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BUILDING DECARBONIZATION

A Blueprint for a Healthier America

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Building Decarbonization: A Blueprint for a Healthier America

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Introduction



I. Introduction

There is growing policy attention to the use of fossil fuels in U.S. buildings. Burning fossil fuels in buildings for heating, cooking, hot water, and other purposes emits air pollution that affects health and the environment. Health impacts include cancer, strokes, heart disease, premature death, "adverse birth outcomes," exacerbated asthma attacks, and other conditions.[1] Fossil fuels burned in buildings also emit carbon dioxide into the atmosphere — contributing to 13 percent of all greenhouse gas emissions in the United States.[2] When considering the electricity used to power buildings, the impacts of buildings on emissions of carbon dioxide and other air pollutants are even higher, as U.S. buildings use approximately 70 percent of all electricity generated in the United States.[3]

Natural gas ("gas") and petroleum products are the most prevalent fossil fuels burned in commercial and residential buildings.[4] Approximately 60 percent of U.S. homes use gas "for space and water heating, cooking, and clothes drying."[5] The contribution of greenhouse gas emissions from gas burned in residential and commercial buildings has increased in recent years.[6]

A growing number of states and local governments have attempted to address these impacts by limiting fossil fuel use in new buildings. Governments can use several mechanisms to reduce fossil fuel use in buildings, including but not limited to:

- Building codes that restrict the use of fossil fuel appliances in new buildings;
- Building performance standards; and
- Limits on air pollution emissions from buildings.

However, the oil and gas industry has a vested interest in continuing to reap the profits from fossil fuels, and, along with trade organizations such as the National Association of Home Builders and National Apartment Association, has orchestrated legal challenges to these regulatory mechanisms in a wave of new litigation across the country.

This paper explores the importance of state and local government building decarbonization standards to limit or eliminate fossil fuel use in buildings, pathways that local governments can follow to implement these standards, and which of these pathways are most likely to withstand court challenges.

Factors Driving Building Decarbonization



II. Factors Driving Building Decarbonization

Several factors are driving efforts by states and local governments to mandate or incentivize building decarbonization, including concerns about climate and other environmental impacts of fossil fuels, health, and energy costs and burdens.[7]

A. Climate and Environment

Many communities are striving to find ways to address the global climate burden that is impacting residents and infrastructure through events such as wildfires, flooding, higher-intensity storms, and drought.[8]

Energy use in buildings contributes substantially to communities' climate and environmental impacts. Direct emissions from buildings, primarily resulting from the onsite combustion of fossil fuels for heating, hot water, and cooking, account for approximately 13 percent of overall U.S. greenhouse gas emissions, but represent a higher percentage of emissions in some communities.[9]

B. Cost

Beyond environmental considerations, some states and local governments are also pursuing building decarbonization because such efforts can substantially reduce individuals' energy burdens. "Energy burden" represents the percentage of individuals' income required for energy, and it tends to be highest for elderly and low-income individuals, among other groups.[10] In areas where efficient electric heat pump heating is less expensive than fuel oil or gas, decarbonization can reduce household energy costs and alleviate energy burden, particularly for low-income households, which spend approximately three times as much of their income on energy as other households.[11] These savings can be further enhanced through complementary energy efficiency improvements, which the U.S. Department of Energy (DOE) estimates could reduce electricity consumption in low-income households by 13 to 31 percent.[12] The potential economic benefits are especially significant for households reliant on heating oil, as the U.S. Energy Information Administration (EIA) projects a 21 percent increase in heating oil expenditures during the 2026-2027 winter heating season.[13]

Building decarbonization can also reduce the costs of new construction. For example, electrifying buildings can decrease costs by eliminating the cost of building new gas lines or extending lines to connect the building to the city's gas distribution system.[14]

Electrification retrofits are not always cost beneficial to building occupants, however, and therefore must be more carefully implemented to avoid inequitable cost burdens.[15]

C. Public Health

Building decarbonization, such as installing electrified cooking and heating systems in place of gas, wood, or oil, has positive health benefits in addition to environmental and some cost-based benefits. Combustion of gas in the home for cooking, heating, and other uses such as clothes dryers emits pollutants such as carbon monoxide, nitrogen oxides, particulate matter, and hazardous polycyclic aromatic hydrocarbons (PAHs).[16] Studies comparing indoor nitrogen oxide levels in apartments with electric induction versus gas stoves show NO_2 levels spiking at four times above the U.S. Environmental Protection Agency-established "safe" limit for gas stoves, whereas apartments with electric stoves had NO_2 levels below the median background levels.[17]

Exposure to these pollutants can contribute to serious health consequences, including respiratory illnesses, asthma development and exacerbation, and increased cancer risks. A 2026 study examining 85 individuals with poorly controlled asthma found that replacing gas stoves with electric induction stoves was associated with improved asthma control and a reduction in asthma-related emergency room visits or hospitalizations from 11.8% to 3.5%.[18] Children are particularly vulnerable to these pollutants because their lungs and other organ systems are still developing, and research has linked long-term NO_2 exposure to childhood asthma development while estimating that children's lifetime cancer risk from gas-stove-related benzene exposure is nearly twice that of adults.[19]

There are also concerns about the environmental health impacts of fossil fuels. Pollutants from fossil fuel combustion can degrade local air quality, contributing to the formation of ground-level ozone, which is associated with shortness of breath, asthma attacks, and increased respiratory-related emergency room visits.[20] These health risks are particularly concerning for children, whose developing organ systems and greater exposure to air contaminants relative to body weight make them especially vulnerable to pollution-related harms.

In summary, decarbonizing buildings by replacing fossil fuels with electricity can have cost, health, and environmental benefits, all of which have led a growing number of states and, more commonly, local governments to consider or promulgate building decarbonization policies.

Building Decarbonization and Preemption



III. Building Decarbonization and Preemption

As we note in the introduction, states and local governments have the authority to reduce the combustion of fossil fuels in buildings through a variety of strategies. In this part, adding to prior work in this area, we introduce the authority of states and local governments generally, and their authority to regulate fossil fuel use in buildings and connected to buildings. We then explore how recent case law can affect decarbonization tools used by states and local governments.

