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7  
 8 UNITED STATES DISTRICT COURT  
 FOR THE EASTERN DISTRICT OF WASHINGTON

9 JAMON RIVERA, an individual;  
 INLAND NW AGC, a membership  
 10 organization; SPOKANE HOME  
 BUILDER’S ASSOCIATION, a,  
 11 nonprofit corporation; WASHINGTON  
 STATE ASSOCIATION OF UA  
 12 PLUMBERS, PIPEFITTERS AND  
 HVAC/R SERVICE TECHNICIANS, a  
 13 labor organization; CONDRON HOMES  
 LLC, a limited liability company;  
 14 PARAS HOMES LLC, a limited liability  
 company; GARCO CONSTRUCTION  
 15 INC., a for-profit corporation,  
 NATIONAL PROPANE  
 16 GAS ASSOCIATION, a national trade  
 association, CITIZEN ACTION  
 17 DEFENSE FUND, a nonprofit  
 corporation; AVISTA  
 18 CORPORATION; CASCADE  
 NATURAL GAS CORPORATION;  
 19 AND NORTHWEST NATURAL GAS  
 COMPANY,

20 Plaintiffs,

Case No. 1:23-cv-03070-SAB

CLIMATE SOLUTIONS, THE  
 LANDS COUNCIL, NW ENERGY  
 COALITION, SIERRA CLUB, AND  
 WASHINGTON PHYSICIANS FOR  
 SOCIAL RESPONSIBILITY’S  
 UNOPPOSED MOTION TO  
 INTERVENE

07/07/2023  
 WITHOUT ORAL ARGUMENT

21 CLIMATE SOLUTIONS, THE LANDS COUNCIL, NW ENERGY  
 COALITION, SIERRA CLUB, AND WASHINGTON PHYSICIANS  
 22 FOR SOCIAL RESPONSIBILITY’S UNOPPOSED MOTION TO INTERVENE  
 1:23-cv-03070-SAB

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v.

WASHINGTON STATE BUILDING  
CODE COUNCIL,

Defendant.

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1 INTRODUCTION

2 The Washington legislature directed defendant State Building Code Council  
3 (“the Council” or “SBCC”) to implement progressively stricter building codes with  
4 the goal of eliminating fossil-fuel emissions from buildings by the year 2031.  
5 Pursuant to that mandate, the Council recently amended the residential and  
6 commercial state energy codes to require high-efficiency heat pumps for space  
7 heating and water heating, with certain exceptions.<sup>1</sup> Plaintiffs challenge these  
8 amendments, arguing that they are preempted by the Federal Energy Policy and  
9 Conservation Act (“EPCA”). ECF No. 1, at 3. Plaintiffs seek a preliminary  
10 injunction to the code updates, even though the Council has already delayed the  
11 effective date of the updates until late October and initiated a process to amend  
12 them to address EPCA concerns. ECF No. 25.

13 Climate Solutions, The Lands Council, NW Energy Coalition, Sierra Club,  
14 and Washington Physicians for Social Responsibility (“Proposed Intervenors”)  
15 move to intervene as defendants pursuant to Federal Rule of Civil Procedure 24 to  
16 defend the code amendments from this premature legal attack. Intervention as of  
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18 <sup>1</sup> Wash. St. Reg. 23-02-060 (Jan. 3, 2023) (adding WAC 51-11R-40392 and  
19 amending WAC 51-11R-40340); Wash. St. Reg. 22-14-091 (July 1, 2022) (adding  
20 WAC 51-11C-40314, and amending WAC 51-11C-40402).

1 right should be granted because Proposed Intervenors meet all the criteria under  
2 Rule 24.<sup>2</sup> In the alternative, permissive intervention should be granted.

### 3 BACKGROUND

#### 4 I. CONTEXT FOR ENERGY CODE UPDATES

5 Washington faces serious disruption from a changing climate including an  
6 increase in air pollution and related morbidity and mortality; declining water  
7 supply; increasing devastation from wildfires; the loss of coastal lands due to sea  
8 level rise; an increase in ocean temperature and acidity; increased harm to fish  
9 because of warmer water temperatures and altered flow regimes; and damaged and  
10 failed field crops and fruit harvests because of higher temperatures and less water  
11 for irrigation.<sup>3</sup> To ensure that Washington does its part to address the climate  
12 crisis, the legislature set a target of reducing Washington’s overall emissions of  
13 greenhouse gases (“GHGs”) to 45 percent below 1990 levels by 2030, 70 percent  
14 by 2040, and 95 percent by 2050. RCW 70A.45.020(1)(a).

