regarding "Buildings and Construction" and containing Berkeley's building code and energy code.

- 46. The Berkeley Ordinance establishes building standards as defined by the California Building Standards Law, to wit, "any rule, regulation, order, or other requirement . . . that specifically regulates, requires, or forbids the method of use, properties, performance, or types of materials used in the construction . . . of a building."
- 9 47. The Berkeley Ordinance's standards concern the energy efficiency and energy use of
 appliances covered in the federal EPCA insofar as the ordinance requires all appliances in newly
 constructed buildings to use only electric power and not natural gas.

48. The Berkeley Ordinance does not identify any provision of the California Building Standards Code that it is amending or modifying for the City of Berkeley and in fact provides that it should not be construed as amending the California Energy Code.

49. In particular, while the Berkeley Ordinance makes certain findings, the Ordinance does not identify the amendments to the California Building Standards Code and the California Energy Code made in the Ordinance, nor on information and belief did Berkeley "file the amendments, additions or deletions expressly marked and identified as to the applicable findings."

50. In fact, the Berkeley Ordinance conflicts with and effectively amends the California Building Standards Code and the California Energy Code.

FIRST CAUSE OF ACTION

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FEDERAL PREEMPTION BY THE ENERGY POLICY AND CONSERVATION ACT

51. Plaintiff re-alleges the preceding paragraphs as though set forth fully herein.

52. The Berkeley Ordinance is preempted by the federal EPCA.

53. The Berkeley Ordinance concerns the energy efficiency and energy use of all appliances in newly constructed buildings, including appliances covered by the EPCA.

54. The Berkeley Ordinance does not fall within the exceptions to preemption in the

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EPCA because:

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a. It is not included in Berkeley's building code; 2 b. It does not set its objectives in terms of total consumption of energy; 3 c. It does not permit builders to select items whose combined energy efficiencies meet an 4 objective for total energy consumption but rather requires a particular category of 5 items (i.e., electric appliances); and/or 6 7 d. It does not give credit on a one-for-one basis for all appliances whose energy efficiency exceeds the federal standards, insofar as it gives no credit for (and indeed 8 bans) the use of natural gas appliances no matter their efficiency. 9 55. There is no plain, speedy, and adequate remedy at law to protect the rights of Plaintiff 10 11 and its members. Plaintiff and its members will be irreparably harmed if the Berkeley Ordinance 12 becomes effective and is enforced because restaurants will not be able to prepare their foods in the same manner, speed, and style and will face higher costs. 13 56. Plaintiff accordingly requests that the Court declare that the Berkeley Ordinance is 14 preempted by the EPCA and enjoin Defendant from enforcement of the preempted Berkeley 15 Ordinance. 16 17 SECOND CAUSE OF ACTION PREEMPTION OF BERKELEY ORDINANCE BY CALIFORNIA LAW AS A VOID AND 18 **UNENFORCEABLE EXERCISE OF POLICE POWER** 19 57. Plaintiff re-alleges the preceding paragraphs as though set forth fully herein. 20 58. Defendant has a clear, present, and ministerial duty to comply with the laws of the 21 State of California, which prohibit a municipality from exercising its police powers to establish 22 23 building code requirements and preempt all ordinances that establish building code requirements under the police power of the municipality. 24 59. 25 Plaintiff and its members have a clear, present, and beneficial interest in the performance of Defendant's duties under California law. 26 60. Article XI, section 7 of the California Constitution provides that municipalities may 27 28 11

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enact and enforce ordinances "not in conflict with general laws." 1

61. Under this provision, any ordinance that conflicts with state law or enters an area fully 2 occupied by state general law is preempted and void. 3

62. Under the California Building Standards Code, the State of California has occupied the field of building standards. 5

63. Because the state has occupied the field of building standards, local governments may not use their general police powers to regulate in the area of building standards and may only exercise those powers in accord with a specific statutory grant of authority. Building Ind. Ass'n v. City of Livermore, 45 Cal. App. 4th 719, 726 (1996).

64. A building standard adopted by a municipality under general police power is 10 11 preempted by state law and is unenforceable and void.

65. The Berkeley Ordinance establishes building standards as defined in the Building Standards Code and was adopted under Berkeley's general police power. The Berkeley Ordinance is therefore preempted by state law and void and unenforceable.

66. There is no plain, speedy, and adequate remedy at law to protect the rights of Plaintiff and its members. Plaintiff and its members will be irreparably harmed if the Berkeley Ordinance becomes effective and is enforced because restaurants will not be able to prepare their foods in the same manner, speed, and style and will face higher costs.

67. Plaintiff accordingly requests that the Court declare that the Berkeley Ordinance is preempted by California law and enjoin Defendant from enforcement of the preempted Berkeley Ordinance.

