R. JULY SIMPSON, WSBA #45869
WILLIAM MCGINTY, WSBA #41868
DIERK MEIERBACHTOL, WSBA #31010
SARAH E. SMITH, WSBA #55770
Assistant Attorneys General
EMMA GRUNBERG, WSBA #54659
Deputy Solicitor General
7141 Cleanwater Dr. SW
Olympia, WA 98504-0111
P.O. Box 40111
(360) 709-6470
July.Simpson@atg.wa.gov
William.McGinty@atg.wa.gov
Dierk.Meierbachtol@atg.wa.gov
Sarah.E.Smith@atg.wa.gov
Emma.Grunberg@atg.wa.gov
Attorneys for Defendant
Washington State Building Code Council

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JAMON RIVERA, et al.,

Plaintiffs,

v.

WASHINGTON STATE BUILDING CODE COUNCIL,

Defendant.

NO. 1:23-cv-03070-SAB

DEFENDANT'S MOTION TO DISMISS

August 11, 2023
Without Oral Argument

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
7141 Cleanwater Dr. SW
PO Box 40111
Olympia, WA 98504-0111
(360) 709-6470

TABLE OF CONTENTS

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
7141 Cleanwater Drive SW
PO Box 40111
Olympia, WA 98504-0111
(360) 709-6470

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
7141 Cleanwater Drive SW
PO Box 40111
Olympia, WA 98504-0111
(360) 709-6470

TABLE OF AUTHORITIES

Cases

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
7141 Cleanwater Drive SW
PO Box 40111
Olympia, WA 98504-0111
(360) 709-6470

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
7141 Cleanwater Drive SW
PO Box 40111
Olympia, WA 98504-0111
(360) 709-6470

Statutes

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
7141 Cleanwater Drive SW
PO Box 40111
Olympia, WA 98504-0111
(360) 709-6470

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
7141 Cleanwater Drive SW
PO Box 40111
Olympia, WA 98504-0111
(360) 709-6470

Regulations

Other Authorities

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
7141 Cleanwater Drive SW
PO Box 40111
Olympia, WA 98504-0111
(360) 709-6470

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
7141 Cleanwater Drive SW
PO Box 40111
Olympia, WA 98504-0111
(360) 709-6470

I. INTRODUCTION

To further the Washington Legislature's goals of reducing energy consumption and greenhouse gas emissions, the State Building Code Council (SBCC) adopted statewide building code provisions requiring the installation of heat pumps in new construction in certain circumstances. The rules were originally meant to take effect on July 1, 2023. However, the SBCC delayed the effective date to October 29, 2023, in order to amend the codes to address federal preemption issues regarding heating appliances following the issuance of the Ninth Circuit's decision in *California Restaurant Association v. City of Berkeley*, 65 F.4th 1045 (9th Cir. 2023). As that decision noted, state building codes are exempt from preemption if they meet certain statutory criteria. The SBCC is actively participating in rulemaking to amend its rules to fit within this exemption.

Plaintiffs' Complaint nonetheless challenges the now-delayed rules on federal preemption grounds, but their claims suffer from two fatal jurisdictional flaws. First, Plaintiffs' lawsuit against the SBCC is barred by the Eleventh Amendment, which prohibits private parties from suing state agencies in federal court. That alone requires dismissal.

Second, Plaintiffs' Complaint is not justiciable under Article III standing and ripeness requirements. Plaintiffs cannot show any actual or imminent injury from the delayed rules; to the contrary, the SBCC delayed them specifically to allow for rule amendments to address preemption concerns. The Court should

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
7141 Cleanwater Dr. SW
Po Box 40111
Olympia, WA 98504-0111
(360) 709-6470

therefore dismiss this case.

II. STATEMENT OF FACTS

A. The State Building Code Council's Role is to Establish Minimum Building Code Requirements to Promote the Health, Safety, and Welfare of Washingtonians

As Washington's Legislature has found, "energy efficiency is the cheapest, quickest, and cleanest way to meet rising energy needs, confront climate change, and boost our economy." Wash. Rev. Code § 19.27A.130. To meet those goals, Washington, like most other states, has adopted a building energy code. Washington's building codes are promulgated by the SBCC, a state quasi-legislative agency with members representing a broad range of stakeholder interests. *See* Wash. Rev. Code §§ 19.27.031; .070; .074; .020. The SBCC establishes the minimum statewide building, residential, mechanical, fire, plumbing, and energy code requirements to promote the health, safety, and welfare of Washingtonians. *Id.* at § .020(1); Wash. Admin. Code § 51-04-010. The SBCC has no enforcement authority; it cannot approve or deny building code applications, nor does it enforce the code. Wash. Rev. Code § 19.27.050. Rather, local building code officials in cities, counties, and other municipalities are responsible for approval of building permit applications, as well as code enforcement. *Id.*