15 The legislature has further directed the SBCC to design a state energy code  
16 to “help achieve the broader goal of building zero fossil-fuel [GHG] emission  
17

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18 <sup>2</sup> Plaintiffs and SBCC do not oppose this motion.

19 <sup>3</sup> Wash. Dep’t of Ecology, *Concise Explanatory Statement, Clean Air Rule* (Sept.  
20 2016) at 3, <https://tinyurl.com/mpehwbf>.



1 homes and buildings by the year 2031.” RCW 19.27A.020(2)(a); RCW  
2 19.27A.160. Every energy code update must incrementally progress toward a 70  
3 percent reduction in annual net energy consumption from 2006 levels. RCW  
4 19.27A.160. SBCC’s 2018 report to the legislature noted a shortfall in emissions  
5 reductions and the need for greater efforts.<sup>4</sup> In the SBCC’s 2021 report to the  
6 legislature, the energy code provisions at issue in this case are considered  
7 “significant measures” that help make progress towards the 2031 goal.<sup>5</sup>

8 Other jurisdictions have enacted code-based measures to address GHG  
9 emissions from buildings. In May, a Ninth Circuit panel determined that EPCA  
10 preempted Berkeley’s ban on gas piping in new buildings. *California Rest. Ass’n v.*  
11 *City of Berkeley*, 65 F.4th 1045 (9th Cir. 2023). Although that litigation is far from  
12 final (a rehearing *en banc* petition is pending), Plaintiffs here seek to leverage this  
13 precedent to enjoin SBCC’s energy code updates. ECF No. 1, at 19.

## 14 II. PROPOSED INTERVENORS

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16 <sup>4</sup> SBCC, *2018 Washington State Energy Code Progress Toward 2030* (Nov. 25,  
17 2020), <https://tinyurl.com/4u3wynbn>.

18 <sup>5</sup> SBCC, *2021 Washington State Energy Code Progress Toward 2030* (Mar. 2023)  
19 at 3–4, <https://tinyurl.com/4w53ety7> (Table 1 listing C403.1.4 and C404.2.1); *id.* at  
20 6 (Table 2 listing R403.13 and R403.5.7).

1 Proposed Intervenors are deeply involved in building electrification issues.  
2 Climate Solutions is a Northwest-based non-profit seeking to accelerate clean  
3 energy solutions to the climate crisis. Hall Decl. ¶ 2. Making buildings carbon-free  
4 and energy efficient is a program focus because it will significantly reduce climate  
5 pollution, cut energy costs, and improve air quality. *Id.* ¶ 4. The Lands Council is a  
6 Spokane-based 501(c)(3) advocating for cost-effective pathways to zero carbon  
7 energy and building electrification. Sherazi Decl. ¶ 2-4. The NW Energy Coalition  
8 is an alliance of organizations, gas and electric utilities, and businesses which  
9 focuses, among other things, on decarbonizing buildings. McCloy Decl. ¶ 2-3.  
10 Sierra Club is a national grassroots environmental organization with a strategic  
11 objective focusing on a clean and just energy transition, including the reduction of  
12 GHG emissions from fossil fuels used in buildings. Plummer Decl. ¶ 2-3. And  
13 Washington Physicians for Social Responsibility is a public health advocacy  
14 organization led by health professionals that works to mitigate climate change by  
15 supporting building electrification in Washington. Vossler Decl., ¶¶ 2-3, 5.

16 As described in the attached Declarations, Proposed Intervenors actively  
17 advocated before the SBCC in support of one or more of the challenged energy  
18 code updates. *See* Hall Decl. ¶ 6; Sherazi Decl. ¶ 4; McCloy Decl. ¶¶ 4-6;  
19 Plummer Decl. ¶ 5; Vossler Decl. ¶ 5. Indeed, just weeks ago, the same  
20 organizations were granted intervention in a similar case challenging SBCC's

1 building and energy code updates in Thurston County Superior Court. Ex Parte  
2 Order Granting Motion to Intervene, *Nw. Reg'l Constr. All. v. Washington State*  
3 *Bldg. Code Council*, No. 23-2-00615-34 (Wash. Sup. Ct., Thurston Cty., April 27,  
4 2023).