THIRD CAUSE OF ACTION

PREEMPTION OF BERKELEY ORDINANCE BY CALIFORNIA LAW AS CONFLICTING WITH CALIFORNIA BUILDING STANDARDS CODE

68.

Plaintiff re-alleges the preceding paragraphs as though set forth fully herein.

69. Under California law, local amendments or modifications to the California Building Standards Code are preempted unless the amendments or modifications are adopted under a specific

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1 statutory grant of authority to the municipality.

70. HSC § 17958.7 and California Mechanical Code, Title 24, Part 4, § 1.1.8 and § 1.1.8.1, and California Plumbing Code, Title 24, Part 5, §1.1.8.1, require that to make any such amendment or modification to the California Building Standards Code, the municipality must "make express findings for each amendment, addition or deletion based upon climatic, topographical, or geological conditions" and "file the amendments, additions or deletions expressly marked and identified as to the applicable findings" with the CBSC .

71. The Berkeley Ordinance establishes building standards as defined by HSC § 18909 and conflicts with, amends, and modifies provisions of the California Building Code, including:

a. California Mechanical Code § 1301.1 regulating the maximum pressure for natural gas in piping in a structure; § 1308.4 regulating the sizing of gas piping in the structure; § 1308.4.1 regulating the volumetric flow rate for gas in a structure; § 1308.7 regulating requirements for gas pressure regulators in a structure; § 1310.2.3 specifying prohibited locations for gas piping in a structure; § 1312 regulating appliance connections to gas piping in a structure; § 1314.1 regulating general requirements for natural gas supply to structures; § 1314.2 regulating the required volume of gas at each piping outlet within a structure; and § 1314.4 regulating the size of supply piping outlets for gas appliances within a structure; and

b. California Plumbing Code § 507.7 requiring that water heaters be connected to the type of fuel gas for which it was designed; § 1201.1 regulating the gas pressure within piping systems in connection with a building or structure; § 1202.0 regulating the coverage of gas piping systems in a structure; § 1202.2 regulating gas piping system requirements in a structure; § 1208.1 regulating the installation of gas piping in a structure; § 1208.4 regulating the sizing of gas piping systems in a structure; § 1208.6 regulating acceptable piping materials and joining methods for gas piping systems; § 1210.1.7 regulating the use of plastic piping for gas; § 1210.2.2.1 regulating gas piping in ceiling locations; and § 1210.2.3 regulating prohibited locations for gas

piping inside a building.

2 72. The Berkeley Ordinance does not provide that it is relying on any specific statutory
3 exception to preemption.

73. The Berkeley Ordinance does not identify the provisions of the California BuildingCode that it is amending or make specific findings as to each such amendment.

74. On information and belief, the Berkeley Ordinance has not been submitted to the CBSC for approval as of the date of this Complaint.

75. Because the Berkeley Ordinance was not adopted in compliance with any specific statutory grant of authority, it is preempted and void and unenforceable.

76. Defendant has a clear, present, and ministerial duty to comply with the laws of the
State of California, which prohibit a municipality from exercising its police powers to establish
building code requirements and preempt all ordinances that establish building code requirements
except where the building code requirements are adopted in compliance with specific statutory grants
of authority.

77. Petitioner and its members have a clear, present, and beneficial interest in the performance of Defendant's duties under California law.

78. There is no plain, speedy, and adequate remedy at law to protect the rights of Plaintiff and its members. Plaintiff and its members will be irreparably harmed if the Berkeley Ordinance becomes effective and is enforced because restaurants will not be able to prepare their foods in the same manner, speed, and style and will face higher costs.

79. Plaintiff accordingly requests that the Court declare that the Berkeley Ordinance is
 preempted by California law and enjoin Defendant from enforcement of the preempted Berkeley
 Ordinance.

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FOURTH CAUSE OF ACTION

PREEMPTION OF BERKELEY ORDINANCE BY CALIFORNIA LAW AS CONFLICTING WITH CALIFORNIA ENERGY CODE

80. Plaintiff re-alleges the preceding paragraphs as though set forth fully herein.

81. Under California law, local amendments or modifications to the California Energy Code are preempted unless the amendments or modifications are adopted under a specific statutory grant of authority to the municipality.

82. The California Energy Code requires that in order for local governmental agencies to adopt energy standards amending or modifying Title 24, Part 1, § 10-106, the California Energy Commission find that the standards will require buildings to be designed to consume less energy than permitted by Title 24, Part 6.

83. The California Energy Code further provides that the California Energy Commission must approve any such local standards.

