Via email: sbcc@des.wa.gov

September 1, 2023
State Building Code Council, Mechanical Ventilation and Energy Committee Members
PO Box 41449,
Olympia WA 98504-1449

RE: Legal Letter in Support of Energy Code TAG Proposals

Dear MVE Committee Members,

RMI encourages members of the MVE committee to review the attached legal analysis of the code proposals that will be under consideration on September 7th. We hope that this letter helps explain why the proposals under consideration address EPCA related concerns.

Thank you,

Jonny Kocher
Manager
RMI

PUBLIC HEALTH
LAW CENTER
at Mitchell Hamline School of Law

**To:** **Jonny Kocher, RMI**
**From:** **Jamie Long, PHLC**
**Date:** **August 31, 2023**
**RE:** **EPCA Preemption of WA Building Code Proposal**

This memo analyzes proposed building code updates submitted to the Washington State Building Code Council ("WSBCC"), concluding that they are likely to withstand potential preemption challenges under the Energy Policy and Conservation Act ("EPCA").

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## I. Introduction

Buildings are one of the largest sources of greenhouse gas emissions in the United States.[1] It is understandable then that many state and local governments are seeking to curb emissions through building codes, and Washington State is no exception.[2] This memo provides an overview of EPCA statutory preemption then discusses how the statute and caselaw would likely be applied to a challenge to three proposed building code updates for Washington State. It concludes that each of these proposals would likely survive an EPCA preemption challenge.

## II. EPCA Preemption Overview

EPCA was first enacted in 1975 in response to the 1973 oil crisis to allow for the establishment of energy efficiency standards for certain consumer products. EPCA's general rule, dating back to a 1978 amendment,[3] preempts states or local governments

[1] Buildings account for about 12.5 percent of total US greenhouse gas emissions through the use of fossil fuels for heating, cooling, and cooking, or 30 percent when energy consumption is included. Resources for the Future, "Federal Climate Policy 106: The Buildings Sector," (June 2023) *available at* https://www.rff.org/publications/explainers/federal-climate-policy-106-the-buildings-sector.
[2] *See* Wash. Rev. Code §§ 19.27A.020(2)(a) (setting a goal of building zero fossil-fuel greenhouse gas emission homes and buildings by 2031); 19.27A.160(2) (requiring energy codes that "incrementally move towards achieving the seventy percent reduction in annual net energy consumption" by 2031).
[3] National Energy Conservation Policy Act, Pub. L. 95-619, § 424(a), 92 Stat. 3206, 3263-64.

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from enacting energy efficiency or energy use standards for covered products.[4] This was modified in 1987 by creating an exemption for energy standards in state and local building codes meeting certain specified criteria.[5]

If a state or local building code would otherwise be preempted as an energy use or energy efficiency standard, there are seven criteria the code can meet to receive an exemption from preemption.[6] These are as follows:

A) Allows builders to select items whose combined energy efficiency meet an energy goal;
B) Does not require that a covered product exceed EPCA standards;
C) For products exceeding EPCA standards, allows them to comply on a "one-for-one equivalent energy use or equivalent cost basis";
D) If a code uses a baseline building design, it must assume covered products meet but do not exceed EPCA standards;
E) If a code allows a combination of items to meet the energy objective, at least one of the options must include covered products that do not exceed EPCA standards;
F) The energy goal must be specified in "terms of an estimated total consumption of energy"; and
G) Product testing procedures must be consistent with EPCA.[7]

The Energy Policy Act of 1992 expanded the federal appliance program to cover commercial and industrial appliances.[8] This expansion largely incorporated the preemption framework from EPCA.[9]

EPCA also contains a waiver process whereby a state or local government can apply to the Department of Energy to request a waiver from preemption for "unusual and compelling" state or local interests.[10] A waiver discussion is beyond the scope of this memo, except to note that a jurisdiction meeting the full seven-factor test for its building code need not apply for a waiver and is automatically deemed safe from EPCA preemption.[11]

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[4] 42 U.S.C. § 6297(c) (2023) (unless a listed exception is met, "no State regulation concerning the energy efficiency, energy use, or water use of such covered product shall be effective").
[5] 42 U.S.C. § 6297(c)(3) (2023) (exempting building codes for new construction described in subsection (f)(3)).
[6] 42 U.S.C. § 6297(f)(3) (2023).
[7] *Id.*
[8] 42 U.S.C. §§ 6295(j)-(k), 6313 (2023).
[9] 42 U.S.C. § 6316(a)-(b) (2023).
[10] 42 U.S.C. § 6297(d)(1)(C) (2023).
[11] 42 U.S.C. § 6297(f)(4)(A) (2023).