In accordance with its purpose, the SBCC regularly amends the state building codes to accommodate technological advances and address novel problems. This process begins when the International Code Council releases new

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
7141 Cleanwater Dr. SW
Po Box 40111
Olympia, WA 98504-0111
(360) 709-6470

editions of model codes, and ends with the formal adoption of the state building code as amended by the SBCC. *See generally* Wash. Admin. Code § 51-04-020 (rules for consideration of proposed statewide amendments). This process occurs in a three-year cycle, in line with the release of the ICC model codes. Wash. Rev. Code § 19.27.074(1)(a), (c). When a new model code is released, the SBCC allows anyone with an interest to petition the SBCC to amend the new model code. Wash. Admin. Code § 51-04-020(3), Wash. Admin. Code § 51-04-025.

Following its consideration of public petitions for amendments to the rules, the full SBCC votes on which code amendments will move forward. Wash. Admin. Code § 51-04-020(3). Any proposals that the SBCC approves by a majority vote are filed with the State Code Reviser and published in the Washington State Register as proposed rules in accordance with the Washington Administrative Procedure Act. Wash. Admin. Code § 51-04-020(3)(d); Wash. Rev. Code § 19.27.074(5)(a). The SBCC then conducts at least two public hearings for the proposals. *Id.* Because the SBCC is a public agency bound by the Washington State Open Public Meetings Act, Wash. Rev. Code 42.30, Wash. Rev. Code § 19.27.074(5)(a), the SBCC must hold a meeting, announced in advance and open to the public when taking any action, including proposing rules or adopting them. *See*, *e.g.*, Wash. Rev. Code § 42.30.030.

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
7141 Cleanwater Dr. SW
Po Box 40111
Olympia, WA 98504-0111
(360) 709-6470

B. The Adoption and Delay of the Challenged Rules and the SBCC's Initiation of Amended Rulemaking

1. The SBCC passes space and water heating rules for new construction, initially intended to be effective July 1, 2023

In late 2022 and early 2023, the SBCC amended the Washington State Energy Code to generally require installation of heat pump heating, ventilation, and air conditioning (HVAC) appliances and heat pump water heaters in new commercial and residential buildings, effective July 1, 2023. 22-14 Wash. Reg. 091 (July 1, 2022) §§ 403.1.4, 404.2.1; 23-02 Wash. Reg. 060 (January 3, 2023) §§ 403.5.7, 403.13.[1] These rules have multiple exceptions, including allowance of fossil fuel burning appliances in certain circumstances. *E.g.,* 22-14 Wash. Reg. 091 § 403.1.4(9) (permitting an exception for "[p]ortions of buildings that require fossil fuel or electric resistance space heating for specific conditions *approved* by the *code official* for research, health care, process or other specific needs that cannot practicably be served by heat pump or other space heating systems.").

These amendments were enacted in part to further the State Legislature's mandate to reduce the carbon footprint of new construction. *See* Wash. Rev. Code §§ 19.27A.020(2)(a) (articulating state goal of building zero fossil-fuel greenhouse gas emission homes and buildings by 2031); 19.27A.160(2)

---

[1] For ease of reference, the relevant amendments to the Commercial Energy Code are attached to this brief as Appendix A. The amendments to the Residential Energy Code are attached as Appendix B.

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
7141 Cleanwater Dr. SW
Po Box 40111
Olympia, WA 98504-0111
(360) 709-6470

(requiring the SBCC to adopt state energy codes that "incrementally move towards achieving the seventy percent reduction in annual net energy consumption" by 2031).