A. Overview of State and Local Authority and Federal Preemption

Under the U.S. Constitution, the 50 U.S. states have broad authority that the U.S. Supreme Court refers to as "police power" authority. Police powers — rooted in the Latin term "politia" or "civil administration or government" — are the powers of states to regulate human well-being.[21] These powers arise under the Tenth Amendment of the U.S. Constitution, which reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[22]

The U.S. Supreme Court has construed states' police powers broadly, stating:

> Throughout our history the several States have exercised their police powers to protect the health and safety of their citizens. Because these are primarily, and historically, ... matter[s] of local concern, the States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.[23]

States, in turn, have delegated many police powers to local governments through zoning enabling statutes and similar laws, as well as through state constitutional provisions. These statutes and constitutional provisions give local governments powers to regulate a variety of activities to preserve human well-being, including the use of land, materials required or prohibited in the construction of buildings, hours of operation and practices of businesses, and many other areas.[24] For example, courts have upheld the authority of local governments to require the installation of specific types of fire protection equipment in buildings,[25] require buildings to be demolished,[26] and require or prohibit the use of specific types of materials in buildings.[27]

Despite this broad local authority, federal law may override state and local government police powers under certain circumstances. For example, the federal government has the constitutional power to enact laws that affect interstate commerce, and such law may preempt (*i.e.*, invalidate or prevent) an otherwise valid state or local law enacted under the state's Tenth Amendment powers.[28] There are three types of preemption: express preemption, implied conflict preemption, and implied field preemption.[29]

Under express preemption, the federal government makes clear, within the text of a statute, that it intends to preempt a state law. Although this may sound simple, the key question in an express preemption case is *how many* and *what types of* state or local laws the federal government intended to preempt — in other words, the "domain expressly pre-empted."[30]

Many federal preemptive statutes do not preempt all aspects of state or local laws. Take, for example, a federal statute that governs state regulation of medical devices. This statute provides that "no State or political subdivision of a State may establish" any requirement for a medical device "which is different from, or in addition to" any federal requirement for the device, and (2) "which relates to the safety or effectiveness of the device."[31] The U.S. Supreme Court has found that this statutory provision expressly preempts only "enactments of positive law by legislative or administrative bodies" governing medical devices and thus does not preempt "the application of general rules of common law by judges and juries" in tort claims brought by plaintiffs seeking damages for harm associated with medical devices.[32]

Conflict preemption can arise in two ways but always involves a situation in which Congress has not expressly preempted state or local law in a federal statute and thus preemption is implied, rather than express. It can arise when compliance with both a state or local law and a federal law would be impossible (if these laws provided two conflicting standards or required two or more conflicting actions by regulated parties), or when complying with the state or local law would impede the purpose of the federal law. This latter category — when compliance with state or local law would impede the federal purpose — is sometimes referred to separately as "obstacle" preemption, rather than being lumped into conflict preemption.[33]

Finally, implied field preemption arises when the federal government has not expressly preempted state or local law, but the federal statutes and regulations are so extensive, and so thoroughly cover an issue, that it appears that the federal government intended to occupy the entire field (area) and left no room for state or local regulation.

When it comes to building decarbonization, these three categories of preemption — express, implied conflict, and implied field — have an added layer of complexity due to the presence of multiple relevant federal statutes, which may have distinct preemption provisions and savings clauses. Savings clauses preserve some areas of state law, clarifying that these areas are not preempted. Courts are expected to give effect to each law's different preemption standards.

B. State and Local Authority to Regulate Fossil Fuel Use in Buildings

State and local governments, exercising their police power authority introduced in Part II.A., have broad authority to regulate the types of infrastructure (such as fossil fuel pipes) and equipment used in buildings. They also have broad police powers authority to regulate the distribution of fossil fuels to buildings. This authority rests upon the strong, longstanding power of states and local governments to regulate public utilities — those that provide essential services to people such as water, sewer, fuel for heating, and electricity.[34]

Local governments also have broad authority to regulate the materials within buildings to protect people's health and welfare. For example, New York City has the authority to require the manufacturers of residential appliances to recover refrigerants from appliances discarded in the city to promote safe refrigerant disposal. In response to a lawsuit challenging the requirement, the U.S. District Court for the Southern District of New York applied state law preemption principles and held that even though state law preempted local laws governing sale, use, reclamation, and disposal of refrigerants from certain products that were not identical to state standards, the state law did not cover residential appliances and did not assign responsibility for collecting refrigerants.[35] Thus, the city's local requirements were valid.

This section explores local government and state efforts to regulate fuel use in buildings and how federal court opinions have affirmed or limited these efforts under federal law.

1. Overview of Case Law Addressing Local and State Government Building Decarbonization Policies

Despite broad state and local authority to regulate buildings, recent litigation regarding federal preemption under the Energy Policy and Conservation Act (EPCA) has significantly reshaped the legal landscape for state and local building decarbonization efforts.[36] Courts are increasingly being asked to determine whether state and local policies aimed at reducing fossil fuel use in buildings are preempted by EPCA's

prohibition on state and local regulations "concerning the energy efficiency [or] energy use" of covered appliances.[37] The resulting case law is evolving, with some decisions expanding the scope of federal preemption under EPCA and others limiting it.

a. EPCA Preemption Framework

EPCA establishes national energy efficiency standards for certain appliances and includes an express preemption clause prohibiting state and local regulations that "concern" the energy use or efficiency of covered products.[38] Until recently, EPCA's preemption provisions were generally understood to apply to state and local energy or water efficiency standards, testing procedures, and labeling requirements, rather than other types of regulations.[39]

EPCA also includes a provision that allows the Department of Energy (DOE) to grant a state a waiver allowing it to set its own standard if the state can establish "by a preponderance of the evidence that such State regulation is needed to meet unusual and compelling State or local energy or water interests."[40] Although states have applied for waivers to set higher efficiency standards for water or energy use, to date, DOE has never granted an EPCA preemption waiver for appliances.[41]

EPCA also includes important exceptions to this express preemption provision, most notably a seven-part test that allows certain building energy codes to avoid preemption if each condition is met. These conditions are summarized below:[42]

1. The code allows the builder to meet an overall energy target by choosing combinations of building components, such as appliances or systems, whose total efficiency adds up to the required level.
2. The code does not require individual products to exceed federal minimum efficiency standards, unless a state has an approved waiver allowing stricter requirements.
3. If higher-efficiency products are used, they are credited on a one-to-one basis in terms of energy savings or cost.
4. Any baseline building design used for comparison must assume products that meet — but do not exceed — minimum standards (or approved state levels).
5. If the code provides pre-set combinations of measures, it must also include options using products at or near the minimum standard.
6. The overall energy goal is defined as total estimated energy use (or cost) for the building.