## III. Residential Electric Prescriptive Proposal

This section discusses the 21-GP3-035 proposal submitted by Henry Odem with Ecotope. This proposal was approved by the Technical Advisory Group in July 2023 incorporating some additional credit options from proposals 21-GP3-001 and 21-GP3-020.[12] It will be taken up by the Mechanical Ventilation and Energy Committee in September.

The EPCA preemption analysis asks broadly: 1) is the code regulating energy use or energy efficiency of a covered product such that EPCA preemption applies?; and 2) if so, does the code meet the criteria for exemption from EPCA preemption? The prescriptive residential code proposal directly regulates EPCA covered products (e.g. furnaces, water heaters), so the question then is whether it qualifies for an exemption.

The prescriptive residential code proposal sets out minimum energy efficiency credit targets that new residential construction must meet.[13] These targets can be met through a combination of measures including a more efficient building envelope, more efficient ventilation, high efficiency HVAC equipment, efficient water heating, renewable energy installation, and efficient appliances. This proposal meets the seven-factor EPCA test for exemption from federal preemption, as described below.

***Prong A***) Allows builders to select items whose combined energy efficiency meet an energy goal

The prescriptive residential proposal meets Prong A of the EPCA test as it is designed to provide builders with options to meet specific energy goals by combining energy efficiency scores. A builder can combine scores across a range of items to meet the goal for their dwelling unit type.

***Prong B***) Does not require that a covered product exceed EPCA standards

The second EPCA preemption prong is likely the most important to a court challenge, and the prescriptive residential proposal meets it. The proposal does not require that a specific product be installed that exceeds EPCA standards. In fact, the required efficiency scores can be met without installing appliances above federal requirements. For example, to meet the Medium Dwelling Unit requirement of 8 credits,

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[12] *See* Washington State Building Code Council ("WSBCC") Technical Advisory Group ("TAG"), Group 3 Code Proposals, July 17, 2023, *available at* https://www.sbcc.wa.gov/sites/default/files/2023-07/EPCA%20Proposal%20Log%202021%20WSEC_071323r.pdf.

[13] Submission from Henry Odem, Ecotope to WSBCC, Log No. 21-GP3-035, R406.3 (Jan 2022), *available at* https://sbcc.wa.gov/sites/default/files/2023-06/21-GP3-035_R406_Odem.pdf (hereinafter "21-GP3-035").

a builder can receive up to 2.5 credits for an efficient building envelope, up to 2.0 credits for efficient ventilation, and up to 4.5 credits for renewable energy.[14]

In 2012, Washington State's building code at the time was upheld by the Ninth Circuit against an EPCA preemption challenge.[15] That Washington state code set out a 15% reduction in new building energy consumption from a baseline and offered three compliance options.[16] Similar to the current prescriptive residential proposal, two of the pathways allowed builders to earn credits through alternative energy reduction approaches, such as the efficiency of the building's shell, efficiency of home heating equipment, or efficiency of other energy consuming devices.[17] The court found that the code complied with prong B because "it does not create any penalty or legal compulsion to use higher efficiency products" and because it did not require higher efficiency products as the "only way to comply with the code."[18]

Similarly here, there is no legal compulsion or requirement to use higher efficiency appliances, as the credit targets can be achieved without such products. As the Ninth Circuit found, "[a] requirement would have to be in the Code."[19] In the 2012 case, the challengers attempted to argue that the options other than installing appliances above EPCA standards were so costly that it was in effect a requirement on builders to install them.[20] But the court rejected the argument that an economic incentive to adopt equipment more efficient than EPCA standards was a requirement to do so.[21] The court noted that installing more efficient devices than federal standards was in fact cheaper for the builders than the alternatives.[22] That is also the case here, where it would be cheaper for builders to install heat pumps than gas alternatives if they choose to seek those credits.[23]