84. To obtain such approval, a local governmental agency must submit to the California 10 Energy Commission an application including the proposed energy standards; findings and supporting analyses on energy savings and cost-effectiveness; a statement or finding that the local energy standards will require buildings to be designed to consume less energy than permitted by Part 6; and 13 any findings required pursuant to the California Environmental Quality Act, Pub. Resources Code Section 21000 et seq. ("CEQA"). 15

85. The Berkeley Ordinance conflicts with, amends, and modifies provisions of the 16 California Energy Code establishing energy standards and requirements applicable to natural gas 17 devices and appliances, including: § 110.0 establishing mandatory requirements for appliances in 18 newly constructed buildings; § 110.2(a) and Tables 110.2-C, 110.2-D and 110.2-J establishing 19 efficiency standards for gas engine heat pumps, water-cooled gas engine driven chillers and gas-fired 20 warm air furnaces; § 110.2(c) regulating thermostats for fireplaces and decorative gas appliances; § 21 110.2(d) regulating gas-fired furnace standby loss controls; § 110.4 establishing requirements where 22 gas pool heaters are used; § 110.2(d) regulating gas-fired furnace standby loss; § 110.5 regulating gas 23 central furnace, cooking appliance pilot lights; § 120.9 regulating gas commercial boilers; § 140.4(c) 24 25 establishing prescriptive requirements for space conditioning systems; § 140.4(g) permitting certain back-up systems for gas heating equipment; § 150.0(e) setting standards for fireplaces, decorative gas 26 appliances, and gas logs; § 150.0(n) setting standards for gas water heaters; § 150.1(b)(8) specifying 27

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1 || requirements for gas water heating systems.

86. The Berkeley Ordinance did not identify the provisions it was amending; make
findings or provide supporting analyses on energy savings and cost-effectiveness; make a finding that
the proposed standards will require less energy than permitted by Part 6; or make findings or
declarations pursuant to CEQA. On information and belief, Defendant has not submitted an
application to the California Energy Commission for the Berkeley Ordinance as of the date of this
Complaint.

87. The Berkeley Ordinance is accordingly preempted by the California Energy Code and is void and unenforceable.

88. Petitioner and its members have a clear, present, and beneficial interest in the performance of Defendant's duties under California law.

89. There is no plain, speedy, and adequate remedy at law to protect the rights of Plaintiff and its members. Plaintiff and its members will be irreparably harmed if the Berkeley Ordinance becomes effective and is enforced because restaurants will not be able to prepare their foods in the same manner, speed, and style and will face higher costs.

90. Plaintiff accordingly requests that the Court declare that the Berkeley Ordinance is
preempted by California law and enjoin Defendant from enforcement of the preempted Berkeley
Ordinance.

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FIFTH CAUSE OF ACTION

FOR INJUNCTION AGAINST ENFORCEMENT OF BERKELEY ORDINANCE AS VOID AND UNENFORCEABLE

91. Plaintiff re-alleges the preceding paragraphs as though set forth fully herein.

92. As demonstrated above, the Berkeley Ordinance is preempted by California law and by federal law and is void and unenforceable.

93. The Berkeley Ordinance has caused and threatens to cause Plaintiff and its members irreparable and substantial harm. The business of restaurants that seek to locate in or relocate within the City of Berkeley will be substantially disrupted and impeded by the inability to use gas in the

operation of their facilities and in preparation of their products. Many restaurants will be faced with the inability to make many of their products which require the use of specialized gas appliances to prepare, including for example flame-seared meats, charred vegetables, or the use of intense heat from a flame under a wok. Indeed, restaurants specializing in ethnic foods so prized in the Bay Area will be unable to prepare many of their specialties without natural gas. Many chefs are trained using natural gas stoves, and losing natural gas will slow down the process of cooking, reduce a chef's control over the amount and intensity of heat, and affect the manner and flavor of food preparation.

94. No amount of monetary damages or other legal remedy can adequately compensate Plaintiff for the irreparable harm that they will suffer from the violations described herein. Plaintiff has no plain, speedy, and adequate remedy at law, in that unless Defendant is enjoined by this Court from effectuating the Berkeley Ordinance, Plaintiff will be subject to the Berkeley Ordinance and will continue to be denied its legal rights.

95. There will be no significant harm to Defendant from an injunction, because Defendant has no legitimate interest in enforcing an invalid ordinance. Moreover, the Ordinance's stated goals are primarily global, relating to issues of global warming and climate change. Ordinance 12.80.010.A. In light of the incremental effect, if any, that an Ordinance in one city would have on global warming or climate change, there is little likelihood that an injunction would cause substantial harm to the Defendant. The balance of harms thus favors injunctive relief.