5 ARGUMENT

6 I. PROPOSED INTERVENORS ARE ENTITLED TO INTERVENE AS A  
7 MATTER OF RIGHT.

8 In considering a motion for intervention as a matter of right under Federal  
9 Rule of Civil Procedure 24(a)(2), the Ninth Circuit evaluates whether (1) the  
10 application is timely; (2) the applicant has a “significantly protectable” interest  
11 relating to the transaction that is the subject of the litigation; (3) the applicant is so  
12 situated that the disposition of the action may, as a practical matter, impair or  
13 impede the applicant’s ability to protect its interest; and (4) the applicant’s interest  
14 is inadequately represented by the parties before the court. *See Sw. Ctr. for*  
15 *Biological Diversity v. Berg*, 268 F.3d 810, 817–18 (9th Cir. 2001). Notably, the  
16 rule is liberally construed to favor intervention. *Donnelly v. Glickman*, 159 F.3d  
17 405, 409 (9th Cir. 1998). Allowing interested persons to participate serves “both  
18 efficient resolution of issues and broadened access to the courts” and can prevent  
19 future related litigation. *Forest Conserv. Council v. U.S. Forest Serv.*, 66 F.3d  
20 1489, 1496, n.8 (9th Cir. 1995). Proposed Intervenor meet the four relevant  
21 criteria.

1           A.     Proposed Intervenors’ Motion for Intervention is Timely.

2           To determine whether a motion to intervene is timely, the Ninth Circuit  
3 considers the stage of the proceedings, potential for prejudice to other parties, and  
4 the reason for any delay in moving to intervene. *United States v. Alisal Water*  
5 *Corp.*, 370 F.3d 915, 921 (9th Cir. 2004). Proposed Intervenors have sought  
6 intervention a mere two weeks after the Plaintiffs’ claim was filed, before  
7 defendants have filed a response, and before any proceedings have taken place.  
8 *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 837 (9th Cir. 1996). Moreover,  
9 no substantive rulings have been made, indicating no existing party would suffer  
10 prejudice from granting intervention. *Id.* This motion is timely.

11           B.     Proposed Intervenors Have Protectable Interests in This Action.

12           Rule 24(a)(2) requires the applicant for intervention to have an interest in the  
13 subject of the action. This requirement is “primarily a practical guide to disposing  
14 of lawsuits by involving as many apparently concerned persons as is compatible  
15 with efficiency and due process.” *County of Fresno v. Andrus*, 622 F.2d 436, 438  
16 (9th Cir. 1980). A movant must show that the interest asserted is protectable under  
17 some law and there is a relationship between that interest and the claims at issue.  
18 *Sierra Club v. Env’t Prot. Agency*, 995 F.2d 1478, 1481 (9th Cir. 1993).

19           Proposed Intervenors have substantial interests in the subject of this action.  
20 First, Proposed Intervenors work to address climate change impacts and advocate

1 for policies to reduce GHG emissions by decarbonizing buildings. *See* Hall Decl.  
2 ¶¶ 2–7; Sherazi Decl. ¶¶ 2–4; McCloy Decl. ¶¶ 2–5; Plummer Decl. ¶¶ 2–5;  
3 Vossler Decl. ¶¶ 2–5. Second, all Proposed Intervenors were actively engaged in  
4 the rulemaking process for the building and energy code updates, including by  
5 advising SBCC and its staff and submitting multiple rounds of comments and  
6 testimony on the updates. *See* Hall Decl. ¶ 6; Sherazi Decl. ¶ 4; McCloy Decl.  
7 ¶¶ 4–6; Plummer Decl. ¶ 5; Vossler Decl. ¶ 5. It is well accepted that such interests  
8 are sufficient for purposes of intervention as a matter of right. *See, e.g., Sagebrush*  
9 *Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir. 1983); *Idaho Farm Bureau*  
10 *Fed’n v. Babbitt*, 58 F.3d 1392, 1398 (9th Cir. 1995).

11 C. Proposed Intervenors’ Interests May Be Impaired as a Result of This  
12 Litigation.

13 A proposed intervenor must show that the disposition of an action “*may*, as a  
14 practical matter,” impede its ability to protect its interests. Fed. R. Civ. P. 24(a)(2)  
15 (emphasis added). This burden is minimal; an applicant need only show  
16 impairment of their legal interest is possible if intervention is denied. *United States*  
17 *v. City of Los Angeles*, 288 F.3d 391, 401 (9th Cir. 2002). Moreover, the court’s  
18 analysis of this factor “is not limited to consequences of a strictly legal nature.”  
19 *Forest Conservation Council*, 66 F.3d at 1497–98.

20 Proposed Intervenors meet this requirement too because of their significant  
21 interest and investment in developing effective, low-cost, and equitable GHG

1 standards. Plaintiffs attack the SBCC’s ability to amend the energy code in ways  
2 needed to meet Washington’s climate objectives, and even seek to block code  
3 implementation despite SBCC’s current efforts to review and potentially amend  
4 the provisions. Should Plaintiffs succeed in enjoining or overturning the code  
5 updates, the Proposed Intervenors’ interests in advancing strong climate and public  
6 health protections in Washington would suffer. Hall Decl. ¶¶ 7, 9; Sherazi Decl.  
7 ¶¶ 2–4; McCloy Decl. ¶¶ 2–5, 8; Plummer Decl. ¶¶ 3–6; Vossler Decl. ¶¶ 2–5.