7. Energy use calculations must rely on federally approved testing methods, though states can adjust for local conditions using reliable, documented methodologies.

In addition to this general exemption framework for building energy codes, EPCA contains a separate provision applicable to certain commercial and industrial building-system appliances governed by ASHRAE/Illuminating Engineering Society Standard 90.1.[43] (ASHRAE is "an international society of heating, refrigerating and air-conditioning professionals" that writes standards for appliances, among other activities.[44]) Under Standard 90.1, federal standards do not preempt state or local building code requirements for new construction where: (1) the building code does not require the energy efficiency of a covered product to exceed the applicable minimum efficiency level established in the amended ASHRAE/IES Standard 90.1; and (2) the building code requirement does not take effect prior to the effective date of the corresponding minimum efficiency standard under ASHRAE/IES Standard 90.1.

b. ***California Restaurant Association v. City of Berkeley***

Until recently, EPCA's preemption provisions were thought to apply to state and local efficiency standards, testing procedures, and labeling requirements, but not to other types of regulations.[45] This changed in the Ninth Circuit with the 2023 decision in *California Restaurant Association v. City of Berkeley*.[46] In 2019, the City of Berkeley amended its Health and Safety Code by adding Chapter 12.80 — "Prohibition of Natural Gas Infrastructure in New Buildings" — which prohibited gas infrastructure in most newly constructed buildings, with an effective date of January 1, 2020.[47] The amendment also included a public interest exception for special circumstances that required "minimally necessary and specifically tailored" gas infrastructure. The California Restaurant Association (CRA) sued the City of Berkeley in the U.S. District Court for the Northern District of California, challenging Berkeley's gas ordinance. In its complaint, the CRA alleged that the amendment required all appliances in newly constructed buildings to use only electric power and therefore prohibited gas appliances. According to the CRA, Congress preempted state and local laws that affect the *type* of energy used by covered appliances through EPCA and subsequent amendments, unless the regulation meets one of the statutory exceptions to preemption.

The district court dismissed the federal claim entirely in 2021, rejecting the CRA's broad reading of EPCA and declining to hear related state claims. The CRA appealed, and in 2023, a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit invalidated Berkeley's ordinance prohibiting gas infrastructure in new buildings. The court held that because the ordinance effectively prevented the use of gas appliances, it

"concerned" their energy use and was therefore preempted by EPCA. However, in a concurring opinion, Judge Baker recognized that EPCA preemption likely does not extend to certain policies affecting access to or consumption of gas. These include restrictions on the distribution of gas to individual meters — such as restrictions on utilities' service areas or right-of-way usage — and carbon taxes intended to discourage gas consumption.[48] Berkeley then sought rehearing *en banc*, asking for the case to be reconsidered not just by the original three-judge panel but by a larger group of judges from the Ninth Circuit, which was denied.

Notably, 11 judges — eight active judges supported by three senior judges — dissented from the court's rejection of Berkeley's petition for *en banc* review. The dissenting opinion, authored by Judge Michelle Friedland, took the position that "energy use" should be treated as a technical term defining a product's fixed amount of energy consumption, rather than being broadly construed to prohibit products entirely.[49] This dissent has influenced subsequent decisions outside the Ninth Circuit, including rulings by the District Courts for the Northern and Southern Districts of New York, the District of Maryland, the District of Colorado, and District of D.C., as discussed below. Most significantly, in 2026, the U.S. Court of Appeals for the Second Circuit expressly adopted Judge Friedland's interpretation in *Association of Contracting Plumbers v. City of New York*,[50] rejecting the Ninth Circuit's broader construction of EPCA and creating a circuit split over the scope of EPCA preemption.

The *Berkeley* decision marked a significant expansion of the scope of federal preemption under EPCA. Rather than focusing on appliance efficiency standards, the court concluded that policies indirectly affecting appliance use could fall within EPCA's scope.[51] As a result, within the Ninth Circuit — which includes western states such as California, Washington, and Arizona — local governments face increased legal uncertainty when adopting policies that could contribute to the phaseout of fossil fuel appliances. Importantly, *Berkeley* does not mean that *any* regulation that prevents EPCA-covered appliances from being used is preempted, as the Ninth Circuit explained in a more recent decision, *Rinnai v. South Coast Air Quality Management District.*[52] In *Rinnai*, the court upheld regulations establishing zero-NOx emissions standards for certain gas appliances, despite their effect of preventing the use of those appliances (*Rinnai* is discussed in more detail in Section 4.b, below).[53] The scope of EPCA preemption under the Ninth Circuit's reading therefore remains limited and somewhat unclear.

c. Diverging Interpretations in Other Jurisdictions

Jurisdictions in states outside of the Ninth Circuit are not bound by *Berkeley*, and courts in other circuits have so far rejected the Ninth Circuit's broad interpretation of EPCA. For instance, in 2025, in *Mulhern Gas Co. v. Mosley*, the U.S. District Court for the Northern District of New York upheld New York State's all-electric building code requirement, explicitly disagreeing with the Ninth Circuit's decision in *Berkeley*.[54] The court concluded that EPCA does not preempt state or local laws regulating building construction, as opposed to directly regulating appliance efficiency.

Also in 2025, in *Association of Contracting Plumbers v. City of New York*, the U.S. District Court for the Southern District of New York upheld New York City's Local Law 154, which limits fuel combustion in new buildings based on emissions thresholds rather than prohibiting fossil-fuel infrastructure or appliances.[55] The court distinguished fuel-based emissions standards from appliance efficiency regulations, concluding that EPCA does not preempt such measures.

In 2026, the Second Circuit affirmed both *Mulhern Gas* and *Association of Contracting Plumbers*, concluding that EPCA's reference to "energy use" concerns the quantity of energy consumed by a covered appliance, rather than whether an appliance may use a particular type of energy at all. In doing so, the Second Circuit expressly rejected the Ninth Circuit's interpretation in *Berkeley* and adopted Judge Friedland's narrower interpretation of "energy use," creating a circuit split over the scope of EPCA preemption.[56] Most importantly, this disagreement between the circuits may prompt Supreme Court review to resolve the conflicting interpretations and establish a uniform rule of federal law.