2. The Energy Policy and Conservation Act and the Ninth Circuit's recent ruling in *California Restaurant Association v. City of Berkeley*

Following the 1970s oil embargo and subsequent energy crisis, Congress passed the Energy Policy and Conservation Act (EPCA), the nation's first "comprehensive national energy policy." *See* H.R. Rep. No. 94-340, at 20 (1975), *reprinted in* 1975 U.S.C.A.A.N. 1762, 1782; *see generally, Air Conditioning and Refrigeration Inst. v. Energy Res. Conserv. & Dev.*, 410 F.3d 492, 498–99 (9th Cir. 2005) (AHRI); *Natural Res. Defense Council v. Abraham*, 355 F.3d 179, 184–87 (2d Cir. 2004) Increasing energy efficiency and decreasing domestic energy consumption are explicitly listed as core purposes of the Act. *See* 42 U.S.C. § 6201 (EPCA's purposes include conserving energy and water supplies and improving the energy efficiency of "major appliances" and other consumer products). As the Ninth Circuit has noted, "EPCA was designed, in part, to reduce the United States' 'domestic energy consumption through the operation of specific voluntary and mandatory energy conservation programs.'" *AHRI*, 410 F.3d at 498–99 (quoting S. Rep. No. 94-516, at 117 (1975)).

EPCA establishes energy efficiency standards for certain consumer products, and requires the U.S. Department of Energy to review and update the standards for those products periodically. 42 U.S.C. §§ 6292, 6295. "Covered

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
7141 Cleanwater Dr. SW
Po Box 40111
Olympia, WA 98504-0111
(360) 709-6470

products," or consumer products for which an efficiency standard has been established under the Act, include refrigerators, central air conditioners and heat pumps, hot water heaters, dishwashers, kitchen ranges and ovens, pool heaters, and showerheads, among others. *Id*. at §§ 6292 (listing covered products), 6291 (defining "covered product").

In April 2023, the Ninth Circuit ruled in *California Restaurant Association v. City of Berkeley*, 65 F.4th 1045 (9th Cir. 2023), that EPCA preempted a city ordinance that generally prohibited installation of natural gas piping in newly constructed buildings. In so holding, the court determined that EPCA's express preemption provision is not limited to state and local rules that directly regulate the energy efficiency or usage of EPCA-covered products, but rather extends to rules indirectly affecting the energy usage of such products. *Id.* at 1048, 1050–56. The City of Berkeley's petition for rehearing en banc is currently pending, supported by the United States. *See* City of Berkeley's Petition for Rehearing En Banc, *California Restaurant. Ass'n v. City of Berkeley*, 65 F.4th 1045 (9th Cir. May 31, 2023) (No. 21-16278), ECF No. 92; Brief for the United States as Amicus Curiae in Support of Petition for Rehearing, *California Restaurant Ass'n v. City of Berkeley*, 65 F.4th 1045 (9th Cir. June 12, 2023), ECF No. 94.

The City of Berkeley's ordinance differs from the SBCC's challenged rules in several key respects, including that Berkeley's challenged ordinance instituted a flat-out ban (with some exceptions) on the installation of natural gas infrastructure in new construction. *Cal. Rest. Ass'n*, 65 F.4th at 1048. In striking

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
7141 Cleanwater Dr. SW
Po Box 40111
Olympia, WA 98504-0111
(360) 709-6470

down the ordinance, the Court noted: "We only hold that EPCA prevents Berkeley from banning new-building owners from extending fuel gas piping within their buildings from the point of delivery at the gas meter." *Id*. at 1055. Unlike Berkeley's ordinance, SBCC's statewide building codes do not prohibit builders or customers from using natural gas in new construction. Further, three of the four challenged provisions do not prevent consumers from using covered appliances in their homes and businesses. The residential energy code allows consumers to purchase, install, and use natural gas HVAC and water cooling appliances, but limits *when* the appliances may be used, requiring that they be integrated into heat pump systems for supplemental or auxiliary heating. *See* 23-02 Wash. Reg. 060 §§ R403.5.7.1, R403.1.2. And the commercial energy code broadly permits auxiliary water heaters that use fossil fuel combustion. 22-14 Wash. Reg. 091 § 404.2.1.4.

3. The SBCC delays the rules' effective date to permit amended rulemaking in light of *California Restaurant Association*

Following the Ninth Circuit's ruling, the SBCC called a special meeting to consider the decision's impact on the Energy Code. The SBCC announced the special meeting on May 18, 2023, and held it on May 24, 2023. Decl. of Stoyan Bumbalov (Bumbalov Decl.) ¶ 11.[2] The agenda for the meeting, published on the

[2] As discussed *infra* § III, the SBCC is making a factual jurisdictional challenge on standing and ripeness grounds, and the Court may therefore consider declarations relating to the SBCC's decision to delay the rules and initiate

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
7141 Cleanwater Dr. SW
Po Box 40111
Olympia, WA 98504-0111
(360) 709-6470

