AlbuquerqueGreen: Regulating Climate Change at the Local Level

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Cary Coglianese, Alexandra Johnson, and Shana Starobin*

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I. The Road to AlbuquerqueGreen

In 2005, Democrat Martin Chávez secured an unprecedented reelection to his third term—and second consecutive term—as mayor of Albuquerque, New Mexico. He had run on a platform that included improving environmental protection and addressing climate change. "I was inspired by Al Gore," Mayor Chávez said of his goal to make Albuquerque the "greenest city" in the United States.[1]

Like many localities across the country and around the world, the metropolitan Albuquerque area faces its share of threats from climate change. According to the U.S. Fish and Wildlife Service, central New Mexico is expected to experience a significant increase in annual temperatures, along with a 13 percent decrease in annual precipitation.[2] The region can expect more severe heat waves and droughts, along with more extreme weather-related events such as brush fires and flash floods. These threats will be exacerbated by the rapid growth of the Albuquerque metropolitan area. The population grew roughly 20 percent over the last twenty years, a trend that is expected to continue and will put an increasing strain on the availability of water.[3]

For decades, environmentalists' calls to establish a national climate policy have gone unheeded. In the face of inaction at the national level, the U.S. Constitution affords state and local governments room to address public policy problems. As a result, many states and localities have been eager to step up to fill the void in federal regulation addressed to climate change.

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[1] Interview with Martin Chávez, University of Pennsylvania Law School, in Phila., Pa. (May 9, 2017), https://www.youtube.com/watch?v=FHedHfiwMj8.

[2] U.S. FISH & WILDLIFE SERVICE, PREPARING FOR A CHANGING CLIMATE: VALLE DE ORO NATIONAL WILDLIFE REFUGE, (2014), https://www.fws.gov/uploadedFiles/Region_2/NWRS/Zone_2/Valle_de_Oro/Images/Appendix%20VIIa%20Climate%20Change%20Scenario%20Planning%20.pdf.

[3] Ecosystem Management, Inc., *Climate Change Effects on Central New Mexico's Land Use, Transportation Systems and Key Natural Resources*, prepared for the Interagency Transportation, Land Use, and Climate Change Scenario Planning Project in Central New Mexico (2014), https://rosap.ntl.bts.gov/view/dot/12198.

Mayor Chávez appointed a "Green Ribbon Task Force" to identify actions that the city could take to reduce emissions of carbon dioxide, a key greenhouse gas that contributes to climate change. The task force, made up of representatives from the local construction and home-building industry, zeroed in on the problem of carbon dioxide emissions linked to buildings' energy use and identified the city's authority to regulate construction and land use as a prime vehicle for reducing such emissions.

In the United States, buildings consume approximately 40 percent of the nation's energy, more than either the transportation or industrial sectors.[4] Since the burning of carbon-based fuels such as oil and coal makes up the vast bulk of energy production in the United States, buildings also are responsible for roughly 40 percent of the nation's carbon emissions.[5] On a global scale, buildings in the United States alone are responsible for 10 percent of worldwide emissions.[6] Not only are buildings a major consumer of energy and source of emissions, but they are also often most vulnerable to the effects of climate change, including flooding and wildfires.

When it comes to regulating the effects of the built environment on climate, state and local regulation might seem particularly well-suited to the task, given the degree to which localities are more familiar with the intricacies of their buildings and environmental needs. Moreover, regulation of the built environment—through zoning laws and building codes—has historically fallen to state and local governments. Not surprisingly, 17 of the Albuquerque Green Ribbon Task Force's 49 recommendations were related to the built environment, more than any other category.[7]

In comparison, the federal government's track record in regulating for energy efficiency has been less dramatic. For instance, although 75 percent of residential building emissions in the United States come from appliances (water heaters, air conditioners, heaters, refrigerators, and electronics),[8] federal appliance standards have faced long delays in implementation, sometimes exacerbated by litigation and reluctant compliance. Balancing these factors for many years had resulted in relatively weak federal standards.[9]

The Green Ribbon Task Force's recommendations called for a new green building ordinance aimed at reducing greenhouse gas emissions produced in the city. The mayor had been under the impression that the proposed ordinance would be acceptable to all of the affected interest groups in the city, including the residential builders who participated in the discussions that led to the recommended code. However, he still had to get the Task Force's recommended ordinance provisions passed by City Council, and the relationship between his administration and City Council was already under some stress at the time, especially over environmental issues.[10] City

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[4] U.S. Dep't of Energy, *Energy Efficiency Trends in Residential and Commercial Buildings* (Oct. 2008), https://www1.eere.energy.gov/buildings/publications/pdfs/corporate/bt_stateindustry.pdf; U.S. Dep't of Energy, *Quadrennial Technology Review: An Assessment of Energy Technologies and Research Opportunities* 145 (2015), https://www.energy.gov/sites/prod/files/2017/03/f34/qtr-2015-chapter5.pdf; U.S. Energy Info. Admin., *How Much Energy is Consumed in U.S. Buildings?*, https://www.eia.gov/tools/faqs/faq.php?id=86&t=1 (last updated May 12, 2022).

