

1 LANE POWELL PC
Callie A. Castillo, WSBA No. 38214
2 Devon J. McCurdy, WSBA No. 52663
Angela Foster, WSBA No. 52269
3 Daniel Miller, WSBA No. 56810
1420 Fifth Avenue, Suite 4200
4 P.O. Box 91302
Seattle, Washington 98111-9402
5 Telephone: 206.223.7000
Facsimile: 206.223.7107
6 castilloc@lanepowell.com
mccurdyd@lanepowell.com
7 fostera@lanepowell.com (*admission to Eastern District of Washington
forthcoming*)
8 millerd@lanepowell.com (*admission to Eastern District of Washington
forthcoming*)
9 *Counsel for the Homeowners, Builders, and Suppliers*

10 BAKER BOTTS L.L.P.
Megan H. Berge (DC Bar No. 983714) (*pro hac vice*)
11 Thomas Jackson (DC Bar No. 384708) (*pro hac vice*)
Scott Novak (DC Bar No. 1736274) (*pro hac vice admission pending*)
12 700 K Street NW
Washington, D.C. 20001
13 202-639-1308
megan.berge@bakerbotts.com
14 thomas.jackson@bakerbotts.com
scott.novak@bakerbotts.com
15
Francesca Eick (WA Bar No. 52432)
16 401 S 1st, Suite 1300
Austin, TX 78704
17 512-322-2672
francesca.eick@bakerbotts.com
18 *Counsel for the Utilities*

19
20

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON**

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

Plaintiffs,

v.

WASHINGTON STATE BUILDING
CODE COUNCIL,

Defendant.

No. 1:23-cv-03070-SAB

**PLAINTIFFS’ MOTION FOR
PRELIMINARY INJUNCTION**

With Oral Argument: July 3, 2023 or
To Be Determined by Court

Table of Contents

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20

	Page
I. INTRODUCTION	1
II. RELEVANT BACKGROUND.....	2
III. LEGAL STANDARD.....	4
IV. ARGUMENT.....	4
A. Plaintiffs are likely to succeed on the merits because the Appliance Restrictions ban EPCA-covered products.	4
1. Federal energy standards exist for the restricted products.....	5
2. The Appliance Restrictions concern energy use of these products.....	5
3. The Appliance Restrictions are not exempt from preemption.....	7
B. The Appliance Restrictions will irreparably harm Plaintiffs.	7
C. Equity and the public interest strongly weigh in Plaintiffs’ favor.....	9
V. CONCLUSION.....	10

TABLE OF AUTHORITIES

Page(s)

CASES

Air Conditioning, Heating & Refrigeration Inst.v. City of Albuquerque,
2008 WL 5586316 (D.N.M. Oct. 3, 2008)5

Air Conditioning, Heating & Refrigeration Inst. v. City of Albuquerque,
835 F. Supp. 2d 1133 (D.N.M. 2010).....6

Ariz. Dream Act Coal.v. Brewer, 757 F.3d 1053, 1068 (9th Cir. 2014).....7

Bldg. Indus. Ass’n of Washington v. Washington State Bldg. Code Council,
683 F.3d 1144 (9th Cir. 2012)7

BNSF Railway Co. v. Cal. State Bd. Of Equalization,
2016 WL 6393507 (N.D. Cal. Oct. 28, 2016)7

Cal. Rest. Ass’n, v. City of Berkeley,
65 F.4th 1045 (9th Cir. 2023)1, 6

Disney Enters., Inc.v. VidAngel, Inc., 869 F.3d 848 (9th Cir. 2017).....4

Hernandez v. Sessions,
872 F.3d 976 (9th Cir. 2017)4

League of Women Voters of the U.S. v. Newby,
838 F.3d 1 (D.C. Cir. 2016).....10

Washington v. DeVos,
481 F. Supp. 3d 1184 (W.D. Wash. 2020)10

STATUTES

42 U.S.C. § 62011

42 U.S.C. § 6295(e)5

42 U.S.C. § 6295(f).....5

42 U.S.C. § 6297(c)5

1 42 U.S.C. § 6297(c)(3).....7

2 42 U.S.C. § 6297(f)(3).....7

3 42 U.S.C. § 6313(a)5

4 42 U.S.C. § 6316(b)(2)(A).....5

5 42 U.S.C. § 6316(b)(2)(B)(i)7

6 RCW 19.27A.025(3).....10

7 RCW 19.27A.045.....10

8 RCW 34.05.350(2).....3

8 **OTHER AUTHORITIES**

9 David Iaconangelo, *Washington state hits the brakes on landmark gas ban*, E&E
 10 News (May 25, 2025),
<https://subscriber.politicopro.com/article/eenews/2023/05/25/washington-state-hits-the-brakes-on-landmark-gas-ban-00098576>..... 1

