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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JAMON RIVERA, et al.,

Plaintiffs,

v.

WASHINGTON STATE BUILDING CODE COUNCIL, et al.,

Defendants,

CLIMATE SOLUTIONS, et al.,

Defendant-Intervenors.

NO. 1:23-cv-03070-SAB

DEFENDANTS' MOTION TO DISMISS

September 5, 2023
Without Oral Argument

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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 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 make modifications to the codes following the Ninth Circuit's decision in *California Restaurant Association v. City of Berkeley*, 65 F.4th 1045 (9th Cir. 2023) and EPCA. As that decision noted, state building codes are exempt from preemption if they meet certain statutory criteria. The SBCC is actively considering proposals to amend its rules to fit within this exemption.

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

Second, Plaintiffs' Amended 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 therefore dismiss this case.

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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 enacted 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 and its members have no enforcement authority; they cannot approve or deny building code applications, nor can they 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 permit applications and 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 usually begins when the International Code Council releases new 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

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§ 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.

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 (July 1, 2022) § 403.1.4(9) (permitting an exception for "[p]ortions of buildings that require fossil fuel or electric resistance space heating for specific

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[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.

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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 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) (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). 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

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the United States' 'domestic energy consumption through the operation of specific voluntary and mandatory energy conservation programs.'" *Air Conditioning and Refrigeration Inst.*, 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.

In April 2023, the Ninth Circuit ruled in *California Restaurant Association*, 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 just 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.

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. Decl. of Stoyan Bumbalov

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(Bumbalov Decl.) ¶ 11, Ex. A. 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. 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. 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 and Procedural History

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 EPCA preempts them. ECF No. 1 at 25 ¶¶ 89–93. In their original complaint, Plaintiffs only named the SBCC as a defendant. *See generally id.* Plaintiffs also moved for a preliminary injunction to be heard on July 18, 2023. ECF Nos. 25, 26.

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The SBCC earlier moved to dismiss and opposed the entry of a preliminary injunction because the Eleventh Amendment bars Plaintiffs' lawsuit, among other reasons. ECF No. 38 at 22–25; ECF No. 43 at 3–5. In response, Plaintiffs amended their complaint naming each member of the SBCC in their official capacity as a Defendant. ECF No. 47; *see also* ECF No. 48 at 3 ("Defendants' argument that Plaintiffs' claims are barred by the 11th Amendment has been rendered moot by the Plaintiffs' Amended Complaint . . . ."). The SBCC withdrew its motion to dismiss, and Defendants now file this motion to address the addition of the new defendants.

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 raised under either Rule 12(b)(1) or Rule 12(b)(6). *Sato v. Orange Cnty. Dep't of Educ.*, 861 F.3d 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.

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Doe v. Regents of the Univ. of California, 891 F.3d 1147, 1153–54 (9th Cir. 2018).

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).

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).

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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). 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 alleges a factual challenge to jurisdiction because it challenges the truth of certain allegations in the Amended Complaint. *Safe Air for Everyone*, 373 F.3d at 1039. Specifically, the Amended Complaint alleges that the SBCC and its members direct the enforcement of the challenged provisions. ECF No. 47 at 8 ¶ 30. But that is not true; the SBCC has no role in the enforcement of the codes it enacts. ECF 40 at 2 ¶ 3. The Amended Complaint further alleges that the challenged amendments became effective on July 1, 2023, and that the SBCC's attempt to postpone their effectiveness was futile.

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ECF No. 47 at 7, 10 ¶¶ 24–26. That allegation is separable from the merits of Plaintiffs' claims, and it is not 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*, 343 F.3d at 1039 n.2). This motion therefore cites evidence relating to the SBCC's enforcement authority and its 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*.

IV. ARGUMENT

The Court should dismiss Plaintiffs' claims for two separate reasons. First, the Eleventh Amendment bars Plaintiffs from suing the SBCC or its members because the SBCC itself is a state agency and none of the members of the SBCC have any role in enforcing the building codes that Plaintiffs challenge. Second, Plaintiffs lack Article III standing and ripeness. 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. This Court lacks subject matter jurisdiction.

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A. Plaintiffs' Claims are Barred by the Eleventh Amendment

Plaintiffs' Amended 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, 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 the 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 (Wash. Rev. Code § 19.27.085(1)), and, as with all State agencies, the State is responsible for satisfying money judgments

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against it (*see generally* Wash. Rev. Code § 4.92). Second, SBCC performs central governmental functions, specifically adopting and maintaining statewide building codes consistent with the State's interest (Wash. Rev. Code § 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.* § .070), and the only work it does in its own name is the promulgation of statewide building codes (*id.* § .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.* § .074(2). Even employment of staff and provision of administrative and information technology services is the responsibility of DES rather than the SBCC itself. *Id.* § .074(3). And finally, as to corporate status, the SBCC is a State statutory executive branch body. *See* Wash. Rev. Code §§ 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 and its members 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*

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Young, 209 U.S. 123, 157 (1908). The connection between the official sued and enforcement of the challenged law "must be fairly direct," and even "a generalized duty to enforce state law or general supervisory power over the persons responsible for enforcing the challenged provision" does not suffice. *Los Angeles Cnty. Bar Ass'n v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992) (*citing Long v. Van de Kamp*, 961 F.2d 151, 152 (9th Cir.1992)). Or, stated more directly: "Absent a real likelihood that the state official will employ his supervisory powers against plaintiffs' interests, the Eleventh Amendment bars federal court jurisdiction." *Long*, 961 F.2d at 152.