[5] Jim Turner & Ellen Vaughan, *The Value and Impact of Building Codes*, ENVTL. AND ENERGY STUDY INST. (Sept. 30, 2013), http://www.eesi.org/papers/view/the-value-and-impact-of-building-codes.

[6] Anne E. Carlson, *Energy Efficiency and Federalism*, 107 MICH. L. REV. FIRST IMPRESSIONS 63 (2008), https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1083&context=mlr_fi.

[7] City of Albuquerque, *City of Albuquerque Climate Action Plan: Climate Action Task Force Recommendations to Mayor Martin J. Chávez*, CITY OF ALBUQUERQUE (Aug. 2009), https://www.cabq.gov/sustainability/documents/2009-climate-action-plan.pdf.

[8] Carlson, *supra* note 6, at 63.

[9] *Id.* at 65-66.

[10] Dan McKay, *Council, Official Feel the Tension*, ALBUQUERQUE JOURNAL (Aug. 6, 2007), https://www.abqjournal.com/news/metro/584187metro08-06-07.htm.

Council members claimed to have been excluded from the Green Ribbon Task Force's discussions over developing the mayor's proposed ordinance. While the Green Ribbon Task force was developing a proposed ordinance for the mayor, three members of the Albuquerque City Council proposed their own green building ordinance.[11] Their proposal contained stringent requirements for the energy efficiency of HVAC (heating, ventilation, and air conditioning) equipment, windows, insulation, and other building features. The requirements for HVAC equipment, in particular, were more demanding than the federal efficiency standards established by the U.S. Department of Energy. Eventually, this separate proposal was combined with the mayor's. The final proposal, which was then adopted by the City Council, amended the Albuquerque Building Code to include more stringent requirements for energy efficiency and water use in new construction and major building renovations. Among other things, the amended code tightened the energy efficiency requirements for hot water heaters and HVAC systems.

II. Incorporation by Reference and Albuquerque's Green Building Code

Local government leaders were instrumental in developing and eventually passing the Albuquerque Energy Conservation Code—a "green building" code for the city. Several of its key substantive provisions came from private standards that had been incorporated by reference. Private codes and standards differ from regulations in that, as their name suggests, they are developed by private, nongovernmental entities. Because compliance with private standards by themselves is not legally required, they are sometimes referred to as "voluntary" codes and standards. These codes and standards play a central role in the governance of economic activity and the design of thousands of products that affect all of our lives every day.

One common way in which voluntary codes and standards affect the law is through a process of "incorporation by reference"—that is, by having a legislature or regulatory body adopt a private standard as part of binding law.[12] Although sometimes regulations or statutes will reprint the actual text from codes or standards developed by nongovernmental entities—as occurs with the Model Penal Code—many times laws and regulations will not include the actual text from the private codes or standards. Instead, they will simply incorporate them by referring to the name or number of the private standard. Even if incorporated just by reference in this way, what were once voluntary standards become no longer voluntary. Compliance with them becomes mandated by law.

The practice of incorporating private standards into government regulations is quite common. The Code of Federal Regulations, for example, contains over 24,000 incorporated private standards which address a wide array of regulatory issues.[13] Incorporation by reference is also commonplace at the state and local levels of government.

When it comes to private codes and standards related to building construction, nongovernmental organizations are well aware of the practice of incorporation by reference and will often develop and regularly update their standards or model codes with the express

[11] Dan McKay, *Council, Chávez Green Building Codes Compete*, ALBUQUERQUE JOURNAL (Aug. 15, 2007), https://www.abqjournal.com/news/metro/586329metro08-15-07.htm.

[12] For more detail on incorporation by reference, see the materials located at https://pennreg.org/codes-standards/.

[13] This figure is current as of 2016. *See* NIST, Standards Incorporated by Reference (SIBR) Database, https://sibr.nist.gov/ (last visited June 20, 2022).

understanding that they will eventually find their way into many state and local governments' binding building codes.

Most of the major aspects of building construction are covered by nongovernmental organizations' model building codes—including plumbing, electrical and wiring, heating and cooling systems, fire protection, and energy efficiency. Before being incorporated into city building codes, these model codes are generally reviewed by local committees comprising experts from the construction industry and by staff at city building departments. City councils or building commissions follow their usual procedures for developing laws and regulations but often end up using those procedures to approve the incorporation of the private standards by reference. State legislatures, city councils, or applicable administrative boards can adopt the private codes entirely, often through the pathway of incorporation by reference, or they can pick and choose just parts of these codes by incorporating by reference only specific provisions or sections.

Professionals involved in developing standards sometimes distinguish between "prescriptive" and "performance" standards.[14] By prescriptive standards, they usually mean those standards that detail precisely what action needs to be taken or the precise products or product features that must be used for a particular application. Because prescriptive standards lay out well-specified actions or technologies that builders need to take or use, they are often said to be easier for builders to follow. They may also at times be simpler for building inspectors to ascertain whether an entity is in conformity with the standard.