8 D. Proposed Intervenors’ Interests Are Not Adequately Represented.

9 The final requirement for intervention as of right is a “minimal” showing  
10 that the existing parties to the litigation “may” not adequately represent the  
11 Proposed Intervenors’ interests. *Trbovich v. United Mine Workers*, 404 U.S. 528,  
12 538 n.10 (1972); *Sagebrush Rebellion*, 713 F.2d at 528. To make this  
13 determination, courts consider whether: (1) an existing party will *undoubtedly*  
14 make all of the intervenor’s arguments; (2) the party is capable of and willing to  
15 make such arguments; and (3) the intervenor would offer any necessary element to  
16 the proceedings that would be neglected. *Fresno County*, 622 F.2d at 438-39.

17 No existing party adequately represents Proposed Intervenors’ interests.  
18 Plaintiffs of course hold directly adverse interests. As a government entity, SBCC  
19 must balance many competing interests in determining its policy and litigation  
20

1 positions, including interests adverse to Proposed Intervenors.<sup>6</sup> Moreover, with a  
2 preliminary injunction pending, Proposed Intervenors likely will have a different  
3 perspective on the balance of equities if an injunction is granted than the  
4 government. *See* Hall Decl. ¶¶ 8-9; Sherazi Decl. ¶¶ 6-7; McCloy Decl. ¶¶ 7-8;  
5 Plummer Decl. ¶¶ 7-8; Vossler Decl. ¶¶ 6-7. Because there is a chance that SBCC  
6 will not “undoubtedly make all” of Proposed Intervenors’ arguments, the agency  
7 does not adequately represent Proposed Intervenors’ interests for purposes of  
8 intervention.

9 II. ALTERNATIVELY, PROPOSED INTERVENORS SATISFY THE  
10 STANDARDS FOR PERMISSIVE INTERVENTION.

11 Alternatively, this Court should grant permissive intervention because  
12 Proposed Intervenors have “a claim or defense that shares with the main action a

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13 <sup>6</sup> *See Trbovich*, 404 U.S. at 538-39 (union member’s interests not adequately  
14 represented because government duties to serve union *and* public interest may not  
15 dictate same approach); *Sw. Ctr. for Biological Diversity*, 268 F.3d at 823  
16 (presumption of adequacy overcome where government and private sector interests  
17 may diverge); *Californians For Safe & Competitive Dump Truck Transp. v.*  
18 *Mendonca*, 152 F.3d 1184, 1190 (9th Cir. 1998) (interests of union “potentially  
19 more narrow” than interests of general public, thus inadequately represented by  
20 state agencies).

1 common question of law or fact” and the intervention will not “unduly delay or  
2 prejudice the adjudication of the original parties’ rights.” Fed. R. Civ. Proc.  
3 24(b)(1), (3). Proposed Intervenors’ defenses are factually and legally related to the  
4 main action. They seek to defend Washington’s energy codes and prevent their  
5 enjoinder. While Proposed Intervenors may advance arguments that differ from  
6 SBCC’s, their defenses are unquestionably related. And intervention will not  
7 prejudice any of the existing parties or delay the proceedings. Moreover, Proposed  
8 Intervenors “will significantly contribute . . . to the just and equitable adjudication  
9 of the legal questions presented.” *Spangler v. Pasadena City Bd. of Educ.*, 552  
10 F.2d 1326, 1329 (9th Cir. 1977). Proposed Intervenors’ specialized knowledge of  
11 climate policy and law at both state and federal levels and experience engaging in  
12 the rulemaking process for the energy code updates will aid the resolution of this  
13 litigation. *See Sagebrush Rebellion*, 713 F.2d at 528 (noting specialized expertise  
14 and differing perspective of environmental nonprofit seeking intervention).

## 15 CONCLUSION

16 For the reasons set forth above, Proposed Intervenors respectfully request  
17 that this Court grant their motion to intervene as of right, or, in the alternative, for  
18 permissive intervention.



1 DATED: June 6, 2023.

2 Respectfully submitted,

3 /s/ Jan E. Hasselman

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CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which in turn automatically generated a Notice of Electronic Filing (NEF) to all parties in the case who are registered users of the CM/ECF system. The NEF for the foregoing specifically identifies the following recipients of electronic notice.

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7 DATED: June 6, 2023

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