96. An injunction is also in the public interest. The public interest is not served by enforcing invalid ordinances. Moreover, the EPCA embodies a strong public interest in the uniform regulation of energy conservation and use policy, and California law also shows support for uniform energy standards in the California Energy Code and for uniform building standards in the California Building Standards Code. These public interests would be served by the issuance of an injunction against the conflicting local regulation of these matters found in the Berkeley Ordinance.

97. Plaintiff accordingly requests that the Court enjoin Defendant from enforcement of the void and unenforceable Berkeley Ordinance.

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SIXTH CAUSE OF ACTION FOR DECLARATORY RELIEF

98.

Plaintiff re-alleges the preceding paragraphs as though set forth fully herein.

99. An actual controversy has arisen and now exists between Plaintiff and Defendant concerning the validity of the Berkeley Ordinance. Plaintiff contends that the Berkeley Ordinance is an unlawful regulation of building standards using the City of Berkeley's general police powers and is preempted by California law. Plaintiff also contends that the Berkeley Ordinance conflicts with and is preempted by the California Building Standards Code and the California Energy Code.
Plaintiff further contends that the Berkeley Ordinance is preempted by federal law and does not satisfy the requirements of any exception to preemption. Plaintiff is informed and believes, and on that basis alleges, that Defendant disagrees with Plaintiff's contentions and asserts that the Berkeley Ordinance is lawful and enforceable.

100. Berkeley Ordinance No. 7,672-N.S. is preempted by the federal Energy Policy and Conservation Act because it is a regulation concerning the energy efficiency or energy use of covered appliances and does not meet the statutory conditions for exemption from preemption.

101. The Berkeley Ordinance is preempted by California law as an unlawful attempt to use the City of Berkeley's general police power to regulate building standards and is therefore void and unenforceable.

102. The Berkeley Ordinance also is preempted by California law as it attempts to regulate building standards and does not satisfy the limited specific statutory exception of HSC § 17958.7 for municipal building standards meeting specific requirements and is therefore void and unenforceable.

103. The Berkeley Ordinance further is preempted by California law as it has the effect of amending the state Energy Code and does not satisfy the limited specific statutory exception for municipal amendments to the Energy Code and is therefore void and unenforceable.

104. Enforcement of the Berkeley Ordinance will injure Plaintiff and is likely to be redressed by a favorable ruling from this Court.

105. In the absence of declaratory relief, the unlawful Berkeley Ordinance will become

Case 4:19-cv-07668-YGR Document 1 Filed 11/21/19 Page 20 of 22

1	effective on Ja	anuary 1, 2020.					
2	106.	Accordingly, pursuant to 28 U.S.C. § 2201(a) and § 1331, Plaintiff prays for					
3	declaratory rel	lief that Berkeley Ordinance No. 7,672-N.S.:					
4	a.	is preempted by federal law because it concerns the energy use of appliances covered					
5		in the federal Energy Policy and Conservation Act and is therefore void and					
6		unenforceable;					
7	b.	is preempted by California law as an unlawful attempt to use the City of Berkeley's					
8		general police power to regulate building standards and is therefore void and					
9		unenforceable;					
10	с.	is preempted by California law as it attempts to regulate building standards and does					
11		not satisfy the limited specific statutory exception for municipal building standards					
12		and is therefore void and unenforceable; and					
13	d.	is preempted by California law as it has the effect of amending the state Energy Cod					
14		and does not satisfy the limited specific statutory exception for municipal amendment					
15		to the Energy Code and is therefore void and unenforceable.					
16		PRAYER FOR RELIEF					
17	WHEREFORE, Plaintiff prays for relief as follows:						
18	1.	For a preliminary and thereafter permanent injunction enjoining Defendant from					
19	enforcing or a	ttempting to enforce Berkeley Ordinance No. 7,672-N.S. as that Ordinance is					
20	preempted by	California law and federal law and does not satisfy any exception to such preemption					
21	and is according	ngly void and unenforceable;					
22	2.	For a declaratory judgment that Berkeley Ordinance No. 7,672-N.S.					
23		(1) is preempted by federal law because it concerns the energy use of appliances					
24	covered in the	federal Energy Policy and Conservation Act and is therefore void and unenforceable					
25		(2) is preempted by California law as an unlawful attempt to use the City of					
26	Berkeley's ger	neral police power to regulate building standards and is therefore void and					
27	unenforceable	;					
28		19					
	I CAL. KE	STAURANT ASS'N COMPL. 3:19-cv-07668					

