Voluntary Codes and Standards

A Teaching Guide on State and Local Climate Regulation: Building Codes in New Mexico and Washington State

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www.pennreg.org/codes-standards

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I. Introduction

This teaching guide supports a course module focused on state and local government efforts to address climate change—and the litigation that can arise when these efforts come into tension with

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federal law. The materials in this module are designed to be used to teach federal preemption but they can also be used in environmental or climate law courses to teach about green building codes and energy efficiency standards.

The module explores preemption—and its potential obstacles for state and local lawmakers—through the lens of two legal cases challenging similar subnational building codes. The first case, *Air Conditioning, Heating & Refrigeration Institute v. City of Albuquerque*,[1] focuses on the city of Albuquerque's attempt to establish its own local green building code that diverged in part from established federal standards regulating the energy efficiency of building equipment, such as heating and air conditioning systems. It traces the development of the city's green building code, introduces some of the interests involved, and lays out the principal issues that emerged in litigation. A federal district court issued two decisions in this case: one granting a preliminary injunction barring implementation of the city building code, and the other granting partial summary judgment declaring parts of the city building code to have been preempted by federal law.

Although federal preemption blocked the Albuquerque green building code from taking effect, a few years later the federal courts upheld a structurally similar green building code adopted by the state of Washington. The second case, *Building Industry Association of Washington v. Washington State Building Code Council*,[2] showcases a subnational entity succeeding in creating a building code that called for energy conservation measures, even in the face of claims that its code was preempted by federal energy efficiency standards. The contrasting court decisions in the Albuquerque and Washington State cases provide an excellent basis for helping students understand federal preemption generally as well as to think about the statutory interpretation issues embedded in any express preemption analysis. And in the face of longstanding gridlock over federal climate legislation, the case studies can be used to invite students to reflect and discuss on strategies for creating more aggressive climate policies at the state and local level without running afoul of federal preemption.

II. Goals of this Course Module

This teaching guide and accompanying materials will help faculty use the *City of Albuquerque* and *Washington State Building Code Council* cases to introduce students to issues of federal preemption or deepen their knowledge of these issues. This guide and accompanying materials can be used to help students both think prospectively about how to design state or local laws with federal preemption in mind, as well as how to apply the doctrine of federal preemption retrospectively to assess how the doctrine applied to the state and local governments profiled in the two case studies.

Faculty teaching classes in administrative law, conflicts of laws, constitutional law, environmental law, or statutory interpretation will find these materials useful. In addition, this course module

[1] The district court's decision on the preliminary injunction motion can be found at 2008 U.S. Dist. LEXIS 106706, at 18 (D.N.M. Oct. 3, 2008). The decision on summary judgment grounds can be found at 835 F. Supp. 2d 1133, 1136 (D.N.M. 2010). An edited version of the district court's summary judgment decision is available on the website for this course module at www.Codes-and-Standards.org.

[2] The district court's decision is available at 2011 U.S. Dist. LEXIS 12316 (W.D. Wash. Feb. 7, 2011). The Ninth Circuit's decision on appeal is at 683 F.3d 1144 (9th Cir. 2012). An edited version of the Ninth Circuit decision is available on the website for this course module at www.Codes-and-Standards.org.

offers materials for faculty who might wish to explore issues of climate regulation, energy efficiency standards, or incorporation by reference of voluntary codes and standards. These materials could be used to discuss the challenges of state and local approaches to environmental problems in courses or seminars on local government law, energy law, climate change, or public policy more generally.

This guide can be used flexibly to prepare a lesson that could last for as little as 15 minutes—for example, a short lecture or class discussion based on just one of the case studies—or for an entire class session if both cases are used to explore federal preemption and the statutory interpretation issues implicated by the several exemptions specified in federal energy legislation.

III. Materials in this Course Module

This teaching guide is part of a larger course module comprising readings, PowerPoint slides, and optional videos that may be useful for instructors or their students. All of these materials can be found online at www.codes-and-standards.org. The course module contains:

- Teaching Guide (this document)
- Case Studies (used separately or in a combined form)
    - *AlbuquerqueGreen: Regulating Climate Change at the Local Level* [13 pages]
        - This case study of *City of Albuquerque* offers readers the facts of the case and the larger background on both voluntary building codes and incorporation by reference. It also provides a description of the court's decision that can be used without assigning the actual court opinion itself.
    - *Washington's 2030 Challenge: Regulating Around Preemption* [9 pages]
        - This case study of *Wash. State Bldg. Code Council* offers readers the facts of the case and the larger background on both voluntary building codes and incorporation by reference. It also provides a description of the court's decision that can be used without assigning the actual court opinion itself. Its background section provides enough information for the case study to be used on its own but it is shorter than that in the *AlbuquerqueGreen* case study to minimize overlap if both case studies are assigned.
- PowerPoint slides (can be used or adapted if the instructor chooses to lecture for some or all of the class session)
- Videos (direct accounts from two key players in the *AlbuquerqueGreen* case study*)*
    - Martin Chávez (Former Mayor, Albuquerque, New Mexico), speaking on why Albuquerque adopted a green building code
    - Joseph Mattingly (General Counsel [retired], Air-Conditioning, Heating, and Refrigeration Institute), speaking on the industry's reaction to the Albuquerque green building code
- Additional background materials
    - *The Air Conditioning, Heating and Refrigeration Institute v. City of Albuquerque*, 835 F. Supp. 2d 1133 (D.N.M. 2010) (an edited version of the district court's opinion)
    - *Building Industry Association of Washington v. Washington State Building Code Council*, 683 F.3d 1144 (9th Cir. 2012) (an edited version of the 9th Cir. opinion)

IV. Background for Instructors

The case studies in this module provide a vehicle for a lesson about express preemption—allowing faculty to show, and students to grapple with, what it takes to analyze whether state or local laws run in tension with federal law. Both case studies focus on a subnational jurisdiction's building code and consider whether code provisions related to appliances or HVAC equipement were preempted by national energy efficiency standards. The key issue is whether the state or local code demanded builders install appliances or equipment that would be more energy efficient than required under federal law. The Energy Policy and Conservation Act of 1975 (EPCA) and its amendments expressly preempt state and local building codes that establish appliance and equipment standards that are more demanding than the federal government's. But EPCA also provides for an exemption to its general rule of preemption. The case studies center on one of the key conditions that must be met in order to qualify for EPCA's exemption.

Although EPCA establishes several criteria that must be met for a state or local law to qualify for the exemption from preemption, the case studies and this module focus attention on the criterion that state and local codes must not "require" equipment exceeding federal energy standards. This might seem like a straightforward criterion but it is complicated in the case studies by the fact that the subnational codes in the case studies include several options builders could take to comply with the relevant codes, only some options of which called for use of high efficiency equipment that exceeded federal standards. The cases thus raise the question: Do state and local codes "require" the adoption of higher efficiency equipment when such high efficiency standards are only one option among many? The district court in New Mexico that reviewed the city of Albuquerque's green building code ruled that the answer is "yes"—that is, even though the city code contained alternative compliance options that did not expressly necessitate use of high efficiency equipment, the existence of provisions in the code calling for high efficiency equipment was enough to make the code preempted. By contrast, when the district court in Washington State and the Ninth Circuit Court of Appeals reviewed the state of Washington's green building code, they answered the same question "no." That is, the Washington code was not preempted merely because some businesses might choose to use high efficiency equipment for ease or cost purposes.