In 2026, in *National Association of Home Builders v. Montgomery County*, the U.S. District Court for the District of Maryland also rejected the plaintiffs' argument that EPCA preempted local ordinances banning new fossil fuel infrastructure in buildings.[57] Montgomery County's all-electric building ordinance — to be formally codified through amendments to the building and energy codes — prohibits the installation of fossil fuel infrastructure, including gas piping, in most newly constructed residential and certain commercial buildings, while allowing limited exceptions for backup systems and specific uses.[58] Adopting an approach consistent with Judge Friedland's dissent in the *Berkeley* case, the court emphasized that EPCA's preemptive scope is directed at product-specific energy efficiency standards, testing procedures, and labeling requirements, and concluded that Montgomery County's ordinance regulates none of these domains. As a result, the court found that the ordinance fell outside of EPCA's

preemptive reach because it governs upstream infrastructure decisions in new construction.

The U.S. District Court for the District of Columbia took a very similar position in *National Association of Home Builders v. District of Columbia*, where the court undertook a more extensive examination of EPCA's statutory history.[59] The opinion discussed EPCA's origins in the energy crisis of the 1970s and continued through its current application to product efficiency regulation, not the broader field of building or land-use controls.[60]

These decisions, along with several other district court decisions rejecting *Berkeley*, strongly suggest a narrower reading of EPCA preemption outside the Ninth Circuit and provide potential pathways for jurisdictions to limit new fossil fuel infrastructure in buildings.

2. Building Codes and EPCA Exemptions

Recent litigation has also addressed whether certain building energy codes fall within EPCA's statutory exception to preemption set forth above.

Flexible energy codes — which allow builders to choose among compliance pathways rather than mandating specific appliance efficiencies — may be exempt from EPCA preemption where they satisfy the seven-part test under EPCA or otherwise fall within the exemption provided by 42 U.S.C. § 6316(b)(2)(B). For example, litigation challenging Washington State's energy code raises these issues but has not yet produced a definitive ruling on the merits.

In the Washington State case, *Rivera v. Anderson* (which is in the Ninth Circuit and is therefore bound by the *Berkeley* decision), a collection of home builders, gas utilities, and building trade unions sued the Washington State Building Code Council (WSBCC) over its new flexible building codes.[61] The codes set minimum energy efficiency credit targets that new residential construction can meet 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. The court dismissed the challenge on procedural grounds, and the subsequent appeal to the Ninth Circuit upheld the lower court's ruling.[62]

3. Building Performance Standards (BPS)

Building performance standards (BPSs), which require buildings to meet energy or emissions targets over time, have also been challenged. These policies regulate overall building performance rather than specific appliances. BPSs set performance targets — such as maximum energy use or greenhouse gas emissions per square foot — that decline over time, giving building owners time to comply efficiently.

BPSs are distinguishable from the prohibition at issue in *Berkeley* because they allow a wide degree of compliance flexibility. Building owners can meet their targets by whatever means they choose, rather than being specifically prohibited from using certain appliances. Many BPSs also allow for other types of compliance, such as "alternative compliance fees" that allow building owners to pay a certain amount of money in lieu of fully meeting their buildings' targets.

In 2026, in *Maryland Building Industry Association v. McIlwain*, the U.S. District Court for the District of Maryland rejected an EPCA preemption challenge to the Maryland Building Energy Performance Standards (BEPS).[63] The court reasoned that the BEPS do not require the use of any particular appliance and that building owners can meet the standards through a variety of efficiency measures or, alternatively, pay a compliance fee to offset any shortfall. Because of this flexibility, the court concluded that the greenhouse gas-based BEPS at issue did not regulate the "energy use" or "energy efficiency" of appliances under EPCA.[64] The court expressly limited its analysis to greenhouse gas-based building performance standards, leaving open the application of its reasoning to other types of BPSs.

One court has recently held that building-wide performance standards may indirectly regulate the performance or use of EPCA-covered appliances. In *Colorado Apartment Association v. Ryan*, the U.S. District Court for the District of Colorado has allowed plaintiffs to proceed on the theory that EPCA preempts BPS policies based on energy use intensity.[65] (The same opinion rejects the argument that EPCA preempts a greenhouse gas-based BPS.[66]) The court stressed that it has only determined that the theory is "plausible" and that further litigation would address whether EPCA actually does preempt the regulations at issue in the case.[67]

The hesitant approach of the *Ryan* court underlines the unsettled nature of the application of EPCA preemption to BPS policies. The two rulings thus far indicate that greenhouse gas-based building performance standards may be resilient to EPCA preemption challenges, at least if they have a fairly broad suite of compliance options. The ongoing litigation will provide further guidance on the relationship between EPCA

preemption and energy use intensity requirements. They also provide a potential pathway even in the Ninth Circuit for state and local governments to use emissions regulations to reduce building emissions rather than banning appliances, following New York City's approach. Other cases have addressed related questions in dicta, but those statements do not necessarily resolve how EPCA applies to BPSs.

By focusing on overall outcomes rather than prescribing specific technologies, BPSs may provide a means of advancing regulatory goals while reducing some of the preemption concerns associated with technology-specific requirements. *Rinnai* provides some support for this distinction, particularly emissions-based BPSs, although the scope of the panel's reasoning and its application to other types of BPSs remain unsettled.

4. Air Pollution and Appliance Emissions Regulations

Courts have also considered whether EPCA preempts local air pollution regulations affecting appliances. To answer that question, courts must consider how EPCA interacts with the Clean Air Act (CAA).

a. State and Local Authority Under the Clean Air Act

The CAA is a classic "cooperative federalism" law, through which states are empowered to implement, and go beyond, minimum federal standards regulating air pollution. This cooperative approach is also reflected in parts of the CAA that broadly protect state and local authority to regulate air pollutants. In fact, the CAA expressly preempts states and local governments *only* from setting emissions standards for mobile sources, like cars and trucks.[68] Putting aside mobile sources, the CAA otherwise includes broad savings clauses that authorize states and local governments to adopt "any standard or limitations respecting emissions of air pollutants" and "any requirement respecting control or abatement of air pollution."[69] The CAA also contains a separate savings clause, which provides that the statute's citizen suit provisions shall not restrict the right of any person under any other statute or common law to enforce emissions standards or to seek any other relief.[70] These provisions preserve state and local government authority to regulate air pollution emissions from buildings.

b. Reconciling EPCA Preemption with Clean Air Act Preservation of State and Local Authority

Recently, regulated parties have attempted to invoke EPCA's preemption provision to prevent state and local air pollution regulation of appliances. This theory of EPCA

preemption would limit the tools that state and local governments may use to address air pollution associated with buildings. However, courts have rejected such arguments.