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1	(3) is preempted by California law as it attempts to regulate building standards and								
2	does not satisfy the limited specific statutory exception for municipal building standards and is								
3	therefore void and unenforceable; and								
4	(4) is preempted by California law as it has the effect of amending the state Energy								
5	Code and does not satisfy the limited specific statutory exception for municipal amendments to the								
6	Energy Code and is therefore void and unenforceable.								
7	3. For costs of this suit, including reasonable attorney's fees; and								
8	4. For such other and further relief as the Court may deem just and proper.								
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	CAL. RESTAURANT ASS'N COMPL. 3:19-cv-07668								
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Case 4:19-cv-07668-YGR Document 1 Filed 11/21/19 Page 22 of 22

Dated: November 21, 2019	Respectfully submitted,
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	/s/ Courtland L. Reichman
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	Attom our for Divintiff
	Attorneys for Plaintiff California Restaurant Association
	21

Case 4:19-cv-07668-YGR Document 1-1 Filed 11/21/19 Page 1 of 1 CIVIL COVER SHEET JS-CAND 44 (Rev. 07/19)

The JS-CAND 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved in its original form by the Judicial Conference of the United States in September 1974, is required for the Clerk of Court to initiate the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

	(
I. (a) PLAINTIFFS California Restaurant Asso corporation	ciation, a California nonprof	ît mutual benefit	;	DEFENDANTS City of Berkele						
(b) County of Residence of (EXCEPT IN U.S. PLAIN)	County of Residence of First Listed Defendant Alameda County (IN U.S. PLAINTIFF CASES ONLY)									
NOTE: IN LAND CONDEMNATION CA THE TRACT OF LAND INVOLV								CATION OI	3	
	Address, and Telephone Number) LP100 Marine Parkway, Suite 300, Redwood Shore, C. I West Peachtree Street, Suite 2300, Atlanta, GA 30309 GUNN & DIAL LLP 3344 Peachtree Road NE, Suite 2	x. 94065 (650) 623-1401 (404) 609-1040 400, Atlanta, GA 30326 (404) 87/	6-2700	Attorneys (If Known)						
II. BASIS OF JURISDICTION (Place an "X" in One Box Only) III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff (For Diversity Cases Only) and One Box for Defendant)										
			· · ·		PTF	DEF			PTF	DEF
1 U.S. Government Plaintif	$\begin{array}{c} \textbf{f} \textbf{X} \textbf{3} \begin{array}{c} \text{Federal Question} \\ (U.S. \ Government \ Note) \end{array}$	a Party)	Citizer	n of This State	1	1 Incorporated <i>or</i> Principal Place of Business In This State			4	4
2 U.S. Government Defenda	Citizer	n of Another State	2				5	5		
	(Indicate Citizenship of	Parties in Item III)		1 or Subject of a n Country	3	3	Foreign Nation		6	6
IV. NATURE OF SUIT (Place an "X" in One Box Only)										
CONTRACT	TO	RTS		FORFEITURE/PENA			NKRUPTCY	-	ER STA	
110 Insurance	PERSONAL INJURY	PERSONAL I	NJURY	625 Drug Related Seiz			eal 28 USC § 158	375 False		
120 Marine	310 Airplane	365 Personal Injury – Pro		690 Other			hdrawal 28 USC	376 Qui Tam (31 USC		
130 Miller Act	315 Airplane Product Liability Liability					§ 157		§ 3729(a)) 400 State Reapportionment		
140 Negotiable Instrument	320 Assault, Libel & Slander	367 Health Care/ Pharmaceutic		LABOR		PROF	PERTY RIGHTS	400 State Reapportionment 410 Antitrust		
150 Recovery of Overpayment Of	330 Federal Employers'	Injury Produ		710 Fair Labor Standards Ad		820 Cop			anks and Banking	
Veteran's Benefits	Liability	sonal Injury	720 Labor/Management		830 Pate		450 Commerce			
151 Medicare Act	340 Marine	Product Liab	oility	Relations			ent-Abbreviated New	460 Deportation		
152 Recovery of Defaulted	345 Marine Product Liability 350 Motor Vehicle	PERSONAL PROPERTY		740 Railway Labor Act 751 Family and Medical		840 Trac	g Application	470 Racketeer Influenced &		
Student Loans (Excludes	355 Motor Vehicle Product	370 Other Fraud		Leave Act				Corrupt Organizations		
Veterans)	Liability	ding	790 Other Labor Litigation			AL SECURITY	480 Consumer Credit			
153 Recovery of Overpayment	360 Other Personal Injury	380 Other Person	al Property	791 Employee Retirem		861 HIA	(1395ff)	485 Telep		
of Veteran's Benefits	362 Personal Injury -Medical	-Medical Damage		Income Security Act			ck Lung (923)	Protection Act 490 Cable/Sat TV		
Malpractice 383 Pro		385 Property Dan Liability	nage Product	IMMIGRATION			VC/DIWW (405(g))			
190 Other Contract				Application			D Title XVI	850 Securities/Commodities/ Exchange ★ 890 Other Statutory Actions		
195 Contract Product Liability	CIVIL RIGHTS PRISONER PETITI					865 RSI	(405(g))			
196 Franchise	440 Other Civil Rights HABEAS COL			465 Other Immigration		FEDE	RAL TAX SUITS	891 Agricultural Acts		
REAL PROPERTY	441 Voting	463 Alien Detain		Actions			es (U.S. Plaintiff or			al Matters
210 Land Condemnation	442 Employment	510 Motions to V	acate				endant)			nformation
210 Land Condemnation	443 Housing/	Sentence		1		871 IRS	–Third Party 26 USC	0,0,0,1,000		