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[14] 21-GP3-035, Table R406.3.
[15] *Bldg. Indus. Ass'n of Wash. v. Wash. State Bldg. Code Council*, 683 F.3d 1144 (9th Cir. 2012)
[16] *Id.* at 1149.
[17] *Id*.
[18] *Id.* at 1152.
[19] *Bldg. Indus. Ass'n of Wash.*, 683 F.3d at 1151.
[20] Similar to the 2012 Washington code lawsuit, a challenger may try to point to an unpublished 2008 decision that found the Albuquerque, New Mexico building code to be preempted under EPCA. *Air Conditioning, Heating and Refrigeration Inst. v. City of Albuquerque*, No. 08–633 MV/RLP, 2008 WL 5586316 at *7 (D. N.M. Oct. 3, 2008). But the Ninth Circuit distinguished this decision in its 2012 ruling on the Washington State code, finding that so long as the building code does not impose "a penalty for not using higher efficiency products" then there is no impermissible "requirement" under EPCA. *Bldg. Indus. Ass'n of Wash.*, 683 F.3d at 1152. The proposed prescriptive residential code meets this test for the reasons discussed above.
[21] *Bldg. Indus. Ass'n of Wash.*, 683 F.3d at 1151.
[22] *Id.* at 1145.
[23] Conversation with Jonny Kocher, RMI (Aug. 28, 2023).

***Prong C***) For products exceeding EPCA standards, allows them to comply on a "one-for-one equivalent energy use or equivalent cost basis"

The prescriptive residential proposal would also meet the third prong of the EPCA preemption exemption test. In the 2012 Washington case, the court explained the intent of prong C as follows: "By requiring credits to be awarded for equivalent energy savings on a 'one-for-one' basis, Congress intended state and local building codes to assign credit values proportional to the amount of energy saved, without regard to the method chosen."[24] Credit values can be "closely proportional" because Congress did not intend "mathematical perfection."[25]

The proposed prescriptive residential code assigns "fuel normalization energy equalization credits" in order to "define the equivalent carbon emissions of the options specified."[26] The base fuel selection is then combined with the requirements in the "energy credits" table to determine if a unit meets the required total credits.[27] This is precisely the type of comparative analysis that Congress anticipated with this requirement. A builder will get credit for the amount of energy saved in different situations, without favoring a particular product or building method. Also, as the Ninth Circuit emphasized, the math does not have to be perfect – it only must be fact-based and "closely proportional." These tables clearly meet this requirement, as the normalization tables are designed to increase the accuracy of the credits from previous building codes (including the methods upheld previously by the Ninth Circuit) to achieve close equivalency in measuring energy use between heat pumps and fossil fuel appliances.[28]

***Prong D***) If a code uses a baseline building design, it must assume covered products meet but do not exceed EPCA standards

Prong D is met by the proposed prescriptive residential code as the baseline building design assumes that a builder is installing EPCA compliant appliances.

***Prong E***) If a code allows a combination of items to meet the energy objective, at least one of the options must include covered products that do not exceed EPCA standards

Prong E of the EPCA test does not apply because the prescriptive residential proposal does not set forth "one or more optional combinations of items" for builders to

[24] *Bldg. Indus. Ass'n of Wash.*, 683 F.3d at 1154.
[25] *Id.* at 1155.
[26] 21-GP3-035, Table R406.2.
[27] *Id.* at R406.3.
[28] Conversation with Jonny Kocher, RMI (Aug. 28, 2023).

choose from.[29] Rather, builders can make their own combinations from a list of potential credits.[30]

***Prong F***) The energy goal must be specified in "terms of an estimated total consumption of energy"

The prescriptive residential code meets prong F because the credit goals are based on a comparative estimate of energy consumption. The energy analysis to prepare the credit goals was performed by building energy experts Ecotope.

***Prong G***) Product testing procedures must be consistent with EPCA

Prong G is not applicable to the prescriptive residential proposal as the proposal does not specify product testing procedures.

## IV. Commercial Electric Performance Proposal

The second proposal this memo will discuss is the Kocher revision to 21-GP3-036,[31] a commercial electric performance code that was approved in a unanimous voice vote by the Technical Advisory Group on August 29, 2023.[32] This approach requires compliance with the American Society of Heating, Refrigerating and Air-Conditioning Engineers ("ASHRAE") performance rating method (90.1, Appendix G) with modifications to meet both regulated and total site energy targets.[33] Building performance factors are specified based on building type to be used for compliance.[34] These factors were calculated by Pacific Northwest National Lab ("PNNL") based on site energy usage.[35] This second proposal also meets the seven-factor EPCA test for exemption from federal preemption, as described below.