SBCC website on May 18 (four days before Plaintiffs filed this lawsuit), indicated that the SBCC would "Discuss Potential Consequences of the 9th Circuit Court of Appeals Decision in *California Restaurant Association v. City of Berkeley* for the Washington Energy Code and Take Possible Action on Options to Address those Consequences[.]" Bumbalov Decl. ¶ 11, Ex. A.[3]

At the meeting, the SBCC voted to postpone the implementation of its amendments to the Energy Code. *Id.* ¶ 11. The SBCC filed a CR 103P Rulemaking Order to effectuate the delay of the rules to October 29, 2023, "to evaluate what, if any, changes may be necessary . . . to maintain compliance with [EPCA] given the recent Ninth Circuit Court of Appeals ruling[.]" *Id.* at ¶¶ 12–13, Ex. B.

The SBCC also voted at the special meeting to initiate rulemaking to amend the Energy Code if necessary to maintain compliance with EPCA in light of the Ninth Circuit's decision. *Id.* at ¶ 14. The SBCC then initiated rulemaking by filing CR 101 Preproposal Statement of Inquiry forms on May 30, 2023. *Id.*

---

rulemaking, to the extent they rebut the Complaint's assertion that the challenged rules will go into effect on July 1, 2023.

[3] The meeting agenda can be found on the SBCC's website. *See* Memorandum from Tony Doan to State Building Code Council (May 18, 2023) https://www.sbcc.wa.gov/sites/default/files/2023-05/a05242023C_Special%20Meeting_0.pdf.

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
7141 Cleanwater Dr. SW
Po Box 40111
Olympia, WA 98504-0111
(360) 709-6470

at ¶ 15, Ex. C. The SBCC requested code change proposals with an initial deadline of June 9, 2023, and these proposals will go through the SBCC's internal review process. *Id.* at ¶ 16. Any proposals that are initially approved by the full SBCC will be filed with the Washington State code reviser's office as proposed rules, the SBCC will receive public comments regarding the adoption of the rules, and, following the close of the public comment period, will vote to revise or adopt the rule proposals. *Id*. at ¶ 17. If it appears that rulemaking to amend the rules cannot be completed by October 29, the SBCC can vote to file additional CR 103P forms modifying the rules' effective date, thereby further delaying the rules. *Id*. at ¶ 18.

C. Plaintiffs' Lawsuit

Plaintiffs filed this lawsuit on May 22, 2023, seeking a permanent injunction enjoining the SBCC from enforcing the now-delayed rules, and a declaratory judgment that the rules are preempted under EPCA. ECF No. 1 at 25 ¶¶ 89–93. Plaintiffs have also moved for a preliminary injunction that is set for oral argument on July 18, 2023. ECF Nos. 25, 26.

III. LEGAL STANDARD

The Eleventh Amendment prohibits private suits against states and state agencies without their consent or waiver. *See Sofamor Danek Grp., Inc. v. Brown*, 124 F.3d 1179, 1183 (9th Cir. 1997). Eleventh Amendment immunity is "quasi-jurisdictional," and may be properly raised in either a Rule 12(b)(1) motion or a Rule 12(b)(6) motion. *Sato v. Orange Cnty. Dep't of Educ.*, 861 F.3d

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
7141 Cleanwater Dr. SW
Po Box 40111
Olympia, WA 98504-0111
(360) 709-6470

923, 927 n.2 (9th Cir. 2017) (collecting cases deciding sovereign immunity defenses under both rules); *Pistor v. Garcia*, 791 F.3d 1104, 1111 (9th Cir. 2015) ("Although sovereign immunity is only quasi-jurisdictional in nature, Rule 12(b)(1) is still a proper vehicle for invoking sovereign immunity from suit."). Under either theory, dismissal with prejudice is required when the claims are barred by state sovereign immunity pursuant to the Eleventh Amendment, and the issue of Eleventh Amendment immunity must be resolved before reaching the merits of the case. *Doe v. Regents of the Univ. of California*, 891 F.3d 1147, 1153–54 (9th Cir. 2018); *Coal. to Defend Affirmative Action v. Brown*, 674 F.3d 1128, 1133 (9th Cir. 2012); *Krainski v. Nevada ex rel. Bd. of Regents of Nevada Sys. of Higher Educ.*, 616 F.3d 963, 968 (9th Cir. 2010).