By contrast, performance standards define the goalposts, such as by setting a goal of a percentage reduction in energy use, without specifying exactly how to reach the goalpost. Performance standards allow for flexibility on the part of the covered entities to find their own actions that meet the specified goal while potentially also saving time, money, or other resources.[15]

Albuquerque's Energy Conservation Code contained both prescriptive and performance standards. It also covered a range of different building types, both commercial and residential, as well as new construction and additions and renovations. Its provisions were arrayed across two main volumes.

Volume I addressed commercial and multi-family residential buildings. Among other things, it incorporated by reference a prescriptive standard known as "ASHRAE Standard 90.1-2004."[16] The American Society for Heating, Refrigeration and Air Conditioning (ASHRAE) is a global professional association comprising over 56,000 members from over 130 nations which, as its name suggests, creates standards related to heating, refrigeration, and air conditioning.[17]

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[14] Such terminology is used here simply because it is what is commonly used by professionals in the field. But distinguishing standards that are so-called prescriptive from those that are so-called performance-based can be misleading. After all, even a performance standard *prescribes* that regulated entities meet the required level of performance. For a discussion of terminology about standards and regulations, see Cary Coglianese, *Introduction to Voluntary Codes and Standards: A Teaching Guide and Resources*, https://pennreg.org/codes-standards/wp-content/uploads/sites/4/2022/08/Coglianese-Introduction-VCS-Teaching-Guide.pdf. *See also* National Academies of Sciences, Engineering, and Medicine, DESIGNING SAFETY REGULATIONS FOR HIGH-HAZARD INDUSTRIES, https://doi.org/10.17226/24907.

[15] For a full discussion of performance standards, largely in the context of government-established regulations, see Cary Coglianese, *The Limits of Performance-Based Regulation*, 50 U. MICH. J.L. REFORM 525 (2017).

[16] City of Albuquerque, *The 2007 Albuquerque Energy Conservation Code, Volume I: Commercial and Multi-family Residential Buildings,* CITY OF ALBUQUERQUE (last visited Sept. 18, 2012), https://web.archive.org/web/20120918054133/http://www.cabq.gov/obsolete/sustainability/pdf/volumeI.pdf [AECC I].

[17] American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE), *Mission and Vision*, ASHRAE (last visited Oct. 30, 2018), https://www.ashrae.org/about/mission-and-vision. *See also* ASHRAE, *Home*, ASHRAE (last visited Oct. 30, 2018), https://www.ashrae.org/.

Standard 90.1-2004 was ASHRAE's 2004 edition of Standard 90.1 and it reflected changes made since the organization had issued its prior version of Standard 90.1 in 2001.

According to ASHRAE, the purpose of Standard 90.1-2004 was "to provide minimum requirements for the energy-efficient design of most buildings except low-rise residential buildings."[18] It applied both to a building's "envelope"—essentially the outer shell of the building structure—as well as to other systems and equipment used in buildings, such as "(1) heating, ventilating, and air conditioning, (2) service water heating, (3) electric power distribution and metering provisions, (4) electric motors and belt drives, and (5) lighting."[19]

Since Standard 90.1-2004 did not apply to single-family homes and townhouses, Albuquerque's leaders turned elsewhere to identify a different set of private standards to cover these buildings, which the city addressed in Volume II of its Energy Conservation Code.[20] This second volume incorporated by reference another private code containing a variety of prescriptive standards for high-efficiency HVAC systems: the 2006 International Energy Conservation Code (IECC). The IECC was developed by the International Code Council (ICC), a nonprofit organization of over 64,000 members dedicated to developing model building codes.[21] The 2006 IECC articulated what were then effectively considered the state-of-the-art energy efficiency requirements for both residential and commercial buildings. It would eventually be adopted or incorporated by at least 47 states, the District of Columbia, the Virgin Islands, New York City, and Puerto Rico.[22]

As of 2007, when they were developing the Albuquerque green building code, the members of the Task Force and other city officials sought to make Albuquerque among the most ambitious localities at the time in terms of energy efficiency. Toward that end, both Volumes I and II of the city's code gave builders performance standards that they could meet as alternatives to the prescriptive standards—and these performance standards aimed at ensuring builders could demonstrate a high level of energy efficiency in their buildings. Each volume contained two alternative "performance pathways" that builders could choose to follow instead of complying with the prescriptive requirements within ASHRAE Standard 90.1-2004 and the 2006 IECC.

Volume I, for example, allowed builders to escape from having to follow Standard 90.1-2004 if they could build a building to alternative specifications that was at least 30 percent more energy efficient than a "baseline building" that would have been constructed to meet the ASHRAE standards. Alternatively, a builder could opt instead to certify that its building met a global standard known as LEED "Silver." LEED—which stands for Leadership in Energy and Environmental Design—is a widely used voluntary, nongovernmental green building rating system with several levels of certification based on a building's projected degree of energy

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[18] ASHRAE, STANDARD 90.1 DOCUMENT HISTORY, ASHRAE (last visited Aug. 22, 2022), https://www.ashrae.org/technical-resources/bookstore/standard-90-1-document-history.