Most importantly, in 2026, the Ninth Circuit upheld a state air quality rule eliminating nitrogen oxide emissions from gas appliances in *Rinnai America Corp. v. South Coast Air Quality Management District*.[71] At issue in *Rinnai* were standards that prohibit emissions from all stationary sources, including appliances, within the South Coast Air Basin, a region that has the worst smog in the country and is in "extreme" nonattainment with federal air quality standards for ozone.[72] The South Coast Air Quality Management District determined that "widespread adoption of zero-emissions technology across all stationary sources was the only way" to bring the region into compliance with the standards.[73] In upholding the zero-emissions standards, the Ninth Circuit rejected arguments that EPCA facially preempts Clean Air Act standards, including those that impose a zero-emissions standard and could therefore prevent ongoing use of gas appliances.

The Court concluded that the plaintiffs failed to meet their "heavy burden" to overcome the "'strong presumption' that repeals by implication are 'disfavored' and that 'Congress will specifically address' preexisting law when it wishes to suspend its normal operations in a later statute."[74] Nothing in EPCA signaled that Congress intended to repeal the Clean Air Act. Even though Congress first enacted EPCA only five years after the Clean Air Act and was "no doubt aware of the obligations it had imposed on states through the CAA," EPCA "makes no mention of emissions regulations."[75] Perhaps more significantly, Congress added EPCA's preemption provision after EPA had approved nitrogen oxide emissions standards that applied to EPCA-regulated appliances, but nothing in EPCA mentions emissions regulation.[76] The Clean Air Act also makes no reference to EPCA, even though it was amended in 1990, only three years after the current EPCA preemption provision became law.[77] The silence regarding preemption in both statutes shows, the court held, that Congress intended for the statutes to operate without either displacing the other.

Rinnai also emphasized the narrow holding of *Berkeley* and distinguished *Berkeley* on the basis that the emissions standards did not directly regulate energy or fuel use at all.[78] In response to the plaintiffs' argument that upholding the emissions standards would make EPCA's preemption provision "trivially easy to evade," the Ninth Circuit simply recognized that "state and local regulators do not necessarily run afoul of EPCA preemption when they exercise their statutory duties under the CAA by enacting emissions standards for covered appliances."[79] So long as a subfederal government has the authority to regulate emissions and justifies the emissions standards it adopts, EPCA preemption should not be a barrier to Clean Air Act regulation.

Indeed, as the case notes, several jurisdictions, including Texas, Utah, and cities in Colorado and Maryland, have regulated emissions from appliances for decades, with EPA's approval.[80] Based on this history of regulation and the strong presumption against implied repeals of federal laws, subfederal governments may continue to set emissions standards for stationary sources, including appliances, even if they incidentally encourage electrification.

Key Takeaways for State and Local Governments: Viable Pathways for Building Decarbonization



IV. Key Takeaways for State and Local Governments: Viable Pathways for Building Decarbonization

Taken together, recent case law reflects several emerging trends in how courts are evaluating EPCA preemption challenges to state and local building decarbonization policies. Although outcomes remain jurisdiction-specific and the law continues to develop, the cases increasingly distinguish among policies based on what they regulate, how they are structured, and, in some instances, the source of the state or local government's regulatory authority. The categories below summarize the relative preemption risks reflected in current case law.[81]

A. Higher Risk Pathways

Within the Ninth Circuit, policies that directly prohibit the use of EPCA-covered fossil fuel appliances, including all-electric building codes and restrictions comparable to the gas infrastructure prohibition invalidated in *Berkeley*, continue to face significant EPCA preemption risk. Accordingly, jurisdictions within the Ninth Circuit should exercise particular caution when adopting policies structured as direct prohibitions on the use of fossil fuel appliances.

Despite this needed caution, the Ninth Circuit's subsequent decision in *Rinnai* clarified that *Berkeley* does not extend to all regulations that eliminate the use of fossil-fuel appliances. In *Rinnai*, the Ninth Circuit upheld a zero-emissions standard adopted pursuant to the Clean Air Act, even though it will prevent the use of certain EPCA-covered gas appliances.

It may also be possible to require electrification through building code regulations that meet the requirements outlined in Section IV.B.1.a above. No defendant in the EPCA preemption cases outlined in this paper has used this defense, and therefore it remains theoretical.

B. Moderate Risk Pathways

Outside of the Ninth Circuit, the picture is very different. Several federal district courts and the Second Circuit have disagreed with the Ninth Circuit and ruled that EPCA does *not* preempt prohibitions on fossil fuel appliances in buildings. Most significantly, the Second Circuit expressly rejected *Berkeley*'s broader interpretation of EPCA, creating a circuit split over the scope of EPCA preemption. While not definitive nationwide, the risk is at least much lower for such regulations outside the Ninth Circuit.

Energy use intensity-based BPS policies also remain unsettled. In *Colorado Apartment Association v. Ryan*, the Colorado federal district court allowed plaintiffs to proceed on the theory that EPCA preempts BPS policies based on energy use intensity.[82] The court stressed that it has only determined that the theory is "plausible" and that further litigation would address whether EPCA actually preempts the regulations at issue in the case. The ongoing litigation will provide further guidance on the relationship between EPCA preemption and energy use intensity requirements.

Emissions regulations that are not promulgated pursuant to the federal Clean Air Act may also present greater uncertainty. The exact contours of the limitations on *Berkeley* recognized in *Rinnai* are still unclear, including whether a regulation must be adopted pursuant to the federal Clean Air Act or be necessary to attain national air quality standards. Accordingly, while *Rinnai* provides strong support for CAA-based emissions regulations, it does not necessarily resolve the preemption risk associated with emissions regulations adopted under other sources of state or local authority.

C. Lower Risk Pathways

Policies that do not regulate energy use of appliances or buildings are most likely to fall outside EPCA's preemptive scope and present lower risks to state and local governments.

Clean Air Act-based emissions regulations also fall within this lower-risk category following *Rinnai*. In *Rinnai*, the Ninth Circuit upheld a zero-emissions standard adopted pursuant to the Clean Air Act, despite its effect of preventing the use of certain EPCA-covered gas appliances. Because the Ninth Circuit is currently the only federal appellate court to interpret EPCA as preempting regulations that restrict the use of covered appliances, *Rinnai* provides further support for the conclusion that Clean Air Act-based emissions regulations are unlikely to be preempted by EPCA.