In addition, without Article III standing and ripeness, a court lacks subject matter jurisdiction under Rule 12(b)(1) and the case must be dismissed. *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004). The presumption is "that federal courts lack jurisdiction unless the contrary appears affirmatively from the record." *Renne v. Geary*, 501 U.S. 312, 316 (1991) (quoting *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 546 (1986)). Plaintiffs bear the burden to establish Article III standing and ripeness and to show that prudential ripeness concerns support review. *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010); *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1126 (9th Cir. 2009).

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
7141 Cleanwater Dr. SW
Po Box 40111
Olympia, WA 98504-0111
(360) 709-6470

A Rule 12(b)(1) motion may challenge the existence of subject matter jurisdiction in two ways. First, a "facial attack" asserts that "the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). The court will adjudicate the motion much as a Rule 12(b)(6) motion, confining its analysis to the allegations contained in the complaint, documents attached thereto or referenced therein, and any judicially noticeable facts, taking all allegations of material fact as true and construing them in the light most favorable to the plaintiff. *Doe v. Holy See*, 557 F.3d 1066, 1073 (9th Cir. 2009) (per curiam); *Kalaka Nui, Inc. v. Actus Lend Lease, LLC*, No. 1:08-cv-00308 SOM-LEK, 2009 WL 1227892, at *1 (D. Haw. May 5, 2009).

Second, a "factual attack" disputes "the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Safe Air for Everyone*, 373 F.3d at 1039. In a factual attack, "the district court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment," and it "need not presume the truthfulness of the plaintiff's allegations." *Id*. (citing *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003); *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000)). If the jurisdictional issue is separable from the case's merits, the court may consider the evidence presented and resolve factual disputes where necessary to the determination of jurisdiction. *AAMC v. United States*, 217 F.3d 770, 778 (9th Cir. 2000); *Chaganti v. 12 Phone Int'l, Inc.*, 635 F. Supp.2d 1065, 1070 (N.D. Cal.

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
7141 Cleanwater Dr. SW
Po Box 40111
Olympia, WA 98504-0111
(360) 709-6470

2007), *aff'd*, F. App'x 54 (9th Cir. 2009). In all cases, "[i]t is to be presumed that a cause lies outside this limited jurisdiction [of the federal courts], and the burden of establishing the contrary rests upon the party asserting jurisdiction[.]" *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

In this case, this motion's Eleventh Amendment argument is a facial challenge to this Court's jurisdiction, because it does not challenge the truth of the allegations in the complaint and instead asserts that the Complaint fails to assert facts giving rise to jurisdiction. *Safe Air for Everyone*, 373 F.3d at 1039.

By contrast, this motion's Article III ripeness and standing argument is a factual challenge to jurisdiction because it challenges the truth of certain allegations in the Complaint. *See id.* Specifically, the Complaint alleges that the challenged amendments become effective on July 1, 2023. ECF No. 1 at 6–7, 10 ¶¶ 24, 25, 37. That allegation is separable from the merits of Plaintiffs' claims, and it is no longer accurate. The Court may consider declarations to resolve these factual questions and determine whether it has jurisdiction. *See Safe Air for Everyone*, 373 F.3d at 1039 (a moving party may "convert[] the motion to dismiss into a factual motion by presenting affidavits or other evidence properly brought before the court[.]") (quoting *Savage v. Glendale Union High Sch., Dist. No. 205*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003)).This motion therefore cites evidence relating to the SBCC's decision to delay the rules' effective date and to initiate rulemaking in light of the Ninth Circuit's decision in *California Restaurant Association v. City of Berkeley*.

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
7141 Cleanwater Dr. SW
Po Box 40111
Olympia, WA 98504-0111
(360) 709-6470

IV. ARGUMENT

Plaintiffs' claims must be dismissed for two separate reasons. First, the Eleventh Amendment bars Plaintiffs from bringing suit against the SBCC, a state agency. Second, Plaintiffs lack Article III standing and ripeness because they cannot show any actual or imminent injury. The rules they challenge on federal preemption grounds have been delayed specifically in order to permit time for rulemaking to ensure compliance with federal law in light of the Ninth Circuit's recent decision. Plaintiffs' claimed injuries from the delayed rules are therefore hypothetical and conjectural and insufficient to establish standing and ripeness. Because Plaintiffs have failed to meet the requirements of Article III, this Court lacks subject matter jurisdiction.