The contrasting arguments advanced within and across these two cases provide a meaningful learning opportunity for students. This section of the teaching guide provides background information that can help instructors develop lesson plans for using in their classrooms the case studies and related materials in this course module.

A. Federal Energy Efficiency Codes

The building and infrastructure industries are unavoidably linked to climate change and its associated risks. Approximately forty percent of carbon emissions are generated by buildings. And buildings are exposed to many climate-related risks from extreme weather, such as flooding, wind damage, and fires.

For many years, efforts to pass federal legislation to regulate carbon emissions had limited success. For example, cap-and-trade legislation passed the House but failed in the Senate in 2010. In 2015, the Environmental Protection Agency adopted the Clean Power Plan under existing authority in

the Clean Air Act to reduce carbon emissions from the power sector, but the Supreme Court issued a stay in the implementation of these regulations even before they could take effect.[3]

In the face of federal gridlock over climate policy, state and local governments have pursued their own efforts to reduce greenhouse gas emissions.[4] Buildings and their energy use have constituted one climate-related domain over which states have traditionally enjoyed legislative and regulatory control. Building codes are state or local laws, not federal ones. Local governments can serve as what Justice Brandeis once called "laboratories of democracy," allowing for experimentation and responsiveness to the ground-level interests and environment. Such experimentation, of course, can also lead to an uneven patchwork of state and local rules.

In an effort to provide greater uniformity in standards for the kinds of equipment and appliances used within buildings, the U.S. Congress authorized the U.S. Department of Energy to issue binding energy efficiency standards for this aspect of buildings' energy impacts and corresponding climate-related emissions. The Energy Policy and Conservation Act of 1975 (EPCA) called for the Energy Department to adopt standards such that the "aggregate energy efficiency of covered products" in 1980 would "exceed the aggregate energy efficiency achieved by" these products in 1972, via the "maximum percentage improvement" that the Energy Department "determines is economically and technologically feasible, but which in any case is not less than 20 percent."[5]

Despite this legislation, the setting of energy efficiency standards languished through the Carter Administration. With the patchwork of state standards remaining a concern, Congress passed the National Energy Conservation and Policy Act (NECPA) in 1978 which, among other things, clarified that federal energy standards would preempt state standards.[6]

The adoption of energy efficiency standards continued to lag under the Reagan Administration. Under NECPA, the Energy Department was not supposed to adopt a federal standard unless it would result in a significant conservation of energy and would be technologically feasible and economically justified. The Department took the position that market pressures were already driving energy efficiency gains, such that federal standards would not result in "significant" energy savings. Furthermore, the Department took the position that a decision *not* to adopt a standard because it did not meet these criteria would itself preempt any state laws attempting to impose efficiency requirements for said product. As a result, it argued that its "no-standards standard" was an affirmative federal policy that preempted any state-level adoption of energy efficiency standards.[7]

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[3] West Virginia v. EPA, 577 U.S. 1126. 136 S. Ct. 1000, 194 L. Ed. 2d 17 (2016). The Supreme Court subsequently ruled that parts of the U.S. Environmental Protection Agency's Clean Power Plan exceeded the agency's authority under the Clean Air Act. West Virginia v. EPA, 142 S. Ct. 2587, 213 L. Ed. 2d 896 (2022).

[4] *See, e.g.*, BARRY RABE, STATEHOUSE AND GREENHOUSE: THE EMERGING POLITICS OF AMERICAN CLIMATE CHANGE POLICY (2004); Cinnamon Carlarne, *Notes from a Climate Change Pressure-Cooker: Sub-Federal Attempts at Transformation Meet National Resistance in the USA*, 40 CONN. L. REV. 1351 (2008).

[5] Energy Policy and Conservation Act, S. 622, 94th Cong., § 6295 (1975).

[6] National Energy Conservation Policy Act, H.R. 5037, 95th Cong. (1978), https://www.govinfo.gov/content/pkg/STATUTE-92/pdf/STATUTE-92-Pg3206.pdf. *See generally* 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://aceee.org/files/proceedings/1996/data/papers/SS96_Panel2_Paper17.pdf.

[7] 48 Fed. Reg. 39,376 (1983).

The Natural Resources Defense Council (NRDC), a leading national environmental group, took the Energy Department and in 1985 the D.C. Circuit ordered the Energy Department to set substantive standards, rejecting the Department's the "no-standards standard" approach.[8] The court ruled that the Department's determinations had been "unsupported by substantial evidence" to the point where they were "contrary to law." In contravention of EPCA, the Department had also "refus[ed] to allow interested persons a meaningful opportunity to question DOE employees who participated in the rulemaking." And the court also found that, contrary to requirements in the National Environmental Policy Act, the Department failed to give due consideration to the environmental impacts of its no-standards policy. The Energy Department had tried to argue that market forces would "continue to encourage the production and sale of efficient appliances" and thus that increased regulation would not significantly improve energy efficiency.[9] The court rejected that argument in the face of a Department analysis that itself predicted that state-level product standards would promote energy efficiency as well as arguments from states and manufacturers that state standards had improved energy efficiency.

After its loss in the D.C. Circuit, the Reagan Administration still dragged its feet in adopting federal standards. But it did retreat from its position on preemption, and the Energy Department granted preemption waivers to states, allowing them to set their own energy efficiency standards. The resulting patchwork of state standards was undesirable for both industry and environmental groups. Industry preferred uniform standards that would allow them to take advantage of economies of scale, while environmental groups preferred to see a strong national baseline for energy conservation.

In a rare exhibition of cooperation between industry and environmental groups, both sides agreed to push new legislation that would enact initial standards for residential and commercial appliances that would then be periodically updated by the Energy Department. Despite the coalition between industry and environmentalists, however, the legislation experienced political setbacks. Initially passed by both houses of Congress in 1986, it was vetoed by President Reagan. Further legislative efforts resulted in the passage of the National Appliance Energy Conservation Act (NAECA) of 1987 with a veto-proof majority.[10] This statute's federal energy efficiency standards for heating, ventilation, and air-conditioning (HVAC) equipment and appliances went into effect in 1992.[11]

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 leading HVAC manufacturers trade association—federal preemption was the carrot without which national standards likely may never have been achieved. Still, state and local leaders were not always aware of the national standards or the possibility that those standards would preempt their own regulatory efforts. In fact, the federal government over

[8] Natural Resources Defense Council, Inc. v. Herrington, 768 F.2d 1355 (1985).
[9] *Id*. at 1432.
[10] National Appliance Energy Conservation Act, S.83, 100th Cong. (1987), https://www.govinfo.gov/content/pkg/STATUTE-101/pdf/STATUTE-101-Pg103.pdf.
[11] Further energy policy legislation—the Energy Policy Act (EPACT) of 1992—established additional federal energy efficiency standards for residential appliances. Energy Policy Act of 1992, H.R. 776, 102d Cong. (1992), https://www.govinfo.gov/content/pkg/STATUTE-106/pdf/STATUTE-106-Pg2776.pdf.

the years has encouraged states to adopt and provide support for the implementation of energy conservation codes.