160 Stockholders' Suits	mapraettee	Liability	IMMIGRATION	864 SSID Title XVI	850 Securities/Commodities/ Exchange		
190 Other Contract	CIVIL RIGHTS	PRISONER PETITIONS	462 Naturalization	865 RSI (405(g))			
195 Contract Product Liability 196 Franchise REAL PROPERTY 210 Land Condemnation 220 Foreclosure 230 Rent Lease & Ejectment 240 Torts to Land 245 Tort Product Liability 290 All Other Real Property	440 Other Civil Rights 441 Voting 442 Employment 443 Housing/ Accommodations 445 Amer. w/Disabilities- Employment 446 Amer. w/Disabilities-Other 448 Education	PRISONER PETITIONS HABEAS CORPUS 463 Alien Detainee 510 Motions to Vacate Sentence 530 General 535 Death Penalty OTHER 540 Mandamus & Other 550 Civil Rights 555 Prison Condition 560 Civil Detainee– Conditions of	Application 465 Other Immigration Actions	 865 RSI (405(g)) FEDERAL TAX SUITS 870 Taxes (U.S. Plaintiff or Defendant) 871 IRS—Third Party 26 USC § 7609 	Exchange X 890 Other Statutory Actions 891 Agricultural Acts 893 Environmental Matters 895 Freedom of Information Act 896 Arbitration 899 Administrative Procedure Act/Review or Appeal of Agency Decision 950 Constitutionality of State Statutes		
ACTION 42 Bri	State Court 2 e the U.S. Civil Statute under U.S.C. 6201 et seq. ef description of cause:	Appellate Court Reope which you are filing <i>(Do not ci</i>	te iurisdictional statutes unless di	t (specify) Litigation–Tran			
	* *	he Energy Policy and Cons	servation Act; California	preemption of local energy	y and building regulations		
VII. REQUESTED IN COMPLAINT:	N CHECK IF THIS IS A UNDER RULE 23, Fed		AND \$	CHECK YES only if dem JURY DEMAND :	anded in complaint: Yes X No		
VIII. RELATED CASS IF ANY (See instru	JULATE		DOCKET NUMBER				
IX. DIVISIONAL A (Place an "X" in One Box O	SSIGNMENT (Civil L nly) X SAN FRA	ocal Rule 3-2) ANCISCO/OAKLAND	SAN JOS	E EUREKA	-MCKINLEYVILLE		

SIGNATURE OF ATTORNEY OF RECORD

Exhibit E

Articles of Incorporation (Original)

191792

FILED In the office of the Secretary of State of the State of California

ARTICLES OF INCORPORATION

05C - 9 199A

OF

INTERNATIONAL CODE COUNCIL, INC.

a California Nonprofit Public Benefit Corporation

Acting Secretary of State

ONE: The name of the corporation is:

INTERNATIONAL CODE COUNCIL, INC.

TWO: This corporation is a nonprofit public benefit corporation and is not organized for the private gain of any person. It is organized under the Nonprofit Public Benefit Corporation Law for public and charitable purposes. Such purposes include, with respect to plumbing systems in buildings and structures, the lessening of burdens of government through the development, maintenance and publication of model statutes and standards and the performance of certain services for the benefit of federal, state and local governments in connection with the administration of building law and regulation.

This corporation is organized exclusively for the promotion of social welfare within the meaning of 501(c)(4) of the Internal Revenue Code of 1986 or the corresponding provision in any future United States internal revenue law. Notwithstanding any other provision of these articles, this corporation shall not, except to an insubstantial degree, engage in any activities or exercise any powers that are not in furtherance of the purposes of this corporation, and the corporation shall not carry on any other activities not permitted to be carried on by a corporation exempt from federal income tax under Section 501(c)(4) of the Internal Revenue Code of 1986 or the corresponding provision of any future United States internal revenue law.