[19] *Id.*

[20] City of Albuquerque, *The 2007 Albuquerque Energy Conservation Code, Volume II: One- and Two- Family Detached Dwellings and Townhouses,* City of Albuquerque (last visited Sept. 18, 2012), https://web.archive.org/web/20120918053944/http://www.cabq.gov/obsolete/sustainability/pdf/volumeII.pdf [AECC II].

[21] International Code Council (ICC), *About ICC*, ICC (last visited October Oct. 30, 2018), https://www.iccsafe.org/about-icc/overview/about-international-code-council/. *See also* International Code Council, *Code Development Process*, ICC (last visited October Oct. 30, 2018), https://www.iccsafe.org/codes-tech-support/codes/code-development/.

[22] ICC, *Overview of the International Energy Conservation Code (IECC),* ICC (last visited Oct. 30, 2018), https://www.iccsafe.org/codes-tech-support/codes/2018-i-codes/iecc/.

efficiency, ranging from Certified (lowest) to Platinum (highest).[23] The Silver level certification is the level just above Certified.

Volume II offered the same two performance options but added two more. A builder could meet the standards spelled out in the Build Green New Mexico certification program. This nongovernmental standards program certifies residential buildings for their sustainability based on how well a house meets best practices identified in the National Association of Home Builders model green home building guidelines.[24] Alternatively, a builder could meet a performance level that would exceed the level of energy efficiency that could be achieved by installation of high-efficiency equipment.

Both Volume I and Volume II had a lot in common. They both offered a menu of options for builders to pursue energy use reductions. Crucially, at least one of the options in each was prescriptive, calling for specific types of air conditioners, furnaces, heat pumps, and water heaters that were more efficient than those required by federal energy efficiency regulations adopted by the U.S. Department of Energy. But each volume also contained performance-based options that did not formally require using equipment that was more energy efficient than federal standards, allowing builders potentially to find other options to meet the code's energy efficiency goals.

When Mayor Chávez and the Green Ribbon Task Force successfully won the City Council's approval for Albuquerque's new green building code in 2007, they did not seem to worry much about the potential for a legal challenge. The city's green building manager would later admit that he simply had been "unaware of federal statutes governing the energy efficiency of HVAC products and water heaters."[25] And apparently, the city's "attorneys who reviewed the Code did not raise the preemption issue."[26] Yet national leaders in the HVAC industry say that they had voiced their concern that the provisions in the Albuquerque's code related to the energy efficiency of HVAC systems and other appliances conflicted with federal law, specifically with the U.S. Energy Department's regulations, by either mandating or creating strong incentives for building construction with HVAC equipment that met more stringent standards than federal law required. After the City Council forged ahead and adopted its new green building code, that code eventually ended up in the courtroom of Martha Vazquez, the Chief District Court Judge for the U.S. District Court for the District of New Mexico.

III. National Energy Efficiency Standards and Federal Preemption

Three national trade associations from the HVAC industry, plus a dozen local companies that supply or install HVAC systems in the city, filed suit in 2008, asking Judge Vazquez to find that Albuquerque's green building code violated the U.S. Constitution—specifically, its

[23] Nora Knox, *LEED: Better buildings are our legacy*, USGBC (Jan. 26, 2015), https://www.usgbc.org/articles/leed-better-buildings-are-our-legacy. LEED was developed by the U.S. Green Building Council. *See* Selina Holmes, *How the LEED rating systems are developed,* USGBC (Mar. 23, 2018), https://www.usgbc.org/articles/how-leed-rating-systems-are-developed. For further background on LEED, see Cary Coglianese, *Environmental Soft Law as a Governance Strategy*, 61 JURIMETRICS 19 (2020).

[24] Build Green New Mexico, *About*, BUILD GREEN NEW MEXICO, http://www.buildgreennm.com/about/.

[25] Air Conditioning, Heating & Refrigeration Inst. v. City of Albuquerque, 2008 U.S. Dist. LEXIS 106706, at 5 (D.N.M. Oct. 3, 2008).

[26] *Id*.

Supremacy Clause.[27] As that clause's name implies, "[i]t specifies that federal law is supreme in case of a conflict with state law."[28] A long series of Supreme Court decisions over the years "have identified three different types of preemption—"conflict," "express," and "field"—but all of them work in the same way: Congress enacts a law that imposes restrictions or confers rights on private actors; a state law confers rights or imposes restrictions that conflict with the federal law; and therefore the federal law takes precedence and the state law is preempted."[29]

A conflict between federal and state law can arise because Congress has expressly stated that it intends the provisions of its legislation to take priority over state law. In the absence of express language, courts may imply preemption when one of two conditions apply. The first condition occurs when Congress has developed a regulatory scheme so complete that it is inferred Congress left no room for states to supplement it.[30] This type of preemption—known as field preemption—requires a clear showing that Congress intended to occupy a field and thus displace the ability of states to regulate in that area.[31] The second condition arises when federal law leaves some room for state law to operate, but the state law in question either directly conflicts with federal law or would undermine the intended purpose of the federal law.