B. Federal Preemption and Subnational Building Codes

The two case studies in this module center on the question of whether the respective building codes in each jurisdiction are preempted by national energy efficiency standards by demanding, or even just encouraging, builders to install appliances or heating and air conditioning equipment that were more energy efficient than required under federal law. The Supreme Court has explained the basic law of federal preemption as follows:

> Preemption is based on the Supremacy Clause, and that Clause is not an independent grant of legislative power to Congress. Instead, it simply provides "a rule of decision." It specifies that federal law is supreme in case of a conflict with state law. Therefore, in order for [a federal law] to preempt state law, it must satisfy two requirements. First, it must represent the exercise of a power conferred on Congress by the Constitution; pointing to the Supremacy Clause will not do. Second, since the Constitution "confers upon Congress the power to regulate individuals, not States," [the federal law] at issue must be best read as one that regulates private actors.
>
> Our cases have identified three different types of preemption—"conflict," "express," and "field," see English v. General Elec. Co., 496 U. S. 72, 78-79, 110 S. Ct. 2270, 110 L. Ed. 2d 65 (1990)—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.
>
> This mechanism is shown most clearly in cases involving "conflict preemption." [In cases involving conflict preemption, the Court has] held that the state law [is] preempted because it imposed a duty that was inconsistent—i.e., in conflict—with federal law.
>
> "Express preemption" operates in essentially the same way, but this is often obscured by the language used by Congress in framing preemption provisions. … [The Court has held that] "we do not require Congress to employ a particular linguistic formulation when preempting state law." … [Any express preemption provision] confers on private entities a federal right to engage in certain conduct subject only to certain (federal) constraints.[12]

The two case studies in this module raise questions of "express" preemption. The Energy Policy and Conservation Act of 1975 (EPCA)—as amended over the years—expressly provides that "no State regulation concerning the energy efficiency, energy use, or water use of [a product covered by federal energy efficiency standards] shall be effective with respect to such product."[13]

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[12] Murphy v. National Collegiate Athletic Association, 138 S. Ct. 1461, 1479-80 (2018).
[13] 42 U.S.C. § 6297.

The Albuquerque and Washington State case studies are interesting, however, because EPCA does more than just expressly state that federal energy efficiency standards preempt state standards. It allows, first of all, for the federal Energy Secretary to waive preemption and permit states to adopt their own standards. But second, EPCA spells out on its own terms a variety of conditions for state or local laws to be excepted from the general preemption provision. [14]

The litigation challenging the Albuquerque and Washington State building codes centered on those conditions specified in EPCA under which "a State or local building code" could be exempted from the express statutory preemption. Specifically, EPCA lists the following seven conditions that must be met for a state or local building code to qualify for a preemption exemption:

(A) The 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.

(B) The code does not require that the covered product have an energy efficiency exceeding the applicable energy conservation standard established in or prescribed [by federal law], except that the required efficiency may exceed such standard up to the level required by a regulation of that State for which the [federal Energy] Secretary has issued a rule granting a waiver [from preemption].

(C) The credit to the energy consumption or conservation objective allowed by the code for installing covered products having energy efficiencies exceeding such energy conservation standard established in or prescribed under [federal law] or the efficiency level required in a State regulation referred to in subparagraph (B) is on a one-for-one equivalent energy use or equivalent cost basis.

(D) If the code uses one or more baseline building designs against which all submitted building designs are to be evaluated and such baseline building designs contain a covered product subject to an energy conservation standard established in or prescribed under [federal law], the baseline building designs are based on the efficiency level for such covered product which meets but does not exceed such standard or the efficiency level required by a regulation of that State for which the Secretary has issued a rule granting a waiver [from preemption].

(E) If the code sets forth one or more optional combinations of items which meet the energy consumption or conservation objective, for every combination which includes a covered product the efficiency of which exceeds either standard or level referred to in subparagraph (D), there also shall be at least one combination which includes such covered product the efficiency of which does not exceed such standard or level by more than 5 percent, except that at least one combination shall include such covered product the efficiency of which meets but does not exceed such standard.

[14] For a discussion of the distinction between waivers and exceptions, and the importance of both in federal law, see Cary Coglianese, Gabriel Scheffler, and Daniel E. Walters, *Unrules*, 73 STAN. L. REV. 885-967 (2021).

(F) The energy consumption or conservation objective is specified in terms of an estimated total consumption of energy (which may be calculated from energy loss- or gain-based codes) utilizing an equivalent amount of energy (which may be specified in units of energy or its equivalent cost).

(G) The estimated energy use of any covered product permitted or required in the code, or used in calculating the objective, is determined using the applicable test procedures prescribed under [federal law], except that the State may permit the estimated energy use calculation to be adjusted to reflect the conditions of the areas where the code is being applied if such adjustment is based on the use of the applicable test procedures prescribed under [federal law] or other technically accurate documented procedure.[15]

EPCA makes clear that all seven of these conditions must be met for a building code to be exempted from federal preemption.

The litigation over the Albuquerque and Washington State building codes together raised questions about most of these seven conditions. Nevertheless, to make the case studies manageable for pedagogical purposes, the case studies have been written to focus on the main condition reflected in subsection (B): "*the code does not require that the covered product have an energy efficiency exceeding the applicable energy conservation standard" in federal law*.

The condition expressed in subsection (B) lies at the heart of both case studies in this course module, with the operative word in this subsection being "require." Both the Albuquerque and Washington State building codes provided several options that builders could take to comply with their state and local requirements. Although some options did specifically call for equipment that exceeded the federal standards, other options were designed to be "performance-based" and did not specifically require any particular kind of equipment. Instead, these performance-based options called for the attainment of an overall level of energy demand by a building.[16]

The case studies raise core questions about preemption when alternative compliance options are provided. Does a code "require" the adoption of higher efficiency equipment if it merely includes the use of such equipment as one option that can satisfy the standards contained in a building code? Does it matter if that equipment-based option is the only one that would be economically feasible for builders to pursue? As the case studies make clear, the federal courts hearing the Albuquerque and Washington State cases reached different answers to these questions. The district court in New Mexico ruled that the city of Albuquerque green building code was preempted by federal energy efficiency standards, while a district court in Washington State, along with a panel of the Ninth Circuit Court of Appeals, held that the state of Washington's green building code was not preempted.

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[15] 42 U.S.C. § 6297(f)(3).

[16] For general background on performance-based regulation, see Cary Coglianese, Jennifer Nash, and Todd Olmstead, *Performance-Based Regulation: Prospects and Limitations in Health, Safety, and Environmental Regulation*, 55 ADMIN. L. REV. 705-29 (2003); Cary Coglianese, *The Limits of Performance-Based Regulation*, 50 U. MICH. J.L. REFORM 525-63 (2017).

C. The Albuquerque Case Study

The Albuquerque building code at the heart of the case study was adopted in 2007. It contained two distinct volumes: Volume I focused on commercial and multi-family residential buildings, while Volume II focused on single-family homes and townhouses. Each volume had so-called prescriptive elements that called for equipment that was more energy efficient than dictated by federal standards. But each offered alternative options that, at least by their express terms, did not necessitate installation of equipment more efficient than required under federal law. For example, Volume I contained the following "performance-based" options: builders could use equipment that just barely met federal standards but (a) they nevertheless would have to build a building that was at least 30 percent more energy efficient than a "baseline" building, or (b) they would have to build a building that met the LEED "Silver" level of a global green building certification. Likewise, Volume II had so-called prescriptive standards calling for equipment that exceeded federal standards, but it contained similar alternative options. Under Volume II, builders could satisfy with the Albuquerque code by building a building which would overall consume less energy than a baseline building or they could choose instead to qualify for a voluntary certification under nongovernmental standards established by a Build Green New Mexico program.

