Case No. 21-16278

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CALIFORNIA RESTAURANT ASSOCIATION,

Plaintiff-Appellant,

v.

CITY OF BERKELEY,

Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of California
No. 4:19-cv-07668-YGR

BRIEF OF *AMICI CURIAE* NATIONAL LEAGUE OF CITIES; LEAGUE OF CALIFORNIA CITIES; AND CALIFORNIA STATE ASSOCIATION OF COUNTIES IN OF SUPPORT DEFENDANT-APPELLEE CITY OF BERKELEY'S PETITION FOR REHEARING EN BANC

MICHAEL BURGER
Counsel of Record
AMY E. TURNER
Sabin Center for Climate Change Law
435 West 116th St.
New York, NY 10027
(212)854-2372
michael.burger@law.columbia.edu

Counsel for Amici Curiae

June 12, 2023

RULE 29 STATEMENTS

Pursuant to Ninth Cir. R. 29-2(a), *amici curiae* certify that all parties in this proceeding have consented to the filing of this amicus brief.

Pursuant to Fed. R. App. P. 29(b)(4), (a)(4)(E), *amici curiae* state that no party or party's counsel authored this brief in whole or in part, and that no other person besides *amici curiae* or their counsel contributed money that was intended to fund preparation or submittal of this brief.

Pursuant to Fed. R. App. P. 26.1(a), amici curiae certify that (each has no parent corporation and (2) no publicly held corporation owns 10% or more of any of their respective stocks.

Date: June 12, 2023

/s/ Michael Burger

MICHAEL BURGER

Counsel for the National League of Cities, the League of California Cities, and the California State Association of Counties

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INTERESTS OF *AMICI CURIAE*

The National League of Cities, the League of California Cities, and the California State Association of Counties respectfully submit this amici curiae brief in support of Defendant-Appellee City of Berkeley's Petition for Rehearing En Banc. The National League of Cities (NLC), founded in 1924, is the oldest and largest organization representing U.S. municipal governments. NLC works to strengthen local leadership, influence federal policy, and drive innovative solutions. In partnership with 49 state municipal leagues, NLC advocates for over 19,000 cities, towns, and villages, where more than 218 million Americans live. The League of California Cities (Cal Cities), founded in 1898, defends and expands local control through advocacy efforts in the California Legislature, at the ballot box, in the courts, and through strategic outreach that informs and educates the public, policymakers, and opinion leaders. Cal Cities also offers education and training programs designed to teach city officials about new developments in their field and exchange solutions to common challenges facing their cities. The California State Association of Counties (CSAC) represents California's 58 county governments before the California Legislature, administrative agencies, and the federal government. CSAC places a strong emphasis on educating the public about the value and need for county programs and services. CSAC's long-term objective is to significantly improve the fiscal health of all California counties so they can

adequately meet the demand for vital public programs and services. NLC, Cal Cities, and CSAC are together referred to as "Amici."

Amici have a strong interest in: (1) protecting their members' duly delegated police powers to protect public health, safety, and the general welfare; (2) ensuring that circumscribed federal statutes, like the U.S. Energy Policy and Conservation Act ("EPCA"), 42 U.S.C. §§ 6201 et seq. ("EPCA"), are not overread to grant far broader preemptory scope than their terms dictate and Congress intended; and (3) maintaining a predictable, consistently implemented regulatory environment in which local governments exercise their lawful authority to govern. Local governments protect their residents largely by exercising traditional police powers, reserved by the States when crafting the U.S. Constitution, and delegated to these local guardians by the States. The panel's decision guts local governments' duly delegated authority over local health, safety, and welfare concerns, and employs too broad a reading of EPCA preemption. This erroneous ruling, and the confusion and uncertainty that has resulted and will result from it, give rise to exceptionally important questions about the scope of local authority that merit review en banc. Fed. R. App. P. 35(a)(2).