In challenging Albuquerque's green building code in court, the industry advanced an express preemption argument. They pointed to federal statutory law—the Energy Policy and Conservation Act of 1975 (EPCA) and several legislative amendments to it—which specifically speak to preemption. The law's preemption provisions, assembled in Section 6297 of Title 42 of the U.S. Code, are quite extensive. They span more than 3,500 words! At their core, though, they contain a "general rule of preemption" for federal energy efficiency standards for appliances and other products: "[N]o State regulation concerning the energy efficiency, energy use, or water use of such covered product shall be effective with respect to such product."[32] The rest of Section 6297 contains a variety of specific rules for specific types of products as well as various exemptions from the general rule.[33]

Congress adopted EPCA following OPEC's 1973 oil embargo which led to skyrocketing gasoline prices and supply shortfalls throughout the United States. EPCA did not itself impose national uniform energy efficiency standards on industry, but instead it mandated that the federal Energy Department develop regulations imposing specific, binding energy efficiency targets for about a dozen specifically named appliances and equipment, including furnaces, central air conditioners, and humidifiers and dehumidifiers. The statute called for the Energy Department's standards to achieve the "maximum percentage improvement" that is "economically and technologically feasible, but which in any case is not less than 20 percent."[34]

Despite these mandates, the setting of energy efficiency standards did not get under way immediately during the Carter Administration. Congress acted again in 1978 by passing the National Energy Conservation and Policy Act (NECPA) which provided the Energy Department

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[27] U.S. Const., art. 6, cl. 2.
[28] Murphy v. Nat'l Collegiate Athletic Ass'n, 138 U.S. 1461, 1479 (2018).
[29] Murphy, 138 U.S. at 1480.
[30] Pac. Gas & Elec. Co. v. State Energy Res. & Dev. Comm'n, 461 U.S. 190 (1983).
[31] R.J. Reynolds Tobacco Co. v. Durham County, 479 U.S. 130 (1986).
[32] 42 U.S.C. § 6297(c). *See also* Air Conditioning, Heating & Refrigeration Inst. v. City of Albuquerque, 2008 U.S. Dist. LEXIS 106706, at 3 (D.N.M. Oct. 3, 2008).
[33] Exemptions are a pivotal aspect of law that the practicing lawyer cannot overlook. For a general discussion, see Cary Coglianese, Gabriel Scheffler, and Daniel E. Walters, *Unrules*, 73. STAN. L. REV. 885 (2021).
[34] 42 U.S. § 6295.

with further directions about the energy efficiency standards that Congress called on it to issue.[35] In some respects, NECPA was more directive. But it also stated that the Department should not adopt a standard for a particular product if it determined "that the establishment of such standard will not result in significant conservation of energy or that the establishment of such standard is not technologically feasible or economically justified."[36]

Although the Carter Administration issued a number of proposed standards, it failed to finalize any of them before President Ronald Reagan took office in January 1981. As the Reagan Administration generally opposed issuing any energy efficiency standards, progress continued to lag in meeting the targets called for in EPCA. In the face of growing interest by some states to adopt their own standards as well as a court action compelling it to issue standards, the Reagan Energy Department finally issued a rule—but one that determined that no standards could be justified. The Department estimated that large gains in energy efficiency were already occurring in response to market demand, which it claimed meant that any standard it issued would not result in "significant" energy savings.[37] Furthermore, the Reagan Administration pointed to NECPA's preemption provisions to argue that this "no-standards standard" position foreclosed state-level efforts to issue energy efficiency standards. The absence of any specific binding standards was an affirmative federal policy, preempting any state-level adoption of standards.[38]

The Natural Resources Defense Council (NRDC), a leading national environmental group, challenged the "no-standards standard" in federal court and, in 1985, the D.C. Circuit set it aside.[39] The court ruled that the Energy Department's determinations had been "unsupported by substantial evidence," forcing the Department to return to the rulemaking table and start to craft some standards.[40] In the meantime, the Reagan Administration exercised authority the statute gave it to grant waivers to states from the general preemption rule, allowing them to set their own standards. Neither environmental groups nor industry welcomed the prospect of a patchwork of standards at the state level. Environmental groups preferred a strong national baseline for energy conservation, while industry favored uniform standards so they could reap the economies of scale from building a single product marketable anywhere in the United States.