11 Declaration of Brian L. Robertson.....9

12 Declaration of Cheryl Stewart8

13 Declaration of George Paras8

14 Declaration of Grant Forsyth9

15 Declaration of John Frankel.....9

16 Declaration of Kim Rush9

17 Declaration of Robb Koschalk.....9

18 Declaration of Ty Jennings8

19 All other declarations attached to this motion are incorporated by reference.

20

1 **I. INTRODUCTION**

2 Plaintiffs challenge recently adopted provisions of the Washington State
3 Energy Code (“Code”) that ban the use of appliances covered by the Energy Policy
4 and Conservation Act, 42 U.S.C. § 6201 *et seq.* (“EPCA”). The U.S. Court of
5 Appeals for the Ninth Circuit has confirmed such bans are preempted by federal law.
6 *See Cal. Rest. Ass’n*, 65 F.4th at 1048 (“*Berkeley*”). In response to the *Berkeley*
7 decision, Defendant Washington State Building Code Council (“Council”) announced its intent to temporarily stay the Code’s effective date, until October 29,
8 2023, while it considers amendments to address *Berkeley*. The author of the
9 temporary stay, Council Member and Energy Code Technical Advisory Group Chair
10 Kjell Anderson, acknowledged that “We need to comply with [the *Berkeley*] ruling
11 or else leave ourselves and our building officials open to legal risk.”¹

13 This action comes too late for Plaintiffs. Plaintiffs are being harmed by the
14 Codes *now*, and the Council has no legal mechanism to stop the Codes from going
15 into effect unmodified on October 29, 2023. By statute, the Council cannot renew
16 the temporary stay, and amendments to the Code cannot take effect before the end
17 of the next legislative session, March 2024, at the soonest. Lacking any other avenue
18

19 ¹ David Iaconangelo, *Washington state hits the brakes on landmark gas ban*, E&E
20 NEWS, (May 25, 2025),
<https://subscriber.politicopro.com/article/eenews/2023/05/25/washington-state-hits-the-brakes-on-landmark-gas-ban-00098576>.

1 for relief, Plaintiffs ask this Court to preliminarily enjoin the challenged Code
2 provisions because they are preempted by EPCA and causing irreparable harm that
3 will only escalate once the Codes are effective.

4 **II. RELEVANT BACKGROUND**

5 The Council adopted amendments to the Code designed to ban or substantially
6 limit the use of gas appliances covered by EPCA. Adopted in two stages in 2022,
7 the amendments ban the use of EPCA-covered appliances in commercial buildings
8 (“Commercial Provisions”) and in residential buildings (“Residential Provisions”).

9 Both the Commercial and Residential Provisions provide a “prescriptive
10 compliance” pathway and a “total building performance compliance” pathway. The
11 prescriptive compliance pathway requires that each element of a building meet a
12 minimum acceptable standard, whereas the performance pathway requires modeling
13 the building as a whole to predict energy usage and assess compliance with energy
14 use and carbon emissions targets. Buildings must comply with one of the two
15 pathways. Section C401.2; Section R401.2.

16 The Commercial Provisions’ prescriptive and total building performance
17 compliance pathways generally ban the use of gas appliances for heating,
18 ventilation, and air conditioning (“HVAC”) systems and water heating systems.
19 Sections C403.1.4, C404.2.1, and Table C407.2. Similarly, the Residential
20 Provisions’ prescriptive and total building performance compliance pathways

1 generally require that water heating shall be provided by an electric or gas heat pump
2 system, thereby banning gas-fired water heating systems. Section R403.5.7, Table
3 R405.2(1). The Residential Provisions’ prescriptive compliance pathway likewise
4 requires that space heating shall be provided by an electric or gas heat pump system,
5 thereby banning other heating systems, such as gas-fired furnaces. Section R403.13.

6 The Code generally imposes the above restrictions (collectively, the
7 “Appliance Restrictions”) on gas appliances in newly constructed buildings, but the
8 restrictions also apply to alterations of or additions to existing buildings. *See, e.g.,*
9 Sections C503.4.6 and R503.1.2.

