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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT SPOKANE

JAMON RIVERA, et al.,

Plaintiffs,

v.

WASHINGTON STATE BUILDING CODE COUNCIL,

Defendant.

NO. 1:23-cv-03070-SAB

OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

July 18, 2023
With Oral Argument: 10:00 a.m.

I. INTRODUCTION

Plaintiffs' Motion for Preliminary Injunction should be denied because this Court lacks jurisdiction over Plaintiffs' claims, and because Plaintiffs cannot make the minimum showing of irreparable harm to justify an injunction.

This Court lacks jurisdiction—meaning Plaintiffs cannot show likelihood of success on the merits—for two reasons.[1] First, Defendant State Building Code Council (SBCC) is immune from suit under the Eleventh Amendment, as an instrumentality of Washington State. Second, this case is not ripe under Article III, because the SBCC has delayed the rules Plaintiffs challenge in order to make amendments to address federal preemption issues following the Ninth Circuit's decision in *California Restaurant Association v. City of Berkeley*, 65 F.4th 1045 (9th Cir. 2023). If amended rulemaking is not complete by the rules' effective date of October 29, 2023, the SBCC—contrary to Plaintiffs' contention—has multiple mechanisms to continue to delay the code while it does its work.

For similar reasons, Plaintiffs cannot show any non-speculative irreparable harm from rules that have been delayed to allow for amended rulemaking. Plaintiffs are shadowboxing with a version of the building code that simply will not go into effect in the foreseeable future. Plaintiffs have sued an immune state

[1] The SBCC has moved to dismiss on these grounds. ECF No. 38.

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agency, this case is not ripe, Plaintiffs have shown no irreparable harm, and their motion for a preliminary injunction should be denied.[2]

II. ARGUMENT

A. Legal Standard

"A preliminary injunction is an 'extraordinary and drastic remedy'; it is never awarded as of right." *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008) (citations omitted). Plaintiffs must make a "clear showing" that (1) they are likely to succeed on the merits; (2) they would likely suffer irreparable harm absent an injunction; (3) the balance of equities tips in their favor; and (4) an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

B. Plaintiffs Have Not Shown a Likelihood of Success on the Merits

To prevail on a preliminary injunction motion, Plaintiffs must make a "clear showing" that subject matter jurisdiction exists. *Winter*, 555 U.S. at 22; *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Plaintiffs cannot carry that burden because the SBCC has sovereign immunity under the Eleventh Amendment and this case is not ripe under Article III. *See* ECF No. 38.

1. Plaintiffs' suit is barred by the Eleventh Amendment

Plaintiffs' claims cannot succeed because they are blocked by the "jurisdictional bar of the Eleventh Amendment," *Seminole Tribe of Florida v.*

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[2] The SBCC incorporates by reference the Statement of Facts in its Motion to Dismiss (ECF No. 38 at 2–9).

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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. v. Brown*, 124 F.3d 1179, 1183 (9th Cir. 1997). This bar extends to actions against state agencies. *Romano v. Bible*, 169 F.3d 1182, 1185 (9th Cir. 1999) (citing *Pennhurst v. Halderman*, 465 U.S. 89, 100 (1984)). The SBCC squarely falls into this category. It is established within the Department of Enterprise Services, a State executive branch agency (Wash. Rev. Code §§ 19.27.070; 43.19.005(1)); its statutory responsibility is to adopt and maintain statewide building codes, consistent with the State's interest (*id.* §§ 19.27.074(1)(a)–(c))); its budget comes from the State legislature (*id.* § 19.27.085(1)); and, as with all State agencies, the State is responsible for satisfying money judgments against the SBCC (*see generally id.* § 4.92).

There are only three narrow exceptions to the Eleventh Amendment bar, and none apply here. *See Douglas v. Cal. 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. 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," because they have not sued any officials responsible for enforcing the state

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building codes. *Ex parte Young*, 209 U.S. 123, 157 (1908).[3] Finally, the Energy Policy and Conservation Act (EPCA), Pub. L. 94-163, 89 Stat. 871 (1975), does not abrogate the States' sovereign immunity; neither prong of that two-part test is satisfied here. *See Douglas*, 271 F.3d at 818. EPCA does not contain any "'unequivocal[] express[ion]'" of Congress's "'intent to abrogate' the states' immunity[,]" meaning the inquiry ends there. *See id*. (quoting *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000)). And, in any event, Congress cannot abrogate state sovereign immunity in legislation passed pursuant to its Article I commerce clause power. *Kimel*, 528 U.S. at 78–79.