In the early 1980s, industry came together with environmental groups to try to negotiate over new legislation that would put into law initial standards for residential and commercial appliances that were then intended for periodic updating by the Energy Department.[41] In 1987, Congress passed the National Appliance Energy Conservation Act (NAECA) which contained federal energy efficiency standards for HVAC equipment and appliances that would go into effect in 1992.[42]

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[35] Steven Nadel & Daniel Goldstein, *Appliance and Equipment Efficiency Standards: History, Impacts, Current Status, and Future Directions,* Research Report A963 for the ACEEE (1996), at 164, https://www.aceee.org/sites/default/files/publications/researchreports/A963.pdf.

[36] National Energy Conservation Policy Act, Pub. L. 95-619, 92 Stat. 3206, § 422 (1978).

[37] *See* Nadel & Goldstein, *supra* note 35.

[38] The Reagan Administration also (unsuccessfully) sought to abolish the Energy Department, which had been established under the Carter Administration in 1977. *See* Howell Raines, *Reagan Adopts Plan to End Energy Dept. and Shift its Duties*, N.Y. TIMES (Dec. 17, 1981), https://www.nytimes.com/1981/12/17/us/reagan-adopts-plan-to-end-energy-dept-and-shift-its-duties.html.

[39] Natural Resources Defense Council, Inc. v. Herrington, 768 F.2d 1355 (1985).

[40] *Id*.

[41] Interview with Joseph Mattingly, University of Pennsylvania Law School, in Phila., Pa. (May 9, 2017), https://www.youtube.com/watch?v=Ar50WkF2CkA.

[42] National Appliance Energy Conservation Act (NAECA) of 1987, S.83, 100th Cong. (1987), https://www.gpo.gov/fdsys/pkg/STATUTE-101/pdf/STATUTE-101-Pg103.pdf.

NAECA's national standards were intended, by design, to preempt state action. Indeed, according to Joe Mattingly, former General Counsel and Secretary of the Air-Conditioning, Heating and Refrigeration Institute (AHRI)—a major national HVAC industry group and one of the lead litigants challenging the Albuquerque green building code[43]—federal preemption was the carrot without which Congress would not have adopted national standards.[44]

Of course, the mere existence of preemption provisions in federal law does not always prevent state and local leaders from moving forward to pursue their own laws. When members of Albuquerque's Green Ribbon Task Force recommended the adoption of a green building code in 2007, they apparently did not fully recognize the potential for conflicts in their proposal. Although the staff of AHRI reportedly met with local officials to warn them about conflicts with the NAECA's energy efficiency standards, the issue never deterred the Albuquerque City Council from adopting its green building code. The city would take the view that existence of the performance pathways in the code, as alternatives to the prescriptive standards, meant that the building code never truly conflicted with federal law. After all, the code never said that builders absolutely had to use equipment that met standards exceeding federal ones. As long as builders could find other ways to meet the performance standards—such as by qualifying for LEED Silver certification—they could in principle comply with the city code without necessarily needing to install HVAC equipment that exceeded the federal minimum efficiency standards.

IV. AlbuquerqueGreen in Court: Round 1, Preliminary Injunction

The first decision confronting Judge Vazquez in hearing the legal challenge to Albuquerque' green building code arose from industry's motion for a preliminary injunction to prohibit the city from enforcing the challenged sections of its code.

The industry argued that both the prescriptive and the performance standards in the code were preempted by federal law. They claimed that enforcement of these parts of the new code would cause irreparable harm to the building industry in Albuquerque by impairing their ability to sell HVAC products that did not exceed federal standards. According to industry, the increased costs of these high-efficiency products would lead consumers to try to repair outdated and less efficient appliances rather than replace and upgrade them.

Industry also argued that the balance of equities favored at least temporarily enjoining the code. The industry would experience hardship from the code's immediate implementation as the result of the need to comply with a complex set of new regulations, while the city of Albuquerque would be less harmed from a delay in implementation

In response, Albuquerque argued that the plaintiffs were not likely to prevail on the merits because the city code was simply not preempted by federal law. Although Albuquerque acknowledged that the prescriptive code provisions required installation of equipment exceeding federal standards, it pointed to the performance paths offered as alternative means to achieve compliance with the code.

Judge Vazquez rejected Albuquerque's argument about the strength of the plaintiffs' argument on the merits. She focused on one word in Section 6297 of the federal statute: "concerning." The statute's general rule on preemption applied to any "state regulation *concerning*

[43] Air-Conditioning, Heating, & Refrigeration Institute, *AHRI: Supporting Nationwide and Global Industry,* AHRI (last visited Oct. 30, 2018), http://www.ahrinet.org/About-Us.
[44] Mattingly, *supra* note 41.

the energy efficiency [or] energy use" and was thus subject to the preemption provision of the EPCA.[45] Judge Vazquez noted that *Black's Law Dictionary* defines "concerning" as "relating to."[46] That definition matters because, as Judge Vazquez observed, the Supreme Court has considered as having a "broad scope" and "expansive sweep" a preemption provision in another federal statute that uses "relate to" instead of "concerning"—namely, the Employee Retirement Income Security Act of 1974, or ERISA.[47]