10 On May 24, 2023 (two days after Plaintiffs’ Complaint was filed), the Council
11 voted to take steps on June 30, 2023, to stay the Code’s effective date for 120 days,
12 thus moving the effective date of the Code to October 29, 2023. The Council also
13 voted to initiate new rulemaking to revise the Code in an attempt to better insulate it
14 from legal challenges. Nevertheless, the Code will go into effect on October 29—
15 unmodified—because the Council lacks the statutory authority to stay the new Code
16 beyond that date, *see* RCW 34.05.350(2) (“Identical or substantially similar
17 emergency rules may not be adopted in sequence . . .”), or to modify its provisions
18 before the Code must go into effect, *see* RCW 19.27A.045 (“Decisions to amend the
19 Washington state energy code for residential structures . . . shall not take effect before
20 the end of the regular legislative session in the next year.”); RCW 19.27A.025(3)

1 (“Decisions to amend the Washington state energy code for new nonresidential
2 buildings... shall not take effect before the end of the regular legislative session in
3 the next year.”).

4 **III. LEGAL STANDARD**

5 “A party can obtain a preliminary injunction by showing that (1) it is likely to
6 succeed on the merits, (2) it is likely to suffer irreparable harm in the absence of
7 preliminary relief, (3) the balance of equities tips in [its] favor, and (4) an injunction
8 is in the public interest.” *Disney Enters., Inc.*, 869 F.3d at 856 (internal quotation
9 marks and citations omitted). Under the “sliding scale” approach adopted by the
10 Ninth Circuit, these elements are “balanced, so that a stronger showing of one
11 element may offset a weaker showing of another.” *Hernandez*, 872 F.3d at 990
12 (internal quotation marks and citations omitted).

13 **IV. ARGUMENT**

14 **A. Plaintiffs are likely to succeed on the merits because the Appliance 15 Restrictions ban EPCA-covered products.**

16 EPCA preempts the Appliance Restrictions, which impermissibly regulate the
17 energy use of EPCA-covered consumer and commercial gas appliances by banning
18 such energy use altogether. Under EPCA, once the U.S. Department of Energy
19 (“DOE”) sets a federal energy conservation standard for any consumer “covered
20 product,” “no State regulation concerning the energy efficiency, energy use, or water
use of such covered product shall be effective with respect to such product,” unless

1 certain exemptions apply. *See* 42 U.S.C. § 6297(c). Similarly, for commercial and
2 industrial products, the federal standards shall “supersede any State or local
3 regulation concerning the energy efficiency or energy use of a product for which a
4 standard is prescribed or established pursuant to such section.” *Id.* § 6316(b)(2)(A).

5 These preemption provisions apply if three conditions are met. First, federal
6 energy conservation standards must exist for the products at issue. Second, the
7 regulation at issue must concern the energy efficiency, energy use, or water use of
8 the EPCA-covered products. Third, EPCA’s statutorily defined exemptions to
9 preemption must not apply. As discussed below, all three conditions are met here.

10 **1. Federal energy standards exist for the restricted products.**

11 The first condition is easily met. Federal energy conservation standards exist
12 for the products banned by the Appliance Restrictions, which include gas space and
13 water heating products. *See* 42 U.S.C. §§ 6295(e), (f), 6316(b)(2)(A), 6313(a). Thus,
14 the Appliance Restrictions ban EPCA-covered products.

15 **2. The Appliance Restrictions concern energy use of these products.**

16 The second condition is also met because the Appliance Restrictions concern
17 the energy use of these EPCA-covered products.

18 In the context of EPCA preemption, terms such as “concerning” “express a
19 broad pre-emptive purpose.” *Air Conditioning, Heating & Refrigeration Inst.*, 2008
20 WL 5586316, at *7. Thus, the “plain language of [EPCA] makes clear that Congress

1 intended the preemption to be broad in scope.” *Air Conditioning, Heating &*
2 *Refrigeration Inst.*, 835 F. Supp. 2d at 1136. EPCA’s legislative history also shows
3 Congress meant to “preempt[] state law under most circumstances” to address “the
4 problem of a growing patchwork of differing State regulations which would
5 increasingly complicate [appliance manufacturers’] design, production and
6 marketing plans.” *Id.* at 1136-37 (quotation omitted).

7 The Appliance Restrictions concern the energy use of EPCA-covered
8 products because the restrictions ban the installation of such products altogether. As
9 such, the Appliance Restrictions impermissibly require the energy use of EPCA-
10 covered products to be zero rather than at levels established by DOE under EPCA.