Notably, this includes BPSs that consider only emissions reductions and not building energy use, particularly if they allow regulated parties to make payments in lieu of compliance. Two district court cases — the *McIlwain* case in Maryland and the *Ryan* case in Colorado — have now upheld greenhouse gas-based BPS policies against an EPCA preemption challenge. *McIlwain* also suggests that the fact that building owners could pay an "alternative compliance fee" in lieu of full compliance with the regulation may have helped it survive a preemption challenge.[83] Indeed, the *McIlwain* opinion found that such regulations would not be preempted even if the Ninth Circuit's reading of EPCA preemption were correct. Properly structured greenhouse gas-based BPS

policies may therefore be viable in any jurisdiction, regardless of whether it adopts the Ninth Circuit's EPCA interpretation.

Specific types of regulations that the *Berkeley* opinion called out as not being within the scope of EPCA preemption may also fit in this category. These include restrictions on the distribution of energy to individual meters — such as restrictions on utilities' service area or right-of-way usage — and, in the eyes of at least one of the panel judges, carbon taxes.[84]

Finally, flexible building energy codes that satisfy EPCA's statutory exemption have always been protected from EPCA preemption. This allows for fairly stringent energy restrictions to be imposed on new construction, inside or outside of the Ninth Circuit.[85]

In sum, the legal landscape remains unsettled, with several unresolved questions as of the date of this publication and a circuit split now existing between the Second and Ninth Circuits. As a result, jurisdictions should carefully design their policies to minimize preemption risk while advancing decarbonization goals.

Endnotes

[1] Anna Belova et al., *Literature Review on the Impacts of Residential Combustion Final Report* 60 (2022), https://www.lung.org/getmedia/2786f983-d971-43ad-962b-8370c950cbd6/ICF_Impacts-of-Residential-Combustion_FINAL_071022.pdf.
[2] U.S. Env't Prot. Agency, *Inventory of U.S. Greenhouse Gas Emissions and Sinks*, https://www.epa.gov/ghgemissions/inventory-us-greenhouse-gas-emissions-and-sinks (last accessed July 18, 2025).
[3] Heather Goetsch & Michael Deru, Natl. Renewable Energy Lab., *Operational Emissions Accounting for Commercial Buildings* 1 (2022), https://docs.nlr.gov/docs/fy22osti/81670.pdf.
[4] U.S. Env't Prot. Agency, Inventory of U.S. Greenhouse Gas Emissions and Sinks 1990-2022 at 3-23 (2024), https://www.epa.gov/system/files/documents/2024-04/us-ghg-inventory-2024-main-text_04-18-2024.pdf. In the residential sector, 75.31 million house units used natural gas in 2020, followed by 11.14 million using propane, 11.05 million using wood, and 5.58 million using fuel oil or kerosene. U.S. Energy Info. Admin., Table HC1.1 Fuels Used and End Uses in U.S. Homes, by Housing Unit Type, 2020, https://www.eia.gov/consumption/residential/data/2020/hc/pdf/HC%201.1.pdf.
[5] U.S. Energy Info. Admin., Natural gas explained, https://www.eia.gov/energyexplained/natural-gas/use-of-natural-gas.php (last accessed July 18, 2025).
[6] U.S. Env't Prot. Agency, Inventory, *supra* note 4, at 3-24.
[7] Kelsea Dombrovski et al., Nat'l Renewable Energy Lab'y, Overview of Building Electrification Technologies and Market Opportunities 7 (2024), https://docs.nrel.gov/docs/fy25osti/88309.pdf (citing indoor air quality benefits, lower building construction costs, and decreased carbon emissions as drivers).
[8] John T. Abatzoglou & A. Park Williams, *Impact of Anthropogenic Climate Change on Wildfire Across Western US Forests*, 113 PROCEEDINGS OF THE NAT'L ACADEMY OF SCI. 11770 (2016) (finding that "anthropogenic increases in fuel aridity approximately doubled the western U.S. forest fire area beyond that expected from natural climate variability alone during 1984–2015"); *Community Vulnerability and Adaptation*, U.S. Climate Resilience Toolkit, https://toolkit.climate.gov/community-vulnerability-and-adaptation (last visited April 21, 2026) (noting "flooding, drought, heat waves, and more intense urban heat island effects" as climate stressors).
[9] Biao Kuang & Jianli Chen, *Regional Difference of US Residential Building Energy Usage and Carbon Footprint: State-Level Analysis*, 3 J. BUILDING DESIGN & ENV'T 28501 (2024); U.S. Env't Prot. Agency, Commercial and Residential Sector Emissions, https://www.epa.gov/ghgemissions/commercial-and-residential-sector-emissions (last updated Mar. 10, 2026).
[10] Ariel Dehobl, Am. Council for an Energy Efficiency Economy, *How High Are Household Energy Burdens?* (2020), https://www.aceee.org/research-report/u2006.
[11] Nancy W. Stauffer, *Reducing Carbon Emissions from Residential Heating: A Pathway Forward*, MIT ENERGY INITIATIVE (Feb. 26, 2025) https://energy.mit.edu/news/reducing-carbon-emissions-from-residential-heating-a-pathway-forward/ (last visited April 21, 2026) (noting that "under certain conditions . . . switching 80% of homes to heating by electricity could cut carbon emissions and at the same time significantly reduce costs").
[12] U.S. Dep't of Energy, Low-Income Household Energy Burden Varies Among States—Efficiency Can Help in All of Them 1–2 (Dec. 2018), https://www.energy.gov/sites/prod/files/2019/01/f58/WIP-Energy-Burden_final.pdf.
[13] U.S. Energy Info. Admin., Winter Fuels Outlook 2026–27, Short-Term Energy Outlook (Oct. 6, 2026), https://www.eia.gov/outlooks/steo/report/perspectives/2026/10-winterfuels/article.php.
[14] Dan York et al., Am. Council for an Energy Efficient Econ., *Building Decarbonization Solutions for the Affordable Housing Sector* at VII (2022), https://www.aceee.org/sites/default/files/pdfs/u2204.pdf.
[15] *Id.*; Ming Yi et al., *Efficient Electrification in a Warming Climate Could Contribute to Keeping Energy Burdens in Check*, 51 COMMUNICATIONS SUSTAINABILITY 1 (2026) (describing U.S. regions in which heat pumps can reduce or intensify energy burdens).
[16] Anna Belova et al., Am. Lung Ass'n & ICF, Literature Review on the Impacts of Residential Combustion viii, 18 (2022), https://www.lung.org/getmedia/2786f983-d971-43ad-962b-8370c950cbd6/ICF_Impacts-of-Residential-Combustion_FINAL_071022.pdf.