THREE: The name and address of the corporation's initial agent for service of process is:

John G. Nelson 15111 East Whittier Boulevard, Suite 400 Whittier, California 90603

FOUR: All corporate property is irrevocably dedicated to the purposes set forth in Article Two, above. No part of the net earnings of this corporation shall inure to the benefit of any of its directors, trustees, officers, private shareholders or members, or to individuals.

On the winding up and dissolution of this corporation, after paying or adequately providing for the debts, obligations and liabilities of the corporation, the remaining assets of this corporation shall be distributed to Building Officials and Code Administrators International, Inc. and International Conference of Building Officials.

Dated: Ullmber 9, 1994

//John G. Nelson, Incorporator

ICC Articles of Incorporation

I hereby declare that I am the person who executed the foregoing Articles of Incorporation, which execution is my act and deed. \wedge

John G. Nelson, Incorporator

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· Program

Articles of Incorporation (Amendment 1)

1917923

CERTIFICATE OF AMENDMENT TO

ARTICLES OF INCORPORATION

OF

INTERNATIONAL CODE COUNCIL, INC., a California Nonprofit Public Benefit Corporation

PAUL K. HEILSTEDT and JON S. TRAW certify that:

1. They are the President and the Secretary, respectively, of International Code Council, Inc., a California nonprofit public benefit corporation.

2. Article FOUR of the Articles of Incorporation of International Code Council, Inc. is amended to read as follows:

"FOUR: All corporate property is irrevocably dedicated to the purposes set forth in Article Two, above. No part of the net earnings of this corporation shall inure to the benefit of any of its directors, trustees, officers, private shareholders or members, or to individuals.

On the winding up and dissolution of this corporation, after paying or adequately providing for the debts, obligations and liabilities of the corporation, the remaining assets of this corporation shall be distributed in equal shares to Building Officials and Code Administrators International, Inc., International Conference of Building Officials, and Southern Building Code Congress International, Inc."

3. The foregoing amendment to the Articles of Incorporation has been duly approved by the Board of Directors of International Code Council, Inc.

4. The foregoing amendment to the Articles of Incorporation has been duly approved by the required vote of members.

We further declare under the penalty of perjury under the laws of the State of California that the matters set forth in this certificate are true and correct of our own knowledge.

DATED:

NAR 2 1995

Paul K. Heilstedt, President

Traw, Secretary



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ED

Articles of Incorporation (Amendment 2)

1917923

A476100 in the office of the Secretary of State of the State of California

CERTIFICATE OF AMENDMENT TO

ARTICLES OF INCORPORATION

MAY 7 1996 **BILL JONES. September of State**

÷.,

OF

INTERNATIONAL CODE COUNCIL, INC.,

a California Nonprofit Public Benefit Corporation

JON S. TRAW and PAUL K. HEILSTEDT certify that:

They are the President and the Secretary, respectively, of International Code Council. 1. Inc., a California nonprofit public benefit corporation.

Article TWO of the Articles of Incorporation of International Code Council, Inc. is 2. amended by deleting the first paragraph of said Article, that is, the paragraph beginning with the words, " This corporation is a nonprofit ... " and ending with the words " ... administration of building law and regulation.", and substituting for and in lieuthereof the following:

" This corporation is a nonprofit public benefit corporation and is not organized for the private gain of any person. It is organized under the Nonprofit Public Benefit Corporation Law for public and charitable purposes. Such purposes include, with respect to buildings and structures: (a) the lessening of burdens of government through the development, maintenance and publication of model statutes and standards for the use by federal, state and local governments in connection with the administration of building laws and regulations, and (b) the lessening of the burdens of government through the performance of certain services for the benefit of federal, state and local governments in connection with the administration of building laws and regulations."

The foregoing amendment to the Articles of Incorporation has been duly approved by 3. the Board of Directors of International Code Council, Inc.

4. The foregoing amendment to the Articles of Incorporation has been duly approved by the required vote of members.

We further declare under the penalty of perjury under the laws of the State of California that the matters set forth in this certificate are true and correct of our own knowledge.

DATED: April 21, 1996

Araw, President n

Paul K. Heilstedt, Secretary

icc\certif3.Al

Articles of Incorporation (Amendment 3)

A0561578



OF

ARTICLES OF INCORPORATION

OF

INTERNATIONAL CODE COUNCIL, INC.

In the office of the Secretary of State of the State of Collifornia

FEB 2 3 2001

BILL JUNES, Seprendry of State

The undersigned certifies:

ONE: He is the Executive Vice President and the Secretary of International Code Council, Inc., a California nonprofit public benefit corporation ("the Corporation").