11 These are exactly the type of regulations concerning energy use that courts
12 have held EPCA preempts. The Ninth Circuit’s recent decision in *Berkeley* is
13 dispositive. In holding that EPCA preempts Berkeley’s building code ordinance
14 banning gas piping in newly constructed buildings because the ordinance concerned
15 the energy use of EPCA-covered products, the court found that “***EPCA would no***
16 ***doubt preempt an ordinance that directly prohibits the use of covered natural gas***
17 ***appliances in new buildings.*” *Berkeley*, 65 F.4th at 1056 (emphasis added). As the**
18 Council itself has implied, that is exactly what the Appliance Restrictions do here,
19 making this case an even more clearcut instance of EPCA preemption than *Berkeley*,
20 which involved an indirect ban on EPCA-covered products rather than a direct ban.

1 **3. The Appliance Restrictions are not exempt from preemption.**

2 The final condition is met because the Appliance Restrictions fail to qualify
3 for EPCA’s exemptions from preemption. To avoid preemption, a state regulation
4 of EPCA-covered products must meet specific requirements. 42 U.S.C. §§
5 6297(c)(3), (f)(3), 6316(b)(2)(B)(i). The Appliance Restrictions fail to meet a
6 number of these requirements because, in short, they do not allow builders to select
7 EPCA-covered gas appliances. Compl. ¶¶ 72–79; see *Bldg. Indus. Ass’n of*
8 *Washington*, 683 F.3d at 1145 (“Section 6297(f)(3)(B) is violated when the code
9 requires a builder, as a matter of law, to select a particular product or option.”).
10 Accordingly, the Appliance Restrictions cannot escape preemption under EPCA.

11 In light of the above, Plaintiffs have demonstrated a strong likelihood of
12 success on the merits that EPCA preempts the Appliance Restrictions.

13 **B. The Appliance Restrictions will irreparably harm Plaintiffs.**

14 The Appliance Restrictions are harming Plaintiffs now, and this harm will
15 escalate once the Codes are effective. Without a preliminary injunction from this
16 Court, the Appliance Restrictions will become effective in mere months, even if the
17 Council follows through on its plan to stay implementation of the Code for 120 days.
18 The harm to Plaintiffs is irreparable because there is “no adequate legal remedy, such
19 as an award of damages,” *Ariz. Dream Act Coal.*, 757 F.3d at 1068; see also, *BNSF*

1 *Railway Co.*, 2016 WL 6393507, to be had from the Council, and invalidation of the
2 restrictions later cannot undo the harm that has been and will be done.

3 The Appliance Restrictions are harming homeowners, builders, and suppliers
4 who are being forced to make costly changes to their building and infrastructure
5 plans now in order to account for the impending restrictions on certain types of
6 appliances and energy use. The Appliance Restrictions are already causing delays to
7 projects, *see* Stewart Decl. ¶ 7, and will unnecessarily increase the costs of building
8 homes and commercial buildings, as well as ownership and maintenance, by
9 eliminating effective and available energy appliances for heating water and ambient
10 air, *see, e.g.*, Paras Decl. ¶¶ 3–8. The increased building costs—which are not
11 accompanied by an equivalent increase in the value of a home—pose a dilemma for
12 homebuilders, who can either absorb the increased costs (with resulting lower profit
13 margins) or pass the costs on to customers and risk pricing some potential customers
14 out of the market. *See* Stewart Decl. ¶¶ 5–6.

15 The Appliance Restrictions are likewise causing irreparable harm to local
16 utilities and other service providers, as would-be customers are deciding not to
17 extend gas service to new developments in anticipation of the enforcement of the
18 Appliance Restrictions. *See, e.g.*, Jennings Decl. ¶ 8. These customer losses would
19 remain even if the Appliance Restrictions were later overturned, because retrofitting
20 costs for switching from electric to gas appliances would be too high for many

1 customers. *See, e.g.*, Koschalk Decl. ¶ 8. Additionally, in cases where the original
2 developer has chosen not to install backbone gas infrastructure because of the
3 Appliance Restrictions, it will be cost-prohibitive for a single customer to extend the
4 gas system to their home or commercial building. *Id.* at ¶ 9. The loss of would-be
5 customers and the infrastructure to support them now irreparably harms existing
6 utility customers long term, because there will be fewer customers to share the costs
7 of maintaining the gas supply system. Rush Decl. ¶¶ 7–8. The local utilities and
8 service providers anticipate that these would-be customer losses will only escalate
9 once the Appliance Restrictions are effective and curtail customer growth. *See, e.g.*,
10 Frankel Decl. ¶¶ 6–9, Forsyth Decl. ¶¶ 5–8, Robertson Decl. ¶¶ 6–12.²

11 **C. Equity and the public interest strongly weigh in Plaintiffs’ favor.**

12 Here, the balance of the equities and public interest strongly favor
13 preliminarily enjoining the Appliance Restrictions.