A. Plaintiffs' Claims are Barred by the Eleventh Amendment

Plaintiffs' Complaint must be dismissed under the "jurisdictional bar of the Eleventh Amendment," *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 73 (1996), which prohibits "federal courts from hearing suits brought by private citizens against state governments without the state's consent," *Sofamor Danek Grp., Inc.*,124 F.3d at 1183. This bar extends to actions against agencies of a state, such as the SBCC. *Romano v. Bible*, 169 F.3d 1182, 1185 (9th Cir. 1999) (citing *Pennhurst v. Halderman*, 465 U.S. 89, 100 (1984)). To determine when an agency is an "arm of the state" for Eleventh Amendment immunity, the Ninth Circuit looks to five factors: whether a money judgment would be satisfied out of state funds, whether the entity performs central governmental functions,

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
7141 Cleanwater Dr. SW
Po Box 40111
Olympia, WA 98504-0111
(360) 709-6470

whether the entity may sue or be sued, whether the entity has the power to take property in its own name or only the name of the state, and the corporate status of the entity. *Mitchell v. Los Angeles Community College Dist.*, 861 F.2d 198, 201 (9th Cir. 1988).

Here, all five factors are met and SBCC is squarely a state agency. First, a money judgment against the SBCC would be satisfied out of state funds. The SBCC is established as an quasi-legislative body housed within the Washington Department of Enterprise Services (DES), a State executive branch agency (Wash. Rev. Code §§ 19.27.070; 43.19.005(1))), its budget comes from the State legislature via appropriations (*id.* at § 19.27.085(1)), and as with all State agencies, the State is responsible for satisfying money judgments against it (*see generally id.* at § 4.92). Second, SBCC performs central governmental functions, specifically adopting and maintaining statewide building codes consistent with the State's interest (*id.* at § 19.27.074(1)(a)–(c)). Third, there is no statutory authorization for the SBCC to sue or be sued, because it is "established in" DES, and so is not completely independent of it (*id.* at § 19.27.070), and the only work it does in its own name is the promulgation of statewide building codes (*id.* at § 19.27.074(1)). Fourth, the SBCC is not authorized to take property in its own name. The SBCC's powers are delineated by statute, and those powers are circumscribed to those necessary to promulgate building codes. *See id.* at § 19.27.074(2). Even employment of staff and provision of administrative and information technology services is the responsibility of DES rather than the

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
7141 Cleanwater Dr. SW
Po Box 40111
Olympia, WA 98504-0111
(360) 709-6470

SBCC itself. *Id.* at § 19.27.074(3). And finally, as to corporate status, the SBCC is a State statutory executive branch body. *See id.* at §§ 19.27.070; 43.19.005(1).

Accordingly, the Eleventh Amendment applies to bar suits against the SBCC. There are only three narrow exceptions to this bar, and none apply here. *See Douglas v. California Dep't of Youth Auth.*, 271 F.3d 812, 817 (9th Cir.), *amended*, 271 F.3d 910 (9th Cir. 2001).

First, the State has not waived its Eleventh Amendment defense. *See id*.

Second, Plaintiffs' claims against the SBCC do not fall within the narrow exception for suits seeking prospective injunctive relief against state officials with "some connection with the enforcement of the act." *Ex parte Young*, 209 U.S. 123, 157 (1908).

Third, Congress has not abrogated the States' sovereign immunity. That test asks first whether Congress "'unequivocally expressed its intent to abrogate' the states' immunity in the legislation itself[,]" and second, if the answer is yes, "'whether Congress acted pursuant to a . . . grant of constitutional authority.'" *See Douglas*, 271 F.3d at 818 (quoting *Kimel v. Fl. Bd. of Regents*, 528 U.S. 62, 73 (2000)). Neither prong is met here. EPCA does not contain any unequivocal expression of Congress's intent to abrogate the states' immunity, meaning the inquiry ends there. *See id*. And regardless, Congress does not have the power to abrogate state immunity in legislation passed under its Article I commerce clause power. *Kimel*, 528 U.S. at 78–79.

The Eleventh Amendment therefore bars Plaintiffs' claims against the

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
7141 Cleanwater Dr. SW
Po Box 40111
Olympia, WA 98504-0111
(360) 709-6470

SBCC and requires dismissal of the Complaint. *See Minnesota Auto Dealers Ass'n v. Minnesota by & through Minnesota Pollution Control Agency*, 520 F. Supp. 3d 1126, 1132–33 (D. Minn. 2021) (dismissing EPCA preemption claim against State of Minnesota and Minnesota Pollution Control Agency as barred by the Eleventh Amendment).