Judge Vazquez reasoned that this expansive reading should even sweep in the performance-based options in the Albuquerque code. These performance standards, she concluded, "directly or indirectly, concern the energy efficiency, energy use, or water use of covered products."[48] Even though they do not "explicitly require[e] a homeowner to install products that exceed federal energy standards, do require a homeowner to incur additional expense … if the homeowner chooses to install products that meet, but do not exceed, federal energy standards."[49] The need to incur additional expenses if "federally-compliant products are used strongly suggests that the Code 'concerns' the energy efficiency of covered products."[50]

Section 6297, however, is a lengthy provision that contains a series of exceptions to the general rule against federal preemption. Judge Vazquez found that, even taking these exceptions into account, the industry plaintiffs were likely to prevail with respect to most of the city code's provisions.

Section 6297 exceptions can apply differently to commercial and residential buildings. Judge Vazquez concluded that none of the provisions in Volume I of Albuquerque's code, with respect to commercial buildings, would qualify for any exceptions. 51 The prescriptive standards in Volume II would also not qualify. But Judge Vazquez determined that it was "less clear" about the performance standards in Volume II.52 They "arguably" qualified for one of Section 6297's exceptions that applies when a "code permits a builder to meet an energy consumption or conservation objective for a building by selecting items whose combined energy efficiencies meet the objective."53

Even if the plaintiffs might not prevail on the merits with respect to the performance standards, Judge Vazquez found a likelihood of plaintiffs prevailing with respect to the prescriptive standards and to all of Volume I. That conclusion, combined with the judge's assessment that the plaintiffs met the other criteria for a preliminary injunction, justified granting the industry's motion to enjoin implementation of the green building code. In October 2008, upon the issuance of Judge Vazquez's order, Albuquerque's quest to be considered the United States' "greenest city" had been officially put on hold.

V. AlbuquerqueGreen in Court: Round 2, Summary Judgment

Following Judge Vazquez's decision to impose a preliminary injunction halting the implementation of the green building code, the litigation proceeded. One year later, the industry

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[45] Air Conditioning, Heating & Refrigeration Inst. v. City of Albuquerque, No. 08-633 MV/RLP, 2008 U.S. Dist. LEXIS 106706, at 18 (D.N.M. Oct. 3, 2008) (emphasis added).
[46] *Id*.
[47] *Id*. at 19. ERISA preempts all state laws "insofar as they ... relate to any employee benefit plan." 29 U.S.C. § 1144(a). *See also* Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739 (1985) ("broad scope") and Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47 (1987) ("expansive sweep").
[48] Air Conditioning (preliminary injunction), 2008 U.S. Dist. LEXIS 106706, at 23.
[49] *Id*. at 23-24.
[50] *Id.* at 24.
[51] *Id.*
[52] *Id*. at 36.
[53] *Id*. at 25-25; 42 U.S.C. § 6297(f)(3)(A).

plaintiffs were again filing motions with the court—this time, motions for partial summary judgment seeking to narrow the case and result in definitive rulings on the industry's preemption arguments. It would take yet another year before Judge Vazquez would issue her ruling on these summary judgment motions.

Industry's first motion sought summary judgment with respect to Volume I of the city's code, which imposed energy efficiency standards on commercial buildings and large multi-family buildings. A separate motion sought summary judgment on Volume II of the code, with respect to residential buildings, such as single-family dwellings and townhouses. Industry claimed that both the prescriptive and performance pathways in Volumes I and II were preempted by federal law.

Judge Vazquez again construed broadly the express preemption provisions contained in Section 6297 of federal statutory law. Citing her 2008 decision granting a preliminary injunction against the code, she concluded that "[t]he plain language of the preemption statute makes clear that Congress intended the preemption to be broad in scope."[54] She then took up the motions about Volume I and II separately, and within each she treated the arguments concerning prescriptive standards as separate from those concerning the performance ones. Boiled down to their essence, the questions with respect to Volume I and II were identical: To what extent did the existence of the alternative performance pathways in the Albuquerque code keep its prescriptive pathways from conflicting with federal energy efficiency standards?

On their own, it was undeniable that the prescriptive standards "require[ed] the use of heating, ventilation, or air conditioning products or water heaters with energy efficiency standards more stringent than federal standards."[55] The incorporated prescriptive standards—specifically, ASHRAE Standard 90.1-2004 and provisions in the 2006 IECC—were more up-to-date with the latest technologies than the federal appliance standards and, as such, they called for costlier equipment that had greater energy efficiency.