14 First, the Council has no public interest in maintaining state regulations
15 preempted by federal law. “There is generally no public interest in the perpetuation
16 of unlawful agency action. To the contrary, there is a substantial public interest in
17 having governmental agencies abide by the federal laws that govern their existence
18 and operations.” *League of Women Voters of the U.S.*, 838 F.3d at 12 (D.C. Cir.

20 ² Plaintiffs incorporate all other declarations attached to this motion by reference.

1 2016) (internal quotation marks and citations omitted); *Washington*, 481 F. Supp. 3d
2 at 1197. As set forth above, the Council has at least implicitly acknowledged that the
3 Appliance Restrictions do not withstand EPCA preemption through its initial steps
4 to delay the Code just two days after Plaintiffs filed their Complaint.

5 Second, if this Court allows the Appliance Restrictions to take effect, the
6 public interest in maintaining affordable housing and energy services will be
7 harmed. Builders and homeowners will face added costs, while local utilities and
8 service providers will face a certain, irreparable loss of their customer base that will
9 also harm Washingtonian families and businesses by causing gas rates to increase.
10 By contrast, preserving the status quo will not harm the Council or the public, and
11 enjoinder of the Appliance Restrictions will cost the Council nothing.

12 Finally, the public interest favors granting a preliminary injunction because it
13 is the *only* remedy available to prevent the unlawful Code provisions from taking
14 effect this year. Even if the Council removes the provisions from the Code, such
15 amendments could not take effect until next year. RCW 19.27A.045; RCW
16 19.27A.025(3). As such, a preliminary injunction from this Court is the Plaintiffs'
17 only hope to abate the ongoing harm caused by the Appliance Restrictions.

18 **V. CONCLUSION**

19 For the above reasons, Plaintiffs respectfully request that the Court
20 preliminarily enjoin the Appliance Restrictions.

1 DATED: June 1, 2023

2 LANE POWELL PC

3 By: s/Callie A. Castillo

4 Callie A. Castillo, WSBA No. 38214
5 Devon J. McCurdy, WSBA No. 52663
6 Angela Foster, WSBA No. 52269
7 Daniel Miller, WSBA No. 56810
8 1420 Fifth Avenue, Suite 4200
9 P.O. Box 91302
10 Seattle, Washington 98111-9402
11 Telephone: 206.223.7000
12 castilloc@lanepowell.com
13 mcurdyd@lanepowell.com
14 fostera@lanepowell.com
15 millerd@lanepowell.com

16 *Counsel for the Homeowners, Builders, and*
17 *Suppliers*

18 BAKER BOTTS L.L.P.

19 By: /s/ Francesca Eick

20 Megan H. Berge (DC Bar No. 98371)
Thomas Jackson (DC Bar No. 384708)
Scott Novak (DC Bar No. 1736274)
700 K Street NW
Washington, D.C. 20001
Telephone: 202-639-1308
megan.berge@bakerbotts.com
thomas.jackson@bakerbotts.com
scott.novak@bakerbotts.com

Francesca Eick (WA Bar No. 52432)
401 S 1st, Suite 1300
Austin, TX 78704
Telephone: 512-322-2672
francesca.eick@bakerbotts.com
Counsel for the Utilities

CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which in turn automatically generated a Notice of Electronic Filing (NEF) to all parties in the case who are registered users of the CM/ECF system. The NEF for the foregoing specifically identifies recipients of electronic notice.

Dated: June 1, 2023

Respectfully submitted,

s/Callie A. Castillo

Callie A. Castillo, WSBA No. 38214
Devon J. McCurdy, WSBA No. 52663
Angela Foster, WSBA No. 52269
Daniel Miller, WSBA No. 56810
1420 Fifth Avenue, Suite 4200
P.O. Box 91302
Seattle, Washington 98111-9402
Telephone: 206.223.7000
castilloc@lanepowell.com
mccurdyd@lanepowell.com
fostera@lanepowell.com
millerd@lanepowell.com