***Prong A***) Allows builders to select items whose combined energy efficiency meet an energy goal

Using a performance metric allows building owners substantial flexibility to achieve the targets, so the commercial electric performance proposal meets the first prong of the seven-factor test. For example, to meet a building performance target an owner

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[29] 42 U.S.C. § 6297(f)(3)(E) (2023).
[30] 21-GP3-035, Table R406.3.
[31] Submission from Jonny Kocher, RMI to WSBCC, Log No. 21-GP3-036 Ver.3 (Aug. 24, 2023), *available at* https://sbcc.wa.gov/sites/default/files/2023-08/21-GP3-036_REV3_WSEC_C_Kocher_082423.pdf (hereinafter "21-GP3-036").
[32] WSBCC TAG Tracking Log (Aug. 29, 2023), *available at* https://sbcc.wa.gov/sites/default/files/2023-08/EPCA_Proposal_Log_2021_WSEC_082923.pdf.
[33] 21-GP3-036 at C407.3.
[34] *Id.* at C407.3(2).
[35] Conversation with Jonny Kocher, RMI (Aug. 28, 2023).

could choose to select from options including installing an efficient HVAC system, creating a well-insulated building envelope, reducing air leakage, or installing energy efficient lighting and lighting controls.

***Prong B***) Does not require that a covered product exceed EPCA standards

The commercial performance proposal also meets the second EPCA prong. Similar to how the Ninth Circuit's 2012 decision viewed Washington's flexible building code approach, a performance metric does not require "a builder, as a matter of law, to select a particular product or option."[36] Builders can select from any number of approaches to reduce energy consumption to achieve the building performance targets, and this need not include selection of covered appliances that would exceed EPCA standards.

For example, the sections relating to building mechanical systems and to service water heating systems make clear the builder has a choice regarding these products. They can if they choose comply with a prescriptive heat pump requirement (C403 or C404) or they can build an energy model (C407) where compliance can be achieved using a range of efficiency options while installing all EPCA minimally compliant products.[37]

Certainly, choosing to install more efficient appliances could assist in meeting the performance targets, but as the Ninth Circuit held, an economic incentive to install products above EPCA is not enough to fail the second prong.[38]

***Prong C***) For products exceeding EPCA standards, allows them to comply on a "one-for-one equivalent energy use or equivalent cost basis"

Using a performance metric ensures that there is a one-to-one equivalency for the energy use of products exceeding EPCA standards. The factors are based on site energy use, as calculated by PNNL, and any use of efficient appliances will reduce the site energy use needed to meet the building performance factor on a one-to-one basis.

***Prong D***) If a code uses a baseline building design, it must assume covered products meet but do not exceed EPCA standards

The building performance factors used for compliance in the commercial performance proposal are calculated using 100 as the site energy use intensity of a building built to ASHRAE 2004 levels.[39] Since the 2004 baseline building design used minimum EPCA compliant products, the proposal satisfies prong D.

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[36] *Bldg. Indus. Ass'n of Wash.*, 683 F.3d at 1145.
[37] 21-GP3-036 at C503.4 & C503.5.
[38] *Bldg. Indus. Ass'n of Wash.,* 683 F.3d at 1145, 1151-52.
[39] Email from Jonny Kocher, RMI (Aug. 31, 2023).

***Prong E***) If a code allows a combination of items to meet the energy objective, at least one of the options must include covered products that do not exceed EPCA standards

The commercial performance proposal does not set forth "one or more optional combinations of items" such that this prong of the test would be triggered, so it is not applicable.[40] The performance approach does not lay out a menu of options, but instead lets the builder select from any approach that meets the performance goal.

***Prong F***) The energy goal must be specified in "terms of an estimated total consumption of energy"

The use of site energy performance factors complies with this prong. The PNNL calculated performance factors are adjusted for specific building types based on estimated total consumption of energy at the site for those buildings.

***Prong G***) Product testing procedures must be consistent with EPCA

Prong G is not applicable to the proposed commercial performance code as the code does not specify product testing procedures.

## V. Commercial Electric Prescriptive Proposal

The third proposal this memo will discuss is the Kocher revision to 21-GP3-037,[41] a commercial electric prescriptive code also approved by the Technical Advisory Group on August 29, 2023.[42] This draft gives commercial buildings compliance pathway options for fossil fuel space heating and for heat pumps.[43] It also requires builders to meet additional energy efficiency and load management measure credit requirements.[44] As discussed below, the prescriptive commercial proposal also meets the seven-factor EPCA test for exemption from federal preemption.