Because the Eleventh Amendment bars Plaintiffs' claims against the SBCC, Plaintiffs cannot show a likelihood of success on the merits. *See Minn. Auto Dealers Ass'n v. Minn. by & through Minn. 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 Eleventh Amendment).

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[3] The SBCC does not have authority to enforce the building codes; rather, local building code officials in cities, counties, and other municipalities are responsible for approval of building permit applications, as well as code enforcement. Wash. Rev. Code § 19.27.050; Declaration of Stoyan Bumbalov (Bumbalov Decl.) ¶ 3.

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2. This case is not ripe because the SBCC delayed the challenged rules and is amending them now

Plaintiffs' allegations are also constitutionally and prudentially unripe. Plaintiffs' sole argument is that the now-delayed rules are preempted by EPCA under the Ninth Circuit's recent decision in *California Restaurant Association v. City of Berkeley*, 64 F.4th 1045 (9th Cir. 2023). But the SBCC delayed the rules following *California Restaurant Association* so that it can amend them to fit within EPCA's preemption exception for state building codes. Plaintiffs therefore cannot show anything more than speculative or hypothetical injuries.

The ripeness requirement is designed "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements[.]" *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 732–33 (1998) (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148–49 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977)). Under Article III of the Constitution, a court may not hear a case unless "there exist[s] a constitutional 'case or controversy,' [and] the issues presented are 'definite and concrete, not hypothetical or abstract.'" *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (noting that Article III ripeness "is often treated under the rubric of standing," and "in many cases . . . coincides squarely with standing's injury in fact prong."). Courts must consider whether the plaintiffs face "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement," or, by contrast, if the alleged injury is too

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"imaginary" or "speculative" to support jurisdiction. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979).

Plaintiffs fail whether this is cast as a question of standing or constitutional ripeness. The challenged rules have not gone into effect and likely will not within the foreseeable future. Bumbalov Decl. ¶ 18; Declaration of Kjell Anderson (Anderson Decl.) ¶¶ 8–10. To the contrary, the SBCC is working to amend the rules in light of the *California Restaurant Association* decision right now. *Id.* As *California Restaurant Association* pointed out, state building codes are eligible for an explicit exemption from federal preemption if they meet certain criteria listed in 42 U.S.C. § 6297(f)(3). 65 F.4th at 1052. Unsurprisingly, the SBCC plans to amend its rules so that they fit within this exemption. Anderson Decl. ¶ 8. If the process is not complete by October 29, 2023, the Council 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. And in the meantime, Plaintiffs can apply for building permits under the current codes (which do not have the challenged provisions) and their projects will vest under those rules. Declaration of Dustin Curb (Curb Decl.) ¶ 6. There is no constitutional case or controversy here, at least not now and not yet.

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Even if Article III is satisfied, the Court should decline to exercise jurisdiction on prudential grounds, which has two factors: 1) whether the issues are fit for judicial decision, and 2) whether the parties will suffer hardship if the court declines to consider the issues. *San Diego Cnty. Gun Rts. Comm. v. Reno*, 98 F.3d 1121, 1132 (9th Cir. 1996) (citing *Abbott Laboratories.*, 387 U.S. at 149). Plaintiffs fail on both counts. The issues Plaintiffs raise are not fit for judicial decision because it is not yet clear what rules are or will be in effect. Moreover, none of Plaintiffs' 17 declarations have set out the details of a project that they cannot pursue because of the delayed rules or alleged that a building permit they submitted has been denied. *See Ohio Forestry Ass'n*, 523 U.S. at 726 (declining to exercise jurisdiction to review logging "plan" where no particular timber harvesting had been approved). Exercise of jurisdiction in these circumstances "threatens the kind of abstract disagreements over administrative policies that the ripeness doctrine seeks to avoid." *Id.* at 736 (cleaned up).

Nor would Plaintiffs suffer hardship in the absence of a decision by the Court. The SBCC is currently working to amend its rules, specifically in response to EPCA preemption concerns. Bumbalov Decl. ¶ 13–18; Anderson Decl. ¶ 8–10. If Plaintiffs 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. Should Plaintiffs be harmed by some future rules passed by the SBCC, they can challenge the rules if and when that happens. *See San Diego Cnty. Gun Rts Comm'n*, 98 F.3d at 1133.