When the case came before Martha Vazquez, the Chief District Court Judge for the U.S. District Court for the District of New Mexico, the first decision faced by the court came in the form of an industry motion for a preliminary injunction blocking enforcement of the city code's energy efficiency provisions.[17] As explained in the case study, the judge granted this motion in 2008, finding that the Albuquerque building code was likely to be preempted by federal energy law. The judge concluded that EPCA's main preemption provision applied because it barred any state or local law "concerning" energy efficiency—which clearly encompassed the city's code. She also ruled that the prescriptive elements of the city code were not likely to qualify for the statutory exemption from preemption because it "required" the use of HVAC equipment that conflicted with (that is, was more energy efficient than) equipment that met federal standards. The judge basically viewed the entire code as a package. Since some parts of it required conflicting equipment, the existence of alternative compliance options that did not expressly require conflicting equipment did not matter—at least at the stage of a preliminary injunction.

In 2010, Judge Vazquez ruled on industry's motion for summary judgement—granting it with respect to the prescriptive standards.[18] To the judge, the prescriptive standards still did "require" the use of specific equipment, even though other, alternative compliance options existed. The judge viewed the conflicting prescriptive parts of the code not as mere "options," but as requirements that had to be met if a builder failed to qualify for the performance options. The court found it irrefutable that the prescriptive portions of Volumes I and II that "requir[ed] the use of heating, ventilation, or air conditioning products or water heaters with energy efficiency standards more stringent than federal standards [were] regulations that concern the energy efficiency of covered products."[19]

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[17] Air Conditioning, Heating & Refrigeration Inst. v. City of Albuquerque, No. 08-633 MV/RLP, 2008 U.S. Dist. LEXIS 106706, at 2 (D.N.M. Oct. 3, 2008).
[18] Air Conditioning, Heating & Refrigeration Inst. v. City of Albuquerque, 835 F. Supp. 2d 1133 (D.N.M. 2010).
[19] *Id*. at 1136.

Albuquerque had cited the U.S. Supreme Court's opinion in *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co*., a 1995 decision involving the preemption provisions in the federal Employee Retirement Income Security Act (ERISA).[20] In her 2008 decision on the preliminary injunction motion, Judge Vazquez had compared EPCA's preemption provision with the preemption provision in ERISA, the latter which the Supreme Court has described in other cases as having a "broad" and "expansive" scope.[21] In defending its building code against the summary judgment motion, the city of Albuquerque now pointed to the *Blue Cross* decision, which held that ERISA did not preempt state laws that required patients covered by ERISA-regulated health care plans to pay surcharges for medical services. The Supreme Court acknowledged in *Blue Cross* that the state surcharges had "an indirect economic effect" on the federally regulated health plans, but it concluded that this effect was not enough to create a conflict with federal law: "An indirect economic influence … does not bind plan administrators to any particular choice and thus function as a regulation of an ERISA plan itself."[22] If a surcharge was not the same as a binding requirement, even though it might indirectly shape a health plan's decision-making, the city argued that the multiple options or pathways in its building code operated in much the same way only to indirectly influence builders' decision-making.

Judge Vazquez did not buy the city's argument. She did not view surcharges as comparable to the structure of Albuquerque's building code, which contained provisions that on their face called for conflicting HVAC equipment, notwithstanding the existence of some alternative options. She treated the *Blue Cross* precedent narrowly, reasoning that it was not directly on point: "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."[23]

D. The Washington State Case Study

Contrasting with Judge Vazquez's approach, a federal district judge in Washington State, along with a panel of judges on the Ninth Circuit, viewed the existence of options in a state building code as enough to avoid creating conflict with federal energy efficiency standards. Because builders had these other options, the state code did not "require" the use of HVAC equipment that demanded greater energy efficiency than federal standards, satisfying EPCA's criteria for the building code exception to the statute's preemption provision.

In 2009, the Washington State legislature signed onto the 2030 Challenge, a framework developed by architects and designed to respond to the climate change crisis by improving the energy

[20] New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995).
[21] Just as EPCA preempts state laws "concerning" energy efficiency, ERISA preempts all state laws "insofar as they ... relate to any employee benefit plan." 29 U.S.C. § 1144(a). 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").
[22] Blue Cross, 514 U.S. at 659.
[23] Air Conditioning, Heating & Refrigeration Inst. v. City of Albuquerque, 835 F. Supp. 2d 1133, 1136-37 (D.N.M. 2010).

efficiency of buildings.[24] The Washington State legislation implementing the 2030 Challenge aimed to see all residential and commercial construction reduce its net energy consumption reduction by 70 percent of the state's current average by 2031.[25]

The legislation charged the Washington State Building Code Council (WSBCC) with responsibility for amending the state's building code to achieving this ambitious goal. In late 2009, WSBCC adopted new provisions in the state's administrative code calling for an additional 15 percent reduction in annual net energy consumption. In drafting those provisions, the Council and its staff had the benefit of knowing about Judge Vazquez's decision enjoining energy-related provisions of the Albuquerque building code.

It could not have come as any surprise to Washington State officials that, in May 2010, a variety of industry organizations filed a lawsuit, claiming that the new building code provisions mandated a level of energy efficiency for HVAC equipment that exceeded federal standards—and hence that they were preempted by federal law. Defendants argued that the Washington Code was not preempted by federal standards because it qualified for EPCA's exemption from federal preemption because, among other things, it did not "require" the use of any particular HVAC equipment.

The Washington code required new buildings to achieve an overall 15 percent reduction in annual energy usage. The code called for a 7 percent reduction via means that the industry never challenged because those "provisions do not appear to contain standards that exceed the federal standards set under EPCA."[26] The industry litigation arose over how the code called for the additional 8 percent reduction. To meet this additional increment of an 8 percent improvement in energy efficiency, builders had an obligation to accumulate a specified number of "credits" from a menu of 13 options provided in the new code. But as District Court Judge Robert J Bryan noted in his 2011 opinion on a summary judgment motion, only some of the credit-bearing menu items required use of equipment more efficient than federal standards:

> Although some of [these] options … explicitly require products with higher efficiency than is mandated by the federal government, some of the options … do not use covered products. Options 3a, "Efficient Building Envelope 1," 3b "Efficient Building Envelope 2," and 3c "Super-Efficient Building Envelope 3," do not require the use of any covered products, for example. Option 4a, "Air Leakage Control and Efficient Ventilation," does not require use of covered products.[27]

The industry complained that given the way that the credits were structured—and given the costs of the various options—it was practically infeasible for builders to accumulate enough credits without using equipment that exceeded the federal standards. Judge Bryan rejected the view that this was dispositive, reasoning that the plaintiffs needed to "show that under no circumstances is

[24] S.B. 5854, 61st Legislature, Reg. Sess. (Wash. 2009), https://lawfilesext.leg.wa.gov/biennium/2009-10/Pdf/Bills/Session%20Laws/Senate/5854-S2.SL.pdf?q=20220922104524.
[25] S.B. 5854, § 5.
[26] Building Industry Association of Washington v. Washington State Building Code Council, 2011 U.S. Dist. LEXIS 12316, at 10.
[27] *Id.* at 24.

the Code constitutional —i.e. that under no circumstances does the Code meet this factor of the test Congress established to gain an exception to preemption."[28] Judge Bryan noted that the industry plaintiffs "have not shown that the Washington Code requires use of products with higher efficiency than mandated by federal standards as the only way to comply with the Code."[29]

The industry further argued that "the Code 'functionally' requires that they use products which exceed federal efficiency standards because the other options are often more expensive."[30] But Judge Bryan rejected this argument as well. He explained that "[t]he text of [EPCA's] exemption provision does not include the terms 'functionally' or 'effectively' require."[31] The state building code actually required not the use of any equipment whatsoever but instead the accumulation of a sufficient number of credits. Indeed, 9 of the 13 options in the building code's menu did not call for equipment more energy efficient than federal standards. Judge Bryan dismissed the industry plaintiff's petition and granted summary judgment to the state of Washington.