***Prong A***) Allows builders to select items whose combined energy efficiency meet an energy goal

As with the two proposals discussed above, the commercial prescriptive proposal also allows in both the fossil fuel and heat pump pathways for a range of options to

[40] 42 U.S.C. § 6297(f)(3)(E) (2023).
[41] Submission from Jonny Kocher, RMI to WSBCC, Log No. 21-GP3-037 (Kocher revised draft 8/28/23 with TAG Revisions 8/29/23), *available at* https://sbcc.wa.gov/sites/default/files/2023-08/21-GP3-037_TAGREC_REV3_5_WSEC_C_Kocher_082923.pdf (hereinafter "21-GP3-037").
[42] WSBCC TAG Tracking Log (Aug. 29, 2023), *available at* https://sbcc.wa.gov/sites/default/files/2023-08/EPCA_Proposal_Log_2021_WSEC_082923.pdf.
[43] 21-GP3-037 at C403.1.4.
[44] *Id.* at C406.

achieve the required energy efficiency credits. In the fossil fuel pathway for example, these can include credits for up to 34 separate options including installing or using renewable energy, efficient building envelopes, and HVAC and lighting controls.[45]

***Prong B***) Does not require that a covered product exceed EPCA standards

The commercial prescriptive proposal allows for compliance with its credit requirements while installing minimally compliant EPCA covered products, meeting the second prong in the seven-factor test. Compliance for builders could include any of the following potential options if the builder selects the fossil fuel pathway:

- More efficient HVAC equipment + energy efficiency measures
- More efficient HVAC equipment + high efficiency fossil fuel appliances
- Mix of fossil fuel and heat pump technology
- EPCA minimum compliant equipment + energy efficiency measures + solar [46]

In this last example of meeting the credit requirement while using all EPCA compliant products, compliance would include a high performance dedicated outside air systems (DOAS) to separate heating and cooling from the ventilation system, obtaining renewable energy credits, and using enhanced reduced air leakage.[47]

Like the other two proposals, there is no "requirement" within the meaning of EPCA that a product exceeding EPCA standards be installed. As with the 2012 Washington State code the Ninth Circuit upheld, this commercial prescriptive proposal does not "command, demand, or insist that builders select higher efficiency options" than minimal federal requirements for covered EPCA products.[48] Also, a challenger would not succeed in arguing that simply incentivizing the installation of higher efficiency products under this proposal converts it into a requirement under EPCA. As the Ninth Circuit noted, "require" means "compulsion backed by the force of law."[49] The builder has a definite choice in the many options they can pursue in meeting the required credits, and an economic incentive – rather than a legal compulsion – is not enough to violate this prong of the seven-factor test.[50]

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[45] *Id.* at Table C406.2(2).
[46] *See* Presentation from Jonny Kocher, RMI to WSBCC TAG, "Jonny Kocher's 037 Slideshow," (August 29, 2023), *available at* https://sbcc.wa.gov/sites/default/files/2023-08/Kocher_036_037_Presentation_082923.pdf.
[47] *Id.* at Slide 8.
[48] *Bldg. Indus. Ass'n of Wash.*, 683 F.3d at 1145.
[49] *Id.* at 1151.
[50] *Id.* at 1152-53 (citing the Supreme Court ruling in *Bates v. Dow Agrosciences, LLC* as demonstrating that an "economic incentive to reach the outcome otherwise forbidden" is not a "requirement" having the force of law).

***Prong C***) For products exceeding EPCA standards, allows them to comply on a "one-for-one equivalent energy use or equivalent cost basis"

The prescriptive commercial proposal also meets the third prong of the test, as it takes great care to ensure that the two pathways are as equivalent as possible in measuring energy use. The proposals achieve this through baseline normalization for space and water heating for both the heat pump and fossil fuel pathways, using calculations generated by the PNNL.[51] There is even a separate approach for builders to blend credits if using heat pumps with a fossil fuel backup.[52]

As the Ninth Circuit recognized, this prong does not require perfection but instead credit values that are "closely proportional."[53] The approach taken here is in fact an improvement over previous versions of the Washington State code, where there was a gap in energy performance between fossil fuel and heat pump buildings that would now be normalized to a functional equivalency.[54] So, for a builder that chose to install a heat pump or another covered product exceeding EPCA standards, this certainly qualifies as "closely proportional," satisfying the one-for-one equivalency requirement to survive preemption.