TWO: Articles Two and Four of the Articles of Incorporation of the Corporation are amended to read as follows:

TWO: This corporation is a nonprofit public benefit corporation and is not organized for the private gain of any person. It is organized under the Nonprofit Public Benefit Corporation Law for public and charitable purposes. Such purposes include, with respect to buildings and structures,(a) the lessening of burdens of government through the development and maintenance and publication of model statutes and standards for use by federal, state and local governments in connection with the administration of building laws and regulations, and(b)the lessening of the burdens of government through the performance of certain services for the benefit of federal, state and local governments in connection with the administration of building laws and regulation.

The corporation is organized and operated exclusively as an organization described in section 501(c)(6) of the Internal Revenue Code of 1986, as amended, or the corresponding provision in any future United States internal revenue law (the "Code"). In lessening the burdens of government as set forth above, the corporation will also promote the common interest of Building Officials and Code Administrators International, Inc., International Conference of Building Officials, Inc. and Southern Building Code Congress International, Inc. by developing, maintaining and publishing model statutes and standards with respect to buildings and structures, and administering building laws and regulations. Notwithstanding any other provision of these articles, the corporation shall not engage in a regular business activity of a kind ordinarily carried on for profit and shall not carry on any other activity not permitted to be carried on by a corporation exempt from federal income tax under section 501(c)(6) of the Code.

FOUR: All corporate property is irrevocably dedicated to the purposes set forth in Article TWO, above. No part of the net earnings of this corporation shall inure to the benefit of or be distributed to any director, employee or other individual, partnership, estate, trust, or corporation having a personal or private interest in the corporation, except that the corporation shall be authorized and empowered to pay reasonable compensation for services rendered to or for the corporation and to make payments and distributions in furtherance of the purposes set forth in Article TWO hereof.

In the event of dissolution or final liquidation of the corporation, all of the remaining assets and property of the corporation shall, after paying or making provision for the payment of all of the liabilities and obligations of the corporation and for necessary expenses thereof, be distributed, in equal shares, to Building Officials and Code Administrators International, Inc., International Conference of Building Officials, and Southern Building Code Congress International, Inc., provided that each organization(i)dedicates such assets and property to public or charitable purposes, and (ii) is qualified as a tax-exempt organization under section 501(c)(3), section 501(c)(4) or section 501(c)(6) of the Code. For purposes of this Article FOUR, an organization that satisfies the two aforementioned conditions is a "qualifying organization." If any of the aforementioned three organizations is not a qualifying organization at the time of distribution, then the share which would have been distributed to such organization (the "non-qualifying organization") had it been a qualifying organization shall be distributed to whichever qualifying organization is designated in writing by such nonqualifying organization.

THREE: The foregoing amendments of Articles of Incorporation have been duly approved by unanimous written consent of the Board of Directors of the Corporation without a meeting as authorized by the Bylaws of the Corporation and the Corporations Code of the State of California.

FOUR: The foregoing amendments of Articles of Incorporation have been duly approved by the required vote of the members of the Corporation.

We further declare under penalty of perjury under the laws of the State of California that the matters set forth in this certificate are true and correct of our own knowledge.

DATED: February 14, 2001

ichard P. Kuchnick

Richard P. Kuchnicki Executive Vice President/Secretary

Articles of Incorporation (Amendment 4)

1917923

A 0 5 9 6 3 6 4 FILED % in the office of the Secretary of State of the State of California

Vin Sul

KEVIN SHELLEY, Secretary of State

MAY

CERTIFICATE OF AMENDMENT OF ARTICLES OF INCORPORATION OF

INTERNATIONAL CODE COUNCIL, INC., a California nonprofit public benefit corporation

The undersigned certify that:

- 1. They are the president and the secretary, respectively, of International Code Council, Inc., a California nonprofit public benefit corporation.
- 2. Article Four of the Articles of Incorporation of this corporation is hereby deleted in its entirety and replaced as follows:

"All corporate property is irrevocably dedicated to the purposes set forth in Article Two above. No part of the net earnings of this corporation shall inure to the benefit of any of its directors, trustees, officers, private shareholders or members, or to individuals. On the winding up or dissolution of this corporation, after paying or adequately providing for the debts, obligations and liabilities of the corporation, the remaining assets of this corporation shall be distributed to a fund, foundation or corporation organized and operating for charitable, scientific, literary or educational purposes."

- 4. The foregoing amendment of Articles of Incorporation has been duly approved by the Board of Directors.
- 5. The foregoing amendment of Articles of Incorporation has been duly approved by the required vote of the statutory members.

We further declare under penalty of perjury under the laws of the State of California that the matters set forth in this certificate are true and correct of our own knowledge.

Date: May 1, 2003

Paul Myers, President

k D'Andrea, Secretary

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Date: May 1, 2003

Paul Myers, President

Nick D'Andrea, Secretary