But the city argued that the prescriptive options in Volumes I and II were not preempted because its building code contained other performance-based alternatives for compliance that did not require anything specific about HVAC equipment. According to the city, the existence of these alternatives made the prescriptive standards "optional," meaning that the "prescriptive path merely provides guidance as to how the energy goals reflected in the two performance-based paths can be obtained."[56]

In support of its argument, the city cited a Supreme Court decision in a preemption dispute arising under ERISA—the very federal statute that Judge Vazquez had relied on in her 2008 decision to construe Section 6297 broadly. In that case, the Supreme Court held that state laws were not preempted when they required patients covered by ERISA-regulated health care plans to pay surcharges for medical services.[57] These surcharges had indirect incentive effects on regulated companies, just as did the various pathways in the Albuquerque code, but they never posed a direct conflict with federal health insurance regulations. The Court found that, although the surcharges had "an indirect influence" on the federally regulated health plans, they failed to "bind plan administrators to any particular choice and consequently [did] not function as a regulation."[58] A surcharge, in other words, was not the same as a binding requirement.

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[54] Air Conditioning, Heating & Refrigeration Inst. v. City of Albuquerque, 835 F. Supp. 2d 1133, 1136 (D.N.M. 2010).
[55] *Id*. at 1137.
[56] *Id*. at 1136.
[57] New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 115 S. Ct. 1671, 131 L. Ed. 2d 695 (1995).
[58] Air Conditioning (summary judgment), *supra* note 54, at 1136.

Judge Vazquez rejected the city's argument. In her view, the prescriptive standards were still binding regulatory standards. Far from being "optional," they were required if builders could not meet the performance standards. As she reasoned in her summary judgment opinion:

> The prescriptive path sets forth specific requirements that HVAC systems and equipment must meet in order to comply with the Code if a building does not comply with the two performance-based compliance paths. …. The City has not persuaded the Court that a local law is not preempted when it presents regulated parties with viable, non-preempted options.[59]

Judge Vazquez found the Supreme Court's ERISA decision inapposite because it dealt with a surcharge, not a regulatory standard: "The City does not point to anywhere in the case where the Supreme Court stated that a local law is not preempted when it presents regulated parties with viable, non-preempted options."[60] Furthermore, the judge looked to the legislative history and the purpose underlying Section 6297, which she found to support her conclusion. Allowing a city to escape from Congress's express preemption rule merely because it gave builders other alternatives would only "complicate the design, production and marketing plans of appliance manufacturers, thus thwarting Congressional intent."[61]

Having rejected the city's argument that the prescriptive standards did not conflict because no builder was necessarily bound to follow them, Judge Vazquez granted industry's summary judgment motion with respect to the prescriptive provisions in Volumes I and II.

With regard to the performance-based compliance paths in both volumes, however, Judge Vasquez found that the industry plaintiffs had failed to show convincingly the absence of genuine issues of material fact necessary to grant summary judgment with respect to those provisions.[62] In a manner that seemingly reprimanded the industry attorneys, she noted that plaintiffs "present[ed] a two-paragraph argument asserting that some of the performance standards and the performance-based compliance paths in Volume I are preempted."[63] And even though industry did "address the performance-based compliance paths in more detail in their Reply, the cursory argument in their Motion regarding the performance-based compliance paths, coupled with very few material facts regarding the performance-based compliance paths, has not shown the absence of genuine issues of material fact or demonstrated that Plaintiffs are entitled to judgment as a matter of law."[64]

With respect to the performance pathways in Volume II, the judge pointed out that all the industry lawyers had done was to rely on her 2008 decision on the preliminary injunction. The industry's reliance on her earlier order was ultimately "unavailing" because the standards for a preliminary injunction and a summary judgment are distinct: "A preliminary injunction requires showing only a substantial likelihood of success on the merits whereas a party seeking summary judgment must demonstrate that they are entitled to judgment as a matter of law."[65]

With her summary judgment decision, issued in September 2010, Judge Vazquez had made it clear that if Albuquerque still wanted to use a green building code in its quest to become America's "greenest city," that policy initiative remained unlikely to take effect any time soon. The city simply

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[59] *Id*. at 1136-1137.
[60] *Id*. at 1136.
[61] *Id*. at 1137.
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.* at 1140.

could not try in any way to adopt code provisions that incorporated the more advanced prescriptive standards reflected in ASHRAE Standard 90.1-2004 and the 2006 IECC. And if it wanted to mandate separate high-efficiency performance standards, it was going to have to keep litigating.

Industry, on the other hand, had managed to buy itself time. Five years had passed since Mayor Chávez had been re-elected on a green platform, and three years had transpired since Albuquerque's Green Ribbon Task Force had been formed. In fact, by the time Judge Vazquez handed down her decision on industry's summary judgment motions, Chávez had finished his term as mayor. Earlier in 2010, he had been appointed as the executive director of a global nonprofit linking together local government officials committed to environmental sustainability.[66]

[66] The former mayor's Wikipedia entry states that, "[i]n March 2010, Chávez, was appointed Executive Director of ICLEI Local Governments for Sustainability USA. Chávez had served on ICLEI USA's Board of Directors and was recognized nationally as a 'green mayor' during his tenure in Albuquerque." Martin Chávez, WIKIPEDIA, https://en.wikipedia.org/wiki/Martin_Ch%C3%A1vez#Post-mayoral_career (last accessed Aug. 21, 2022).