INTRODUCTION

In 2019, the City of Berkeley, California (the "City" or "Berkeley") enacted an ordinance prohibiting natural gas connections to most newly-constructed buildings within the City (the "Berkeley Ordinance" or the "Ordinance"). Berkeley Ordinance No. 7,672-N.S.; Berkeley Municipal Code (BMC) §§ 12.80.010 et seq. The U.S. District Court for the Northern District of California upheld the Ordinance against a California Restaurant Association (the "CRA") challenge, which was predicated on the theory that the Ordinance was preempted by EPCA. *California Restaurant Ass'n. v. Berkeley*, 547 F. Supp. 3d 878 (N.D. Cal 2021). There, the District Court held that the Berkeley Ordinance was a proper exercise of the City's police power, expressly reserved under the Tenth Amendment of the U.S. Constitution by the States and duly delegated to the City by the State of California. Id. Pursuant to its police powers, the City has broad authority to regulate in order to protect the public "safety… health and welfare." *Massingill v. Dep't of Food & Agric.*, 102 Cal. App. 4th 498, 504 (2002). On appeal before the Ninth Circuit Court of Appeals, the panel reversed the District Court's decision, invalidating the Berkeley Ordinance.

Amici support the City's en banc petition because the panel decision (1) erroneously and detrimentally constrains the scope of the local police power; (2) improperly expands the scope of EPCA preemption; and (3) will cause, and has

already started to cause, significant uncertainty for local governments in policy areas beyond the natural gas restriction enacted in the Berkeley Ordinance. The decision raises exceptionally important questions about the nature of local authority that merit review of the panel's decision en banc.

ARGUMENT

I. The Panel Decision Inappropriately Constrains the Traditional Police Powers Reserved for the States and Local Governments Within the Constitutional Structure, And In So Doing Undermines Myriad State and Local Measures in Place to Protect Residents' Health and Welfare.

The police power (both state and local) is a critical piece of the broader system of cooperative federalism upon which the U.S. legal system rests. *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006). The Tenth Amendment of the U.S. Constitution reserved to the states, and to the people, all "powers not delegated to the United States by the Constitution, nor prohibited by it." U.S. Const. Amdt. X. Federal courts recognize the police power held in "the possession by each state [and] never surrendered to the government of the Union, of guarding and promoting the public interests by reasonable police regulations that do not violate the Constitution of the state or the Constitution of the United States." *Chicago, B. & Q. Ry. Co. v. People of State of Illinois*, 200 U.S. 561, 584 (1906). It is

fundamental to our system of government that certain areas of traditional state and local regulation, including those relating to protecting public welfare, remain with the states so long as they are not preempted. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

Most states delegate at least part of these police powers to local governments, which are often best-suited to tailor and exercise these powers as needed to protect their local residents. California fits this mold. California's State Constitution delegates the power to "make and enforce within [a municipality's] limits all local, police, sanitary, and other ordinances and regulations not in conflict with" state law to all cities and counties within its borders. Cal. Const., art. XI, § 7. The delegated police power enables local governments to achieve their "legislative objectives in furtherance of public peace, safety, morals, health and welfare." *Massingill v. Dep't of Food & Agric.*, 102 Cal. App. 4th 498, 504 (2002). Unless specifically preempted by state or federal law, California courts view the police power as "inherent" to local governments. *Big Creek Lumber Co. v. Cty. Of Santa Cruz*, 38 Cal. 4th 1139, 1151 (2006). [1]

[1] See also, e.g., Mont. Code. §§ 7-1-4123(1)&(2); Ore. Rev. Stat. § 221.916; and Wash. Const. art. XI, § 11.

The local police power is an essential feature of our country's model of cooperative federalism, under which the federal, state, and local governments have overlapping but distinct sets of authority to regulate in areas for which they are best suited. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 533-35 (2012). Local governments are particularly well-positioned to assess risks to their communities, including negative impacts to residents' health, heightened potential for catastrophic incidents, and particular locational vulnerabilities. 6A McQuillin Mun. Corp. § 24:1 (3d ed.)