Because the council members do not have a "fairly direct" connection to enforcement of the challenged codes, *Ex parte Young* does not apply. The SBCC and its members' statutory responsibility is to adopt and maintain statewide building codes, consistent with the State's interest (Wash. Rev. Code §§ 19.27.074(1)(a)–(c))). However, the SBCC lacks authority or any mechanism to enforce the codes. This is because "[t]he state building code . . . shall be enforced by the counties and cities[,]" and specifically by local building code officials responsible for approval of building permit applications, as well as code enforcement. Wash. Rev. Code § 19.27.050; *see also id.* § .031 (providing that the SBCC "may issue opinions relating to the codes at the request of *a local official charged with the duty to enforce the enumerated codes*") (emphasis added); ECF No. 40. The council members have no duty to enforce the code, nor do they have any ability or mechanism to do so.

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Further, individuals acting in their role as members of the council have no supervisory power over the county and city officials who are responsible for code enforcement. Rather, the Washington Constitution treats counties and cities as separate political subdivisions of the State. Wash. Const. art. XI, §§ 4, 10. This "home rule" principle "seeks to increase governmental accountability by limiting state-level interference in local affairs." *Watson v. City of Seattle*, 401 P.3d 1, 10 (2017). No state officer or agency has general command-and-control over the decisions of local governments. *See Mochizuki v. King County*, 548 P.2d 578, 580 (1976) ("Counties are considered separate political subdivisions with particular powers conferred by constitution and statute."). The enforcement of local building codes is no exception. Thus, the council members have no ability to employ any supervisory powers to act "against plaintiffs' interests," and "the Eleventh Amendment bars federal court jurisdiction." *Long*, 961 F.2d at 152.

Finally, Plaintiffs cannot overcome this barrier by claiming that adoption of the codes is itself a directive to enforce the regulations statewide. ECF No. 48 at 4. Plaintiffs cite no Eleventh Amendment case law to support this novel proposition. If it were sufficient, the Eleventh Amendment's protections would be eviscerated. Any plaintiffs could bring any number of challenges against a state by also naming as a defendant every state legislator—or, as here, every member of a quasi-legislative state agency—and stating that passage of a law is a directive to enforce that law. Even "a duty to enforce state law or general supervisory power over the persons responsible for enforcing the challenged

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provision" does not suffice to convey *Ex parte Young* jurisdiction. *Eu*, 979 F.2d at 704. The act of adopting a building code or passing a law is even more remote. *Ex parte Young* fails to save Plaintiffs' claims, which are barred by the Eleventh Amendment.

Third, Congress has not abrogated the States' sovereign immunity. That test requires Congress to "'unequivocally express[] its intent to abrogate' the states' immunity in the legislation itself." *Douglas*, 271 F.3d at 818 (quoting *Kimel v. Fl. Bd. of Regents*, 528 U.S. 62, 73 (2000)). EPCA does not contain any unequivocal expression of Congress's intent to abrogate the states' immunity, meaning the inquiry ends there. *See id*.

The Eleventh Amendment therefore bars Plaintiffs' claims against the SBCC and its members and requires dismissal of the Amended 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 Amended Complaint must also be dismissed because it fails to show justiciability under Article III and, therefore, the Court lacks subject matter jurisdiction. This alone is reason to grant Defendants' motion. But this case is also not prudentially ripe. Plaintiffs' preemption challenge is not fit for judicial resolution, because the SBCC has delayed the rules in order to permit rulemaking

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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"—it cannot depend 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, 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).

Plaintiffs cannot make either showing. The rules they claim will injure them (*see* ECF No. 47 at 11 ¶¶ 42–48) have been delayed to allow the SBCC to consider amended rules following the Ninth Circuit's preemption analysis in *California Restaurant Association*. Bumbalov Decl. ¶¶ 11–17, Exs. B, C; Decl. of Kjell Anderson (Anderson Decl.) ¶¶ 8–9. As that case 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

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EPCA preemption. Bumbalov Decl., Ex. C; Anderson Decl. ¶ 8. If the process is not complete by the rules' current 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).

Plaintiffs claim that the SBCC's postponement of the rules was not procedurally proper under Washington law (ECF No. 47 at 7 ¶ 26), but it is not clear what that gets Plaintiffs in this lawsuit. Regardless of whether Washington law permits the SBCC to act as it did (and it does, *see* Wash. Rev. Code §§ 34.05.360, .380), it is clear that neither the SBCC nor its members have any intention of enforcing the challenged code provisions against Plaintiffs, even if they could. And without that, Plaintiffs do not have standing. *See Thomas*, 220 F.3d at 1140 (for plaintiffs to have standing "the threat of enforcement must at least be 'credible,' not simply 'imaginary or speculative.'") (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)).

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

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Dustin Curb (Curb Decl.) ¶ 6; *see also Hull v. Hunt*, 331 P.2d 856, 859 (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. Dep't of Energy*, 254 F.3d 791, 799 (9th Cir. 2001).

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.

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2. This case is not prudentially ripe

Even if the Amended 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 v. Brammer*, 616 F.3d 1045, 1060 (9th Cir. 2010) (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 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 if necessary to maintain compliance with EPCA in light of the Ninth Circuit's opinion. Deciding this case now, on the basis of rules that are not in effect and that may 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

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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 and other jurisdictional requirements). 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

The Court should dismiss the Amended Complaint as barred by the Eleventh Amendment and for lack of subject matter jurisdiction.

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DATED this 17th day of July 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 17th day of July 2023, at Seattle, Washington.

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