B. Plaintiffs Cannot Establish Justiciability Under Article III

The Complaint must also be dismissed because it fails to show justiciability under Article III and, therefore, the Court lacks subject matter jurisdiction. In addition, this case is not prudentially ripe. Plaintiffs' preemption challenge is not fit for judicial resolution, because the SBCC has delayed the rules in order to permit rulemaking to ensure compliance with EPCA's preemption provision. And Plaintiffs have shown no harm from delaying resolution until the SBCC's rulemaking process runs its course and concrete facts develop.

1. Plaintiffs cannot show Article III standing or ripeness

Two related doctrines of justiciability—each originating in the case-or-controversy requirement of Article III—make clear that Plaintiffs' case is not justiciable. First, Plaintiffs fail to assert the injury-in-fact necessary to demonstrate standing, which must be "concrete and particularized and . . . actual and imminent, not conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (cleaned up). Second, the case must be "ripe"—that is, it cannot be dependent on "'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Trump v. New York*, 141 S. Ct. 530,

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
7141 Cleanwater Dr. SW
Po Box 40111
Olympia, WA 98504-0111
(360) 709-6470

535 (2020) (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)); *see also Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc) (noting that the Article III ripeness inquiry "is often treated under the rubric of standing," and "in many cases . . . ripeness coincides squarely with standing's injury in fact prong.").

Plaintiffs cannot make this showing. The rules they claim will cause them injury (*see* ECF No. 1 at 10–11 ¶¶ 36–42) have been delayed in order for the SBCC to consider amended rules following the Ninth Circuit's preemption analysis in *California Restaurant Association v. City of Berkeley*. Bumbalov Decl. ¶¶ 11–17, Exs. B, C; Decl. of Kjell Anderson (Anderson Decl.) ¶¶ 8–9. As *California Restaurant Association* pointed out, EPCA explicitly exempts state building codes from preemption if they meet certain criteria listed in 42 U.S.C. § 6297(f)(3). *See Cal. Restaurant Ass'n*, 65 F.4th at 1052. The purpose of the SBCC's rulemaking is to amend its rules to address preemption under EPCA. Bumbalov Decl., Ex. C; Anderson Decl. ¶ 8. If the process is not complete by the rules' effective date of October 29, 2023, the SBCC can delay the effective date again by filing a new CR 103P form. Wash. Rev. Code §§ 34.05.360, .380; *see also* Bumbalov Decl. ¶ 18; Anderson Decl. ¶ 10. As a result, any injuries Plaintiffs allege will occur if the delayed rules go into effect are the definition of "conjectural [and] hypothetical." *Lujan*, 504 U.S. at 560. Their case is "dependent on 'contingent future events that may not occur as anticipated, or indeed may not occur at all." *See Trump*, 141 S. Ct. at 535 (quoting *Texas*, 523 U.S. at 300).

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
7141 Cleanwater Dr. SW
Po Box 40111
Olympia, WA 98504-0111
(360) 709-6470

Further, Plaintiffs are unable to dispute that if they (and their customers) apply for building permits in the meantime, their projects will vest under the current rules, which do not contain the challenged provisions. *See* Decl. of Dustin Curb (Curb Decl.) ¶ 6; *see also Hull v. Hunt*, 331 P.2d 856, 859 (Wash. 1958) ("[T]he right [to build] vests when the party, property owner or not, applies for his building permit, if that permit is thereafter issued.").

For an additional reason, the utility and natural gas industry worker Plaintiffs lack standing. Plaintiffs claim the delayed rules "have caused harm through the erosion of their customer base through the permanent loss of new customers over time." ECF No. 1 at 11 ¶ 41. But these customers could, just as the Plaintiff builders and property owners, apply for permits under the rules as they currently stand. And importantly, even if this Court enjoins the delayed rules on a permanent basis, nothing will force these customers to choose natural gas over electric appliances. This is a case where the remedy to utilities and other natural gas industry participants depends on the "unfettered choices made by independent actors not before the court[][.]" *See Lujan*, 504 U.S. at 562 (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989)). Because an order from this court will not require a change in the behavior of third parties, these Plaintiffs' claimed injuries cannot be remedied by the Court, and they lack standing. *See Pritikin v. Dept. of Energy*, 254 F.3d 791, 799 (9th Cir. 2001); *San Diego Cnty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1130 (9th Cir. 1996).