In enacting the Ordinance, Berkeley used the "fundamental power [from which] local governments derive their authority to regulate land through planning, zoning, and building ordinances, thereby protecting public health, safety and welfare." *Fonseca v. City of Gilroy*, 148 Cal. App. 4th 1174, 1181 (Ct. of App., 6th D.Cal. 2007). Berkeley assessed its own local circumstances – population, geography, risk tolerance – and responded with a local law designed to "reduc[e] the environmental and health hazards produced by the consumption and transportation of natural gas." BMC § 12.80.010(H). Among the City's legislative findings are those based on air quality risks, BMC §12.80.010(C); risk of explosion from seismic events, BMC § 12.80.010(B)(4); and several relating to the impacts of global climate change on the City and its residents and to natural gas combustion's contribution to global climate change. BMC §§ 12.80.010(A),

(B)(1), (B)(2), (B)(3), (D), (E) & (H). Moreover, Berkeley's legislative findings broadly conclude, based on these threats, that "[a]ll-electric building design benefits the health, welfare, and resiliency of Berkeley and its residents." BMC § 12.80.010(F). Thus, the stated purposes and intended effects of the Ordinance are to protect the health, safety and welfare of Berkeley residents by lessening local air pollution, lowering the risk of gas explosions, and blunting the impacts of global climate change by reducing greenhouse gas emissions.

Mitigating the impacts of climate change has in recent years become a core use of the local police power. Berkeley[2] and hundreds of other local governments around the U.S. have committed to reduce greenhouse gas emissions considerably in the coming decades,[3] and many others have committed to a one hundred percent

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[2] See, e.g., Measure G, Resolution No. 63,518- N.S. (2009), Berkeley Ordinance. Resolution No. 69,852-N.S.

[3] Samuel A. Markolf, Ines M.L. Azevedo, Mark Muro, and David G. Victor, Pledges and Progress, Brookings (Oct. 2020) at 1, https://www.brookings.edu/research/pledges-and-progress-steps-toward-greenhouse-gas-emissions-reductions-in-the-100-largest-cities-across-the-united-states/.

clean or renewable energy supply.[4] These local governments have determined such actions to reduce greenhouse gas emissions are necessary to protect resident health and safety.

Local governments have also passed a wide array of laws relating to building energy efficiency and building energy performance. For example, Reno, Nevada's Energy and Water Efficiency Program[5] requires commercial and multifamily buildings to meet one of several energy performance targets. In order to achieve compliance with Reno's standard, some building owners may choose to comply, in part, by using appliances that use less energy than those meeting but not exceeding the standard prescribed under EPCA regulations. This sort of regulation of the whole building, rather than of appliances, has always been the traditional domain of state and local governments. Despite some "downstream impact" on a building owner's choice of appliance, whole-building standards of this kind are plainly not intended to be preempted by EPCA. The panel's overbroad reading of

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[4] *Check Out Where We Are Ready For 100%*, Sierra Club (last accessed June 2, 2023), https://www.sierraclub.org/climate-and-energy/map.

[5] Reno, Nev. Energy and Water Efficiency Ord. (2019).

EPCA preemption would put this kind of pervasive local regulation directly in EPCA's cross hairs.

The full import of the decision for the local police power may be evidenced by looking at its impact on land use and zoning regulation, foundational components of that police power. 8 McQuillin Mun. Corp. § 25:40 (3d ed.). The panel's reading of EPCA preemption might readily extend to land use and zoning regulations. Among other things, local zoning requirements are frequently and traditionally enacted to organize communities by land uses. 8 McQuillin Mun. Corp. § 25:85 (3d ed.). For example, a residential zone that disallows large commercial and industrial operations – some version of which exists in the vast majority of municipalities across the U.S., 8 McQuillin Mun. Corp. § 25:96 (3d ed.) – by default prevents the use of any commercial or industrial appliances in that zone. Many of these appliances are regulated by standards promulgated under EPCA. The panel decision would arguably render this very basic zoning requirement, a fundamental principle upon which local governments spatially organize their communities, preempted by a completely unrelated federal law.