On appeal, the industry groups renewed their argument that, no matter how the law was structured, its effect served to compel them to use equipment that exceeded federal energy efficiency standards. In fact, as the Ninth Circuit panel noted in its decision, the industry plaintiffs fully "acknowledge[d] that [the Washington code] does not legally mandate use of higher efficiency covered products. Their contention [was], rather, that the other options are so costly that builders are economically coerced and hence 'required' to select the higher efficiency options."[32] But the panel rejected this argument, just as the District Court had done. The following passage from the panel's opinion is especially illuminating:

> Plaintiffs nevertheless point to language in the legislative history, in particular House Report 100-11, stating that the provisions of § 6297(f)(3) "are designed to ensure that performance-based codes cannot expressly or effectively" require installation of higher efficiency products. H.R. Rep. 100-11 at 26 (1987). Plaintiffs argue that the House Report's reference to an "effective" requirement means Congress wanted to bar states from adopting building codes that exert even indirect economic pressure to install higher efficiency options. Congress was concerned, however, with the content of a regulation that was within state or local control. The market costs of products fluctuate outside the control of those who promulgate the codes. Congress cannot preempt market costs. The fact that certain options may end up being less costly to builders than others does not mean the state is, expressly or effectively, requiring those options.
>
> The state would effectively require higher efficiency products, in violation of subsection (B), if the code itself imposed a penalty for not using higher efficiency products. This is what a building code ordinance for the city of Albuquerque, New Mexico did. The federal district court for the District of New Mexico therefore granted a preliminary injunction against enforcing that ordinance. See Air

[28] *Id.* at 25.
[29] *Id.*
[30] *Id.*
[31] *Id.* at 38.
[32] Bldg. Indus. Ass'n of Wash. v. Wash. State Bldg. Code Council, 683 F.3d 1144, 1151 (9th Cir. 2012).

> Conditioning, Heating, and Refrigeration Institute v. City of Albuquerque, 2008 U.S. Dist. LEXIS 106706, 2008 WL 5586316 (D. N.M. 2008). That court held, in relevant part, that the ordinance did not satisfy EPCA's subsection (B), because the ordinance itself had created a situation in which the builder had no choice. Albuquerque's ordinance imposed costs, as a matter of law, on builders who installed certain covered products meeting federal standards, by requiring the builder to install additional products that would compensate for not using a higher efficiency product. 2008 U.S. Dist. LEXIS 106706, at *2. As the court explained, "if products at the federal efficiency standard are used, a building owner must make other modifications to the home to increase its energy efficiency." 2008 U.S. Dist. LEXIS 106706, at *9. The Albuquerque ordinance thus effectively required use of higher efficiency products by imposing a penalty through the code itself.
>
> Here, by contrast, the Washington Building Code itself imposes no additional costs on builders. The district court noted that there are "substantial differences" between the Washington Building Code and Albuquerque's ordinance. It correctly rejected the Plaintiffs' argument concerning subsection (B), explaining that the Washington Building Code created no penalties, and did not require higher efficiency products as the "only way to comply with the code." We hold the Washington Building Code complies with subsection (B) because it does not create any penalty or legal compulsion to use higher efficiency products.[33]

In other words, the Court of Appeals concluded that the *effects* that a building code might have on businesses cannot determine whether the code itself imposes a requirement on businesses. A determination of whether a building code "requires" the use of conflicting, high-efficiency equipment must be based on the face of the code itself. Does it create, by its terms, a legal compulsion? Does it threaten a penalty for failure to install high-efficiency equipment that exceeds federal standards? The Ninth Circuit panel did not find the Washington State code on its face to require high-efficiency equipment, and the mere fact that some businesses might choose to use such equipment because it was easier or cheaper than the other options did not create a requirement that such equipment be used.

Although students should be able to see how the various courts reached their conclusions in both the Washington State and Albuquerque litigation, it will be more challenging for students to discern exactly why the courts reached opposing outcomes in the different jurisdictions. It is true that there were "substantial differences" in what the building codes in each jurisdiction said and how they were structured. And it is also true that Judge Vazquez characterized the Albuquerque code in a way that made it seem as if the Albuquerque code created a legal compulsion to install conflicting equipment. But in reality, the basic structure was largely the same in each jurisdiction. Albuquerque's building code was based on alternative compliance pathways, with builders able to choose between multiple sets of rules—only one of which called for higher efficiency equipment. Washington State's building code similarly allowed options—only a small number of which called for higher efficiency equipment. In both cases, builders could choose among options. And in both cases, if builders opted not to take advantage of the options that did not call for conflicting

[33] *Id.* at 1151-52.

equipment, then they were required to take the options that called for the use of such conflicting equipment.

What, then, might explain the different outcomes? Students can be invited to consider the possible explanations. Perhaps, for example, it was due to the Albuquerque code containing obligation-like words related to higher efficiency equipment when it spelled out what was, in actuality, just one of its compliance options; by contrast, the Washington State code reserved its obligation-imposing words for the accumulation of energy efficiency credits. Perhaps the connection between the legal obligation and the higher efficiency options was simply more opaque or attenuated in Washington State's code than in Albuquerque's. Perhaps the judges just had differing perspectives. And perhaps the outcome in one case was right and the outcome in the other case was wrong.

V. Discussion Questions

The Albuquerque and Washington State cases provide a basis for much insightful classroom discussion as students grapple with the issues presented to the courts. Going beyond the legal questions presented in each case, though, students can also be asked to reflect on the value of federalism and the proper level of government for addressing public policy problems. When should regulation be uniform across the nation? When should it vary? For what types of problems or issues might regulation be better set at state and local levels? Is federal supremacy always the best policy? What are the virtues of democratic experimentalism provided by the opportunity for states and localities to adopt varied policies?

These questions can also be addressed specifically with respect to the problem of climate change. A general advantage of policymaking at the state and local level stems from its ability to be crafted to fit the contexts and particularities of different regions of the country. Given that different parts of the country have different mixes of industry and varying transportation needs, perhaps climate policy is best set at the state and local levels of government. Moreover, with seemingly persistent gridlock in Washington, D.C., throughout recent decades, perhaps states and localities afford the most meaningful avenues for policy innovation and climate action today.