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
7141 Cleanwater Dr. SW
Po Box 40111
Olympia, WA 98504-0111
(360) 709-6470

In sum, Plaintiffs have failed their burden of showing actual or imminent injury resulting from the delayed rules, and their case is unripe. It must therefore be dismissed for lack of subject matter jurisdiction.

2. This case is not prudentially ripe

Even if the Complaint met Article III's requirements, the Court should decline to exercise jurisdiction because this case is not prudentially ripe. The ripeness doctrine "'prevent[s] the courts, through avoidance of premature adjudication[] from entangling themselves in abstract disagreements." *Twitter, Inc. v. Paxton*, 56 F.4th 1170, 1173 (9th Cir. 2022) (quoting *Portman v County of Santa Clara*, 995 F.2d 898, 902 (9th Cir. 1993)). To determine whether a case is prudentially ripe, courts consider (1) whether the issues are fit for judicial resolution and (2) the potential hardship to the parties if judicial resolution is postponed. *Wolfson*, 616 F.3d 1045, 1060 (9th Cir. 2010) (citing *Abbott Labs v. Gardner*, 387 U.S. 136m 149 (1967)); *id*. at 1064 (finding certain claims were not prudentially ripe because they rested upon contingent future events that might not occur as anticipated, if at all). Here, neither prong is met.

First, the issues are not fit for judicial resolution at this stage because although Plaintiffs seek to challenge the rules on EPCA preemption grounds, the SBCC has delayed the rules' effective date for the express purpose of providing sufficient time to amend the rules to fit within the EPCA exception to preemption. Deciding this case now, on the basis of rules that are not in effect and that may

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
7141 Cleanwater Dr. SW
Po Box 40111
Olympia, WA 98504-0111
(360) 709-6470

never go into effect, would make little sense. Rather, the Court should wait until it is clear what set of rules will govern.

Second, Plaintiffs have not shown a credible threat of harm from delaying adjudication until it is clear which set of rules are or will be in place. Delaying adjudication will not prejudice Plaintiffs' ability to bring a preemption challenge to the rules that ultimately become effective. If the SBCC adopts amended rules in light of *California Restaurant Association* (which would not go into effect until at least 30 days after they are filed, *see* Wash. Rev. Code § 34.05.380(2)), Plaintiffs may determine that the amended rules do not raise preemption concerns—further underscoring the lack of ripeness here. But if Plaintiffs still believe the amended rules are preempted, or if the SBCC decides to cease rulemaking and allow the delayed rules to take effect, Plaintiffs can bring a challenge at that time (if it complies with the Eleventh Amendment). Any future action would have the benefit of actual facts about which set of rules are or will be in place, rather than pure conjecture. In the meantime, Plaintiffs cannot dispute that if they have a building project ready to go, then they can apply for a permit and vest under the rules as they are right now. Curb Decl. ¶ 6. Under prudential considerations, too, Plaintiffs' lawsuit is therefore unripe.

V. CONCLUSION

For the reasons stated above, the Court should dismiss the Complaint as barred by the Eleventh Amendment and for lack of subject matter jurisdiction.

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
7141 Cleanwater Dr. SW
Po Box 40111
Olympia, WA 98504-0111
(360) 709-6470

DATED this 22nd day of June 2023.

ROBERT W. FERGUSON
Attorney General

/s/ R. July Simpson
R. JULY SIMPSON, WSBA #45869
WILLIAM MCGINTY, WSBA #41868
DIERK MEIERBACHTOL, WBSA #31010
SARAH E. SMITH, WSBA #55770
Assistant Attorneys General
EMMA GRUNBERG, WSBA #54659
Deputy Solicitor General
July.Simpson@atg.wa.gov
William.McGinty@atg.wa.gov
Dierk.Meierbachtol@atg.wa.gov
Sarah.E.Smith@atg.wa.gov
Emma.Grunberg@atg.wa.gov
Attorneys for Defendant
Washington State Building Code Council

DECLARATION OF SERVICE

I hereby declare that on this day I caused the foregoing document to be electronically filed with the Clerk of the Court using the Court's CM/ECF System which will serve a copy of this document upon all counsel of record.

DATED this 22nd day of June 2023, at Tacoma, Washington.

/s/ R. July Simpson
R. JULY SIMPSON, WSBA #45869
Assistant Attorney General

ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
7141 Cleanwater Dr. SW
PO Box 40111
Olympia, WA 98504-0111
(360) 709-6470