[17] Nate Seltenrich, *Clearing the Air: Gas Stove Emissions and Direct Health Effects*, 132 ENV'T HEALTH PERSPECT. (2024); U.S. Env't Prot. Agency, *Integrated Science Assessment for Oxides of Nitrogen—Health Criteria: Chapter 4: Respiratory Effects—Long-Term Exposure* 4-117 (2026) (External Review Draft), https://www.epa.gov/system/files/documents/2026-07/nox-isa_chapter-04_lt-respiratory_final-external-release_2026july.pdf.

[18] Ashwini R. Sehgal et al., *Asthma Control Before and After Changing Gas Stoves to Electric Stoves*, 14 J. ALLERGY & CLINICAL IMMUNOLOGY: IN PRACTICE 2341 (2026), https://doi.org/10.1016/j.jaip.2026.06.039.

[19] *See* Anchal Garg et al., *Exposure and Health Risks of Benzene from Combustion by Gas Stoves: A Modelling Approach in U.S. Homes*, 492 J. HAZARDOUS MATERIALS 137986 (2025), https://doi.org/10.1016/j.jhazmat.2025.137986.

[20] *See, e.g.*, *Climate Change and Lung Health*, Am. Lung Ass'n (Feb. 18, 2025); *Ozone*, Am. Lung Ass'n (June 9, 2025); U.S. Env't Prot. Agency (EPA), Integrated Science Assessment for Ozone and Related Photochemical Oxidants: Executive Summary ES-6 (Apr. 2020).

[21] Santiago Legarre, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745, 748-49 (2007).

[22] U.S. CONST. amend. X.

[23] *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (internal quotations and citations omitted).

[24] *See, e.g.*, *City of New Orleans v. Bd. of Commissioners of the Orleans Levy District*, 640 So.2d 237, 241 (La. 1994) (finding that the City of New Orleans's "constitutionally granted home rule powers include the power to initiate and enforce local building and zoning ordinances consistent with the constitution within the city boundaries" and "the power of immunity from the legislature's authority to withdraw, preempt, or deny the city's power to initiate such legislation"); *Quick Chek Food Stores v. Springfield Twp.*, 416 A.2d 840 (N.J. 1980) (finding that " limitations upon hours of service in commercial establishments located in a residential milieu is a regulation related to the health, peace and comfort of those surrounding homes" and is within a township's police power authority); *Home Building Contractors, Inc. v. The County of DuPage*, 322 F.2d 635 (7th Cir. 1963) (affirming the authority of a local government, under its building code, to require visual inspection of the components of prefabricated homes to determine whether those components complied with the building code).

[25] Application of Sace Realty Corp., 73 N.Y.S.2d 211, 215 (N.Y.S.C., Queens County, 1947).

[26] *Tessier v. City of Denham Springs*, 404 So.3d 699, 707 (La. Ct. App., 1st Cir., 2024).

[27] *Assoc. Builders & Contractors of Wisconsin, Inc. v. City of Madison*, 998 N.W.2d 549, 560 (Wis. Ct. App. 2023).

[28] *Raich v. Gonzales*, 500 F.3d 850, 867 (9th Cir. 2007) (Generally speaking . . . a power granted to Congress trumps a competing claim based on a state's police powers.").

[29] *Gade v. Nat'l Solid Wastes Mgmt. Assn.*, 505 U.S. 88, 98 (1992).

[30] *Medtronic. v. Lohr*, 518 U.S. 470, 484 (1996). For subsequent limitation of *Medtronic*'s holding regarding a presumption against preemption, see, e.g., *Thornton v. Tyson Foods, Inc.*, 28 F.4th 1016, 1023 (10th Cir. 2022).

[31] 21 U.S.C. § 360k(a).

[32] *Medtronic*, 518 U.S. at 489.

[33] Kellen Norwood, Am. Bar Ass'n, *Federal Preemption of State and Local Law* 11 (June 20, 2019).

[34] *See, e.g.*, *Nat'l Energy Marketers Ass'n v. N.Y. State Pub. Serv. Comm'n*, 33 N.Y.3d 336, 341 (N.Y. Ct. App. 2019) (observing that the New York Public Service Commission "was created at the beginning of the twentieth century to regulate and control public service corporations, as an exercise of the state's police powers," with public corporations including the "generation of electricity [or production of gas], its transmission, and its distribution to consumers" (internal citations and quotations omitted)).

[35] *Ass'n of Home Appliance Manufacturers v. City of New York*, 36 F. Supp. 3d 366, 375-77 (S.D.N.Y. 2014).

[36] 42 U.S.C. §§ 6297(b)-(c), 6316.

[37] *Id.*

[38] *Id.* EPCA provides some explicit exceptions to state preemption for certain state standards for certain products, generally ones that existed prior to EPCA's enactment. *See* 42 U.S.C. §§ 629(b) and (c).

[39] *See, e.g.*, *Bldg. Indus. Ass'n of Wash. v. Wash. State Bldg. Code Council*, 683 F.3d 1144, 1145 (9th Cir. 2012) (explaining that EPCA establishes nationwide energy efficiency standards for certain and expressly preempts stricter state standards); Public Health Law Center, *Legal Levers to Promote Building Electrification: Initial Research Brief* 4-5 (Feb. 2025) (explaining EPCA preemption).

[40] 42 U.S.C. § 6297(d).