On the other hand, climate change is a global environmental problem, which at least in theory implies that the optimal solution to this problem lies at the most expansive jurisdictional level. After all, even if Albuquerque or Washington State—or both of these subnational jurisdictions together—managed somehow heroically to eliminate greenhouse gas emissions altogether, this would not make much of a difference in ameliorating climate change if other jurisdictions in the United States and around the world continued to increase their emissions.[34]

In this part of the teaching guide, we offer a series of discussion questions that instructors could choose to pose in working through the one or both of the case studies with their students. The questions below are organized first by questions specific to each case study, then by several themes that cut across both cases: federalism; climate policymaking; and the role of voluntary codes and standards. Before instructors turn to these broader questions with their students, we would suggest instructors orient their class to the details of the assigned case study or case studies. Either through

[34] *See, e.g.,* Cary Coglianese & Jocelyn D'Ambrosio, *Policymaking Under Pressure: The Perils of Incremental Responses to Climate Change*, 40 CONN. L. REV. 1411-1430 (2008).

a brief lecture or guided class discussion, it would be helpful to lay out for students the core chronology of events in each assigned case study, provide background on the subnational building code or codes, and discuss the basic procedural history behind the relevant litigation.

A. Questions about the Albuquerque Case Study

1. On the question of whether the city code had been preempted by federal energy efficiency standards, how should the court have ruled? Do you agree that the prescriptive provisions of the Albuquerque building code were preempted by federal law?
2. Were the performance-based provisions of the city building code preempted by federal law?
3. How should the existence of the performance-based alternatives for compliance have been considered in determining the preemption question? In what sense (if at all) did the city code "require" builders to use conflicting equipment if there also existed options for complying with the city code that did not necessarily demand using conflicting equipment?
4. What if the city of Albuquerque had merely adopted the performance-based provisions of Volume I and II of its building, without adopting any prescriptive provisions? Would such a completely performance-based code have been preempted since nowhere would the code say anything about installing equipment that exceeded federal standards? Would it make a difference in your answer if the only feasible means by which builders could comply with a performance-based code where to use equipment that exceeded federal energy efficiency standards? Or suppose that other means were feasible, but just slightly more costly than using equipment that exceeded federal energy efficiency standards?
5. The district court emphasized in its opinion that EPCA's preemption provision was to be read broadly. Is that the only reading of EPCA? What might be the argument that EPCA itself actually contemplated the value of state building codes and that an expansive view of the preemption provision might not be the best reading of the statute?
6. Put yourself in the position of the city lawyer for Albuquerque following the district court's 2010 ruling. The mayor and city council would still like to craft a progressive green building code that will promote energy efficiency in new construction in the city. What would you advise? Is there a way you could craft a revised code that would achieve the elected leaders' objectives while avoiding the risk that a new code would be found to be preempted by federal energy efficiency standards?

B. Questions About the Washington State Case Study

1. On the question of whether the state's energy efficiency provisions had been preempted by federal standards, how should the courts have ruled? Do you agree that the Washington State code did not *require* the use of equipment with a greater degree of energy efficiency than required by federal standards? Should the mere existence of alternative options for compliance that do not call for use of conflicting equipment be

enough to keep the provisions that do call for conflicting equipment from being preempted?

2. What might explain why the courts reached different results in the Albuquerque and Washington State cases, despite such similar structures of the building codes that afforded builders different pathways to achieve compliance? Given the centrality of exception (B) to both cases, do the two sets of courts simply have a different understanding of what it means to "require" the use of covered equipment? Do the two sets of courts simply have differing levels of tolerance for how much states can try to encroach on federal policies? Do the two sets of courts simply read EPCA's preemption provisions differently?
3. Express preemption cases can depend on how statutory provisions related to preemption are crafted. EPCA not only had a general preemption provision, but other provisions allowing for waivers and exemptions from preemption. Does this mean that resolving express preemption cases hinges ultimately on how the language in the federal statute is or ought to be interpreted by the courts? Or on how the language in the state statute is or ought to be interpreted? Should statutory interpretation in express preemption cases be different in any way from any other instances of statutory interpretation?
4. What lessons about professional lawyering might be drawn from comparing the Albuquerque and Washington State cases? The district court in the Albuquerque case noted that the city lawyers did not really give much consideration to preemption. State officials in Washington, on the other hand, had the benefit of reading the district court's decisions in the Albuquerque case before crafting their code provisions. Did the greater attention and care the Washington State lawyers paid to preemption make the difference? If so, how exactly?
5. One way to read these two cases stems from the way in which the prescriptive options are presented. Albuquerque's code could be read to say, essentially, "install higher-efficiency equipment unless you can meet a performance-based alternative." Washington State's code, on the other hand, could be read to say, essentially, "build a building that consumes less energy and in doing so choose among the following options to achieve that goal." Are these differences in form or substance? Does this difference in form really mean that Washington State's code is not "requiring" the use of conflicting equipment, while the Albuquerque code is?

C. Questions About Federalism

1. What exactly *is* federal preemption? How much of a conflict must exist between state and federal law for a court to determine that a state law has been preempted by federal law?
2. Should preemption only be limited to situations where state law on its face conflicts with federal law? What if conflicts exist in practice or application? If a state law merely provides incentives for taking action that exceeds federal standards, should such a law be treated as preempted?
3. What advantages and disadvantages does federal supremacy pose when it comes to having law effectively solve public problems? More generally, what are the advantages and disadvantages of regulating at different levels of government—local, state, or

national? Are national energy efficiency standards for HVAC equipment better than local energy efficiency codes as a method of reducing greenhouse gas emissions from the building sector?

4. Given that the U.S. federal government was created by states, how stringently should the federal Supremacy Clause in the Constitution be construed and applied? Is the Supremacy Clause in tension with the Tenth Amendment?
5. How might state and local government leaders avoid federal preemption challenges? Given how extensive federal law and regulation can be, what steps should lawyers take to advise state and local leaders when they want to take action today?
6. What might businesses prefer more: state and local standards, or federal ones? Would the answer be the same for all businesses and all policy domains?
7. What might environmental or public interest groups prefer more: state and local standards, or federal ones? Would the answer be the same for all groups and all policy domains?
8. The key statutory provision at the heart of the Albuquerque and Washington State cases—Title 42, Section 6297 of the U.S. Code—contains more than 3,500 words, which suggests that federal statutes can be designed to allow for what might be thought of as greater or lesser degrees of preemption—that is, being more or less tolerant of ways that state laws might come into some tension with federal laws. As a result, to what extent do or should legislators' views about federalism factor into how federal statutory provisions on preemption are drafted?

D. Questions About Climate Policymaking

1. What are the advantages and disadvantages of setting climate policy at the state and local level? Are the disadvantages a sufficient rationale for waiting for the federal government to take action?
2. Are federal energy efficiency standards for HVAC equipment better than local energy efficiency codes as a method of reducing greenhouse gas emissions from the building sector?
3. Why has it historically been so difficult for the national government in the United States to address climate change? Why do you suppose it took so long for the federal Energy Department to establish energy efficiency standards for appliances and equipment?
4. Should federal non-action on climate change preempt state climate action?
5. Does federal supremacy tend to work in favor of higher or lower energy efficiency standards and more or less stringent climate policies overall? Does federal preemption improve overall environmental outcomes? Should the answer to that question factor into any assessment of the preemption of state building codes? Does the answer to this last question depend on whether the assessment is being made by a judge or by a legislator?