***Prong D***) If a code uses a baseline building design, it must assume covered products meet but do not exceed EPCA standards

The baseline used for the calculations in the commercial prescriptive approach assumes EPCA compliant covered products.[55] So, this complies with prong D of the EPCA test.

***Prong E***) If a code allows a combination of items to meet the energy objective, at least one of the options must include covered products that do not exceed EPCA standards

Prong E of the EPCA test does not apply because the prescriptive commercial proposal does not set forth "one or more optional combinations of items" for builders to

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[51] *See* Submissions by PNNL to WSBCC TAG, "PNNL Support Data for Kocher's 12-GP3-037 C406 Revision, 8/28/23" & "PNNL EUI Credit Worksheet for Kocher's 037, 8/28/23" (August 29, 2023), *available at* https://sbcc.wa.gov/sites/default/files/2023-08/PNNL_AlternativeCreditCalcs_heat-cool-hpwh_037K_R3_5_082823.pdf and https://sbcc.wa.gov/sites/default/files/2023-08/PNNL_New_EUI_Based_Credits_037K_Rev3_5_082823.pdf, respectively.
[52] 21-GP3-037 at C406.2.
[53] *Bldg. Indus. Ass'n of Wash.*, 683 F.3d at 1154-55.
[54] *See* "Jonny Kocher's 037 Slideshow," at Slide 2.
[55] Conversation with Jonny Kocher, RMI (Aug. 28, 2023).

choose from.[56] Rather, builders can make their own combinations from a list of potential efficiency measure credits.[57]

***Prong F***) The energy goal must be specified in "terms of an estimated total consumption of energy"

The goals in the prescriptive commercial proposal are expressed in the form of energy efficiency credits, which meets this requirement as an estimated total consumption of energy.[58]

***Prong G***) Product testing procedures must be consistent with EPCA

Prong G is not applicable to the proposed prescriptive commercial code as the code does not specify product testing procedures.

## VI. Berkeley Decision

While the WSBCC recently paused its building code updates to assess the impact of the Ninth Circuit's ruling in *California Restaurant Association v. Berkeley*, the *Berkeley* decision is not particularly relevant to a potential EPCA legal challenge to the three proposals discussed above. This is because the Ninth Circuit's finding in *Berkeley* analyzes a different EPCA provision entirely than what a court would be asked to review in any challenge to the above proposals.

The *Berkeley* ruling assessed the novel issue of whether a prohibition on natural gas infrastructure in most new buildings violated EPCA preemption.[59] None of the proposals discussed in this memo would prohibit natural gas infrastructure. The question for the Ninth Circuit was a threshold one of whether EPCA preemption applied at all to an indirect regulation of EPCA covered products. The court therefore focused its analysis entirely on EPCA's general preemption provision (42 U.S.C. § 6297(c)) instead of the seven-factor test for building codes (42 U.S.C. § 6297(f)(3)). In fact, one of the judges noted in concurrence that it was "undisputed" that the Berkeley ordinance failed the seven-factor test.[60] In short, the seven-factor test was not at issue in the *Berkeley* decision. As a result, far more relevant to a court asked to review any of the above proposals would be the 2012 Ninth Circuit ruling this memo has often referenced, upholding a previous Washington building code against an EPCA preemption challenge based on the seven-factor test.[61]

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[56] 42 U.S.C. § 6297(f)(3)(E) (2023).
[57] 21-GP3-037, Table C406.2(2).
[58] *Id.*
[59] *Cal. Restaurant Assn. v. City of Berkeley*, 65 F.4th 1045 (9th Cir. 2023).
[60] *Id.* at 1067
[61] *Bldg. Indus. Ass'n of Wash.*, 683 F.3d 1144.

As the WSBCC noted in its motion to dismiss the recent *Rivera* lawsuit, the *Berkeley* decision acknowledged that "state building codes are exempt from preemption if they meet certain statutory criteria" and that "The SBCC is actively participating in rulemaking to amend its rules to fit within this exemption."[62] As discussed above, each of these three proposals meets the seven-factor test exempting them from EPCA preemption and the WSBCC should feel confident in their legal footing.

[62] Defendant's Motion to Dismiss, *Rivera v. Wash. State Bldg. Code Council*, NO. 1:23-cv-03070-SAB (E.D. Wash., Jun. 22, 2023) at 1.