[41] *See* Alexandra B. Klass, *State Standards for Nationwide Products Revisited, Federalism, Green Building Codes, and Appliance Efficiency Standards*, 34 HARV. ENV'T L. REV. 335, 348-49 (2010) (discussing barriers to states obtaining preemption waivers from DOE for appliance efficiency standards under EPCA); Public Health Law Center, *supra* note 38, at 15-16 (discussing statutory standards for EPCA preemption waiver and DOE's refusal to grant waiver applications).
[42] *See* 42 U.S.C. § 6297(f)(3).
[43] 42 U.S.C. § 6316(b)(2)(B).
[44] *About ASHRAE*, https://www.ashrae.org/about (last visited April 21, 2026).
[45] *Air Conditioning & Refrigeration Inst. v. Energy Res. Cons. & Dev. Comm'n*, 410 F.3d 492, 500 (9th Cir. 2005).
[46] *Cal. Rest. Ass'n v. City of Berkeley*, 65 F.4th 1045 (9th Cir. 2023).
[47] City of Berkeley, S*upplemental Material for Item C (Harrison)* (16 July 2019).
[48] *See Berkeley*, 89 F.4th at 1117 & n.9 (Baker, J., concurring).
[49] "Energy efficiency" and "energy use" are both technical terms that refer to different aspects of an appliance's efficiency: "Energy use" standards prevent appliances from using too much energy overall, while "energy efficiency" standards prevent appliances from using too much energy relative to their useful output. *Calif. Rest. Ass'n v. City of Berkeley*, 89 F.4th 1094, 1122 (9th Cir. 2024) (Friedland, J. dissenting).
[50] 180 F.4th 434 (2d Cir. 2026).
[51] *Berkeley*, 89 F.4th at 1122.
[52] 184 F.4th 1094 (9th Cir. 2026).
[53] *Rinnai*, 184 F.4th at 1107 (rejecting argument that "any regulation that directly or indirectly results in consumers being unable to use gas appliances—including those enacted pursuant to a state's authority under another federal statute—must be preempted").
[54] *Mulhern Gas Co. v. Mosley*, 798 F. Supp. 3d 304 (N.D.N.Y. 2025).
[55] *Ass'n of Contracting Plumbers v. City of N.Y.*, No. 23-CV-11292 (RA), 2025 LX 162511 (S.D.N.Y. Mar. 18, 2025).
[56] *Ass'n of Contracting Plumbers v. City of N.Y.*, 180 F.4th 434 (2d Cir. 2026).
[57] *Nat'l Ass'n of Home Builders of the U.S. v. Montgomery Cnty.*, No. 8:24-cv-03024-PX, 2026 WL 817322 (D. Md. Mar. 25, 2026).
[58] Montgomery County Council, Agenda Item #15C: Bill 13-22—Buildings—Comprehensive Building Decarbonization—Favorable with Amendments [page 12] (Nov. 29, 2022), https://www.montgomerycountymd.gov/council/Resources/Files/agenda/col/2022/20221129/20221129_15C.pdf.
[59] *Nat'l Ass'n of Home Builders of the U.S. v. District of Columbia*, No. 24-cv-02942 (ACR), 2026 WL 837674, at *5 (D.D.C. Mar. 26, 2026).
[60] *Id.* at *5. The court provided this example: "Consider a hypothetical federal law," that "sets a national tortilla chips-to-salsa ratio of 2 grams for every 3 grams, and preempts states from regulating that ratio. No one would say that because Congress set a chips-to-salsa ratio, it intended to ensure that every restaurant has a right to sell chips and salsa. And a state regulation prohibiting French restaurants from serving chips and salsa would not be preempted because it would operate in an entirely different regulatory space, preserving French cuisine—one that happens also to affect chips and salsa availability." *Id.* at *8.
[61] *Rivera v. Anderson*, No. C24-0677-KKE, 2025 WL 606212 (W.D. Wash. Feb. 25, 2025).
[62] *Rivera v. Sami*, 2026 WL 2653094 (9th Cir. Sept. 9, 2026).
[63] *Md. Building Industry Ass'n, Inc., et al. v. McIlwain*, No. CV DLB-25-113, 2026 WL 885003 (D. Md. Mar. 31, 2026).
[64] *Id.* at *9; *see also id.* at *17 ("Regardless of whether 'energy use' refers to a fixed or mutable characteristic of a covered product, the BEPS are not preempted by EPCA because (i) the BEPS do not distinguish between buildings with high-efficiency covered products and those with less-efficient covered products and the emissions requirements do not depend on the energy efficiency or energy use of a building's covered products; and (ii) the BEPS do not require building owners to use more energy-efficient products at all. Thus, regardless of whether 'energy use' means what the plaintiffs urge or what MDOE urges, the BEPS do not 'refer to' or have a forbidden 'connection with' the energy use or energy efficiency of EPCA-covered products.").
[65] No. 24-cv-1093, 2026 WL 2935963, at *6-9 (D. Colo. Sept. 30, 2026).
[66] *Id.* at *9.
[67] *See, e.g.*, *id.* at *8 (acknowledging that defendants' arguments "may be true" but that they "address the merits of [the BPS]'s alleged preemption rather than Plaintiff's plausible claim of preemption" and that the court would therefore not resolve them yet).

[68] *See* Clean Air Act § 209(a), 42 U.S.C. § 7543(a).
[69] Clean Air Act § 116, 42 U.S.C. § 7416.
[70] Clean Air Act § 304(e); 42 U.S.C. § 7604(e).
[71] *Rinnai Am. Corp. v. S. Coast Air Quality Mgmt. Dist.*, 184 F.4th 1094 (9th Cir. 2026).
[72] *Id.* at 1097.
[73] *Id.*
[74] *Id.* at 1105 (citing Epic. Sys. Corp. v. Lewis, 584 U.S. 497, 510 (2018)).
[75] *Id.* at 1105.
[76] *Id.*
[77] *Id.*
[78] *Id.* at 1107.
[79] *Id.* at 1108.
[80] *Id.* at 1104-05.
[81] This list is intended to summarize current caselaw and is not legal advice. Legal technical assistance organizations like the Public Health Law Center stand ready to assist jurisdictions assessing their building decarbonization options.
[82] No. 24-cv-1093, 2026 WL 2935963, at *6-9 (D. Colo. Sept. 30, 2026).
[83] *McIlwain*, 828 F. Supp. 3d at 641-43.
[84] *See Berkeley*, 89 F.4th at 1117 & n.9 (Baker, J., concurring).
[85] *See, e.g., Bldg. Indus. Ass'n of Wash. v. Wash. State Bldg. Code Council*, 683 F.3d 1144 (9th Cir. 2012) (rejecting challenge to Washington State's building code and finding that the code met EPCA's building code exception to preemption); Erin Sherman, Daniel Carpenter-Gold, Jonny Kocher & Jamie Long, *The Energy Code Safe Harbor: How to Adopt Ambitious Building Energy Codes That Boost Efficiency, Reduce Pollution, and Comply with Federal Law*, RMI (2024), https://rmi.org/insight/the-energy-code-safe-harbor.