E. *Questions About Voluntary Codes and Standards*

1. The building codes in both Albuquerque and Washington State relied in varying ways on energy efficiency standards developed by private, nongovernmental organizations: e.g., the International Code Council, the American Society for Heating, Refrigeration

and Air Conditioning, the U.S. Green Building Council, among others. What are the advantages and disadvantages of state and local governments relying on voluntary codes and standards developed by private organizations?

2. Should governments rely on nongovernmental codes and standards only when they have been produced under certain specified procedures, such as those that demand transparency and open participation? What, if any, checks should be placed on nongovernmental standard-setting bodies to ensure they produce high-quality standards? What, if any, checks should be placed on governmental bodies that rely on nongovernmental standards to ensure that governments do so only when it is in the public interest?
3. Sometimes governmental bodies incorporate nongovernmental standards merely by reference, as the actual text of the nongovernmental standard is copyrighted. What might be the advantages and disadvantages of incorporation by reference? Does incorporation by reference offend fundamental principles of transparency of the law? Are there any ways that government can make rules incorporated by reference more accessible to the public while still honoring the intellectual property of standard-setting organizations?

VI. Sample Lesson Plans

In this section, we offer instructors three possible plans for organizing a lesson around the Albuquerque or Washington State cases. We have written these case studies so that they could be used separately or in combination. Although each case study could stand on its own, the AlbuquerqueGreen case study provides more detailed background information. It also offers the more salient opportunity for students to learn about the importance of preemption because the city leaders failed to achieve their climate goals as they failed to design their building code to withstand judicial challenge. Instructors that decide to use only one of the two cases may decide they wish to use the Albuquerque case study for both reasons. We have tried, however, to give enough information in the Washington State case study so it can be used by itself too, although not so much that it would be overly redundant if assigned in combination with the Albuquerque case study.

We suggest that instructors read both case studies before deciding whether to assign just one—and which one—or whether to use both in combination. The first two lesson plans below are intended to draw on just the Albuquerque case study, while the third one shows how both cases could be assigned and used to explore the contrasting outcomes in the two cases. Instructors wishing to use the Washington case study by itself should be able to adapt one of the first two lesson plans for that purpose. Indeed, all three lesson plans are highly flexible. Within each lesson plan, we have cross-referenced relevant readings, discussion questions, slides, and videos. We do so not because of an expectation that an instructor will use all of these materials when teaching from the case studies—rather, these cross-referenced materials should be thought of as suggested resources upon which the instructor can draw to create a lesson that fits with the instructor's own teaching objectives in using these materials.

Lesson Plan 1

Learning Objective: To provide students with either an introduction to preemption or a concrete problem to discuss on preemption.

Class time: 20-30 minutes

Reading assignment: AlbuquerqueGreen: Regulating Climate Change at the Local Level

Discussion questions: From Part V.A above, questions 1 to 4.

Slides: 2-11, 16

Videos:

- Martin Chávez, Former Mayor, Albuquerque, New Mexico (video recording of interview), Penn Program on Regulation, Philadelphia, PA, https://youtu.be/FHedHfiwMj8
- Joseph Mattingly, General Counsel [retired], Air-Conditioning, Heating, and Refrigeration Institute (video recording of interview), Penn Program on Regulation, Philadelphia, PA, https://youtu.be/lpNHDx6FQRM

Session overview: This lesson would begin with either a short lecture using the PowerPoint slides to introduce the Albuquerque case study or a guided discussion to bring out the salient background facts of the case study. The opening of the session should summarize the core elements of the Albuquerque building code as well as the litigation. Following this short overview, class discussion can focus on whether the court reached the correct judgment given the facts about the Albuquerque building code and EPCA preemption provisions. An instructor could ask a student or students to make the best case for the city's position that the existence of its code's performance pathways meant that the prescriptive standards were not "required" and therefore were not preempted by federal law. That could be followed by inviting a response based on what the industry would argue (and the judge ultimately accepted). Students could then be asked to assess which position has the better position and why.

Even a short lesson like this can also serve to drive home the importance of attorneys who advise paying attention to preemption. The case study indicates that city officials "did not seem to worry much about the potential for a legal challenge."[35] In her opinion on the preliminary injunction motion, Judge Vazquez was even more pointed: "At the time the Code was drafted, the Green Building Manager, by his own admission, was unaware of federal statutes governing the energy efficiency of HVAC products and water heaters and the City attorneys who reviewed the Code did not raise the preemption issue."[36]

[35] Cary Coglianese, Alexandra Johnson, and Shana Starobin, *AlbuquerqueGreen: Regulating Climate Change at the Local Level* (2022).
[36] Air Conditioning, Heating & Refrigeration Inst. v. City of Albuquerque, No. 08-633 MV/RLP, 2008 U.S. Dist. LEXIS 106706, at 5 (D.N.M. Oct. 3, 2008).

Lesson Plan 2

Learning Objective: To provide students with an in-depth introductory session both to the legal aspects of federal preemption and to broader policy issues raised by a local green building in the face of federal energy efficiency standards. These broader policy issues could concern federal preemption in general, state and local climate policymaking, or governmental reliance on voluntary codes and standards.

Class time: 60-90 minutes (1 class session)

Reading assignment: AlbuquerqueGreen: Regulating Climate Change at the Local Level

Optional readings:

- *The Air Conditioning, Heating and Refrigeration Institute v. City of Albuquerque*, 835 F. Supp. 2d 1133 (D.N.M. 2010) (edited opinion of the district court on summary judgment, available on the federal preemption course module page at www.Codes-and-Standards.org)
- Cary Coglianese, A Primer on Voluntary Codes and Standards (one-page handout available on the introduction to voluntary codes and standards course module page at www.Codes-and-Standards.org)

Discussion questions: From Part V.A above, questions 1 to 6, plus a selection of questions from one or more of Parts V.C, V.D, or V.E above.

Slides: 2-11, 16 or 17

Videos:

- Martin Chávez, Former Mayor, Albuquerque, New Mexico (video recording of interview), Penn Program on Regulation, Philadelphia, PA, https://youtu.be/FHedHfiwMj8
- Joseph Mattingly, General Counsel [retired], Air-Conditioning, Heating, and Refrigeration Institute (video recording of interview), Penn Program on Regulation, Philadelphia, PA, https://youtu.be/lpNHDx6FQRM

Session overview: This lesson can begin with a short lecture summarizing the crucial facts of the case in the context of the historical background surrounding federal energy efficiency standards, as well as with a summary of the Albuquerque building code and the path that led to the district court's decision. The lesson could proceed as with Lesson Plan 1 to have students assess the district court's handling of the fundamental legal issue: Did the Albuquerque code really "require" the use of higher-efficiency equipment than mandated under federal standards? What should be the significance, if any, of the alternative performance-based pathways or alternatives?

The additional time allotted for this lesson plan would allow for more sustained and in-depth consideration of these questions.

Following discussion of the case, the instructor can proceed in a number of directions to draw out a more in-depth consideration of the case study or use it as a springboard to the consideration of related legal or policy issues. Students can be invited, for example, to think about how they could have written the code for the City of Albuquerque to avoid losing a preemption challenge (Discussion Question V.A.6). In this connection, instructors choosing to select a more in-depth consideration of the Albuquerque litigation could consider sharing with students in lecture form the details of the Washington case. Doing so would allow students to see that the results in the Albuquerque case were not necessarily inevitable.