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There is no reason for the Court to take up this case at this time, and doing so would be a waste of time and judicial resources.

C. Plaintiffs Fail to Show Any Likelihood of Irreparable Harm

Plaintiffs' motion should also be denied because they fail to show any irreparable harm.

First, Plaintiffs premise their claim of irreparable harm on the assertion that without an injunction, the challenged rules "will become effective in mere months," i.e. October 29, because the SBCC lacks authority to delay them again. ECF No. 25 at 6, 8–9, 12. This is simply wrong. The SBCC did not adopt an emergency rule to delay the code (*cf. id.* at 8) but rather re-filed a CR 103P Rulemaking Order with a new effective date of October 29. *Id.* at ¶ 12. Should the amended rulemaking process not be complete by that date, the SBCC can simply file another CR 103P form with a new effective date. Wash. Rev. Code §§ 34.05.360, .380; *see also* Bumbalov Decl. ¶ 18; Anderson Decl. ¶ 10. Thus, Plaintiffs face no harm—let alone irreparable harm—from rules that have been delayed so that amended rules can be adopted in their place. "Speculative injury cannot be the basis for a finding of irreparable harm." *In re Excel Innovations, Inc.*, 502 F.3d 1086, 1098 (9th Cir. 2007).[4]

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[4] Even if the delay had been put in place via emergency rule, it could be extended. *See* Wash. Rev. Code § 34.05.250(2) (SBCC can extend emergency rule if "conditions have changed"); Wash. Admin. Code § 51-04-020(6) (December 1st

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In the meantime, Plaintiffs will not suffer irreparable harm on current projects. Any projects for which complete permit applications are submitted before the new rules' effective date—which could be October 29, 2023, or much later if new rulemaking is not complete by then—would be "vested" under the current rules, which do not contain the challenged provisions. Curb Decl. at ¶ 6. Plaintiffs' claims that they are *currently* being forced to delay projects, and make costly changes to *current* projects, are disingenuous. ECF No. 25 at 8.

Plaintiffs also cannot claim irreparable harm when they have an adequate remedy at law available to them. *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014) ("Irreparable harm is traditionally defined as harm for which there is no adequate legal remedy, such as an award of damages.") (citing *Rent-A-Ctr., Inc. v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991)). Plaintiffs can file a request for a building permit, and if the local code official finds "errors" or non-compliance (such as use of certain appliances), the applicant can appeal that determination to the jurisdiction's hearing examiner. Curb Decl. at ¶ 9. If that hearing is not favorable to the applicant, then the applicant can appeal to the Washington State Superior Court. *Id.* Notably, *none* of the Plaintiffs have been denied permits or told their permits contain errors—because their current projects are vested in the current code.

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deadline for building code decisions "shall not apply to emergency rules or expedited adoption of rules under the [APA].").

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Finally, Plaintiffs' other claims of harm are too speculative to constitute irreparable harm. *See In re Excel*, 502 F.3d at 1098. For example, Plaintiffs claim that customers are choosing to not install gas in their homes and businesses, but Plaintiffs cannot know *why* these customers are making this decision. Certainly some are choosing to forego gas for health or environmental decisions—otherwise they would be taking advantage of the delayed implementation of the challenged rules to lawfully install gas appliances in their home under the current rules. This is particularly true given that even if the challenged rules were to go into effect, they are not a gas ban. Customers who currently use a gas furnace may continue to use and later replace that furnace, and customers who currently have building projects underway are vested under the current rules. Thus, Plaintiffs cannot show irreparable harm justifying an injunction.

D. The Equities and Public Interest Weigh Strongly in the State's Favor

The final two *Winter* factors merge when the government is the defendant. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). Here, the equities and public interest weigh strongly in favor of the SBCC. The SBCC is taking active steps, beginning before this lawsuit was filed, to promulgate rules that fulfill the SBCC's statutory duties in accordance with federal law and the Ninth Circuit's ruling. Plaintiffs have shown no irreparable harm that would result from allowing the SBCC to continue that vital work.

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III. CONCLUSION

Plaintiffs' Motion for Preliminary Injunction should be denied.

DATED this 22nd day of June 2023.

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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.

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