Either in addition to the above strategies, or as alternatives to them, the instructor could invite students to discuss the broader issues raised by the discussion questions on federalism, climate policy, or voluntary codes and standards (Discussion Questions V.C.1-8, V.D.1-5, or V.E.1-3). Although not all of these issues could be explored in a single class session, the instructor could be selective in focusing on one of these themes and choose questions of greatest interest, depending on the course in which these materials are used.

Lesson Plan 3

Learning Objective: To provide students with an in-depth introduction to federal preemption by assessing and contrasting the outcomes in the Albuquerque and Washington State cases.

Class time: 60-90 minutes (1 class session)

Reading assignment:

- AlbuquerqueGreen: Regulating Climate Change at the Local Level
- Washington's 2030 Challenge: Regulating Around Preemption

Optional readings:

- *The Air Conditioning, Heating and Refrigeration Institute v. City of Albuquerque*, 835 F. Supp. 2d 1133 (D.N.M. 2010) (edited opinion of the district court on summary judgment, available on the federal preemption course module page at www.Codes-and-Standards.org)
- *Building Industry Association of Washington v. Washington State Building Code Council*, 683 F.3d 1144 (9th Cir. 2012)
- Cary Coglianese, A Primer on Voluntary Codes and Standards (one-page handout available on the introduction to voluntary codes and standards course module page at www.Codes-and-Standards.org)

Discussion questions: From Part V.A above, questions 1 to 6, and from Part V.B above, questions 1-5

Slides: 2-16

Videos:

- Martin Chávez, Former Mayor, Albuquerque, New Mexico (video recording of interview), Penn Program on Regulation, Philadelphia, PA, https://youtu.be/FHedHfiwMj8

- Joseph Mattingly, General Counsel [retired], Air-Conditioning, Heating, and Refrigeration Institute (video recording of interview), Penn Program on Regulation, Philadelphia, PA, https://youtu.be/lpNHDx6FQRM

Session overview: This lesson could begin with a consideration of AlbuquerqueGreen, starting with a short lecture or guided discussion to explicate the core elements of the city building code and the preemption provisions in federal energy law. That overview could be followed either with a more in-depth discussion of the Albuquerque case, along the lines presented in Lesson Plans 1 or 2, or immediately with a similar overview of the facts and elements of the Washington State case. Because this lesson plan assumes that students will have read both cases in advance of class, it may be better to lay out the facts of each at the outset. Then the instructor can use the discussion questions presented in Part V.A and V.B in roughly the order presented to assess the decisions made by the federal courts in New Mexico, Washington State, and the Ninth Circuit. The contrasting outcomes in the courts' consideration of the Albuquerque and Washington State building codes affords the instructor the opportunity to push the class to assess which outcome is the better one—or whether both outcomes might be reconciled with each other.

As time permits, the instructor may then take the discussion forward by asking students to discuss how state and local governments might craft their legislation to push forward with energy efficiency goals while also avoiding judicial disapproval on preemption grounds (Discussion Question V.A.6). The larger questions around federalism, climate change policy, and voluntary codes and standards can also be explored (Discussion Questions V.C.1-8, V.D.1-5, or V.E.1-3).

VII. Additional Resources

Although the case studies are intended to be self-contained, instructors wishing to assign additional background readings may wish to consider some of the following materials, many of which can be readily accessed online.

A. Resources Related to the Albuquerque and Washington State Case Studies

Air Conditioning, Heating, and Refrigeration Institute, https://www.ahrinet.org.

Martin Chávez, Former Mayor, Albuquerque, New Mexico (video recording of interview), Penn Program on Regulation, Philadelphia, PA, https://youtu.be/FHedHfiwMj8.

Compact of Mayors, https://www.globalcovenantofmayors.org/

Energy Policy and Conservation Act of 1975, 42 USC 6201, https://www.gpo.gov/fdsys/pkg/STATUTE-89/pdf/STATUTE-89-Pg871.pdf.

Joseph Mattingly, General Counsel [retired], Air-Conditioning, Heating, and Refrigeration Institute (video recording of interview), Penn Program on Regulation, Philadelphia, PA, https://youtu.be/lpNHDx6FQRM.

National Energy Conservation Policy Act of 1978, https://www.gpo.gov/fdsys/pkg/STATUTE-92/pdf/STATUTE-92-Pg3206.pdf.

Procedures for Consideration of New or Revised Energy Conservation Standards for Consumer Products, https://www.gpo.gov/fdsys/pkg/FR-1996-07-15/pdf/96-17886.pdf.

U.S. Conference of Mayors Climate Protection Agreement & 2007 Mayors Climate Summit, https://www.usmayors.org/programs/mayors-climate-protection-center/.

B. Resources on Energy Efficiency Standards

Ann E. Carlson, *Energy Efficiency and Federalism*, 107 MICHIGAN L. REV. FIRST IMPRESSIONS 63 (2013), https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1083&context=mlr_fi.

Energy Conservation Program: Energy Conservation Standards for Residential Furnaces and Commercial Water Heaters, 84 Fed. Reg. 449 (proposed Jan. 29, 2019) (to be codified at 10 C.F.R. pt. 430), https://www.federalregister.gov/documents/2019/01/29/2019-00257/energy-conservation-program-energy-conservation-standards-for-residential-furnaces-and-commercial.

Energy Futures Initiative, *Optionality, Flexibility, & Innovation: Pathways for Deep Decarbonization In California*, April 2019, https://static1.squarespace.com/static/58ec123cb3db2bd94e057628/t/5cadebd04cd61c00017a563b/1554901977873/EFI%252BCalifornia%252BSummary%252BDE%252BPM.pdf.

Justin Gillis, *An Important Vote for the Climate*, N.Y. TIMES (Mar. 20, 2019), https://www.nytimes.com/2019/03/20/opinion/climate-building-codes.html.

Alexandra B. Klass, *State Standards for Nationwide Products Revisited: Federalism, Green Building Codes, and Appliance Efficiency Standards*, 34 HARV. ENVTL. L. REV. 335 (2010), https://pdfs.semanticscholar.org/3045/ddcc1d94fd0a33444bf81f02815094b841bb.pdf.

Matthew J. Kotchen, *Energy Efficiency Codes: Plan B for Climate Change?*, THE MILKEN INST. REV., (2011) 58-69, https://environment.yale.edu/kotchen/pubs/milken11.pdf.

Matthew J. Kotchen, *Longer-Run Evidence on Whether Building Energy Codes Reduce Residential Energy Consumption*," 4 J. ASS'N ENVTL. & RESOURCE ECONOMISTS 135, 153 (2017), https://environment.yale.edu/kotchen/pubs/codesLR.pdf.

Grant D. Jacobsen & Matthew J. Kotchen, *Are Building Codes Effective at Saving Energy? Evidence from Residential Billing Data in Florida"* 95 REV. OF ECON. AND STAT. 34-49 (2013), https://www.nber.org/papers/w16194.pdf.

Tara Lohan, *How to Build the Green New Deal? Cities and States May Already Have Answers*, THE REVELATOR (May 7, 2019), https://therevelator.org/local-green-new-deal/.

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