Local zoning codes also generally designate zones as allowing for different amounts of residential density, such as low-density single-family zones, medium density zones with smaller multifamily apartment buildings, and high density

residential zones with many-unit buildings. There are many reasons for this sort of zoning: economic development, alleviation of housing shortages, distribution of essential services, transportation capacity, to name a few. One effect of denser multifamily zones is that the buildings share walls and, at least for newly-constructed buildings, tend to be more energy efficient than single-family homes.[6] The EPCA was plainly not intended to preempt multifamily zoning, yet the panel decision arguably supports preemption in just such a scenario. En banc review is merited to correct this overbroad reading of the scope of EPCA preemption.

II. The Panel's Misinterpretation of EPCA's Narrow Preemption Clause is Unsupported by the History and Scope of That Federal Statute, And By the U.S. Department of Energy's Authority and Ability to Implement It, Leaving a Regulatory Void Where Local Governments Would Normally Have Authority

The City's Brief discusses at length the panel's misinterpretation of EPCA, and explicates why EPCA preemption was never meant to apply to the Berkeley

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[6] Peter Berrill, Kenneth T. Gillingham, and Edgar G. Hertwich, *Linking Housing Policy, Housing Typology, and Residential Energy Demand in the United States,* *ENVIRONMENTAL SCIENCE & TECHNOLOGY at 2224-2233 (2021).*

Ordinance. We concur with the City's analysis. We add here the specific perspective of local governments, with a discussion of implications for municipalities statewide, throughout the Ninth Circuit, and across the country of the panel's erroneous reading of EPCA preemption.

A. EPCA's Origins and Context Illuminate its Purpose and Scope, Which are Unrelated to Most Local Government Regulation.

EPCA is grounded in the federal government's commerce clause power, and grew out of the Congressional desire to effectuate a consistent set of energy conservation standards on which appliance manufacturers could rely, no matter where in the national markets their products were sold. S. Rep. No. 100-6 (1987) and H.R. Rep. No. 100-11, at 24 (1987). That is, EPCA created national appliance standards to support nationwide markets, and, to ensure that appliance manufacturers would not have to design fifty different dishwashers meeting fifty different efficiency or energy usage levels. Id. EPCA is not designed to ensure market demand for any such appliances, but rather to create a uniform set of design standards. To that end, EPCA specifically preempts local laws that set standards with respect to the energy efficiency or energy use of "covered appliances," including many common building appliances. 42 U.S.C. § 6297(c).

Local governments do not have the authority to regulate the energy efficiency or energy use of appliances regulated under EPCA, and Berkeley did not do so here. That they are so plainly and clearly preempted from this sort of action helps local governments understand the scope of their legal authority, and shape their policy actions accordingly. In contrast, the panel's erroneous misinterpretation of the scope of preemption leaves local governments unable to craft local health and safety policies that they can reasonably conclude are safe from preemption. Had Congress intended to go so far beyond appliance energy conservation standards to control local choices about providing particular fuel sources or infrastructure, it would have done so expressly. *Nesovic v. United States*, 71 F.3d 776 (9th Cir. 1995). See also Berkeley Petition 9-11.

B. The Panel's Misinterpretation of EPCA Preemption Runs Counter to the Federal Government's Longstanding Practices in Implementing EPCA.

The panel's interpretation of EPCA also runs counter to the U.S. Department of Energy's ("DOE") own longstanding practices in implementing the statute. In its amicus brief to the panel, the United States notes that DOE has for at least forty years considered EPCA preemption to apply only to "State regulations that are appliance *efficiency* standards," not requirements "that have only a peripheral

effect on the energy efficiency of a covered product." 47 Fed. Reg. 14,424 (Apr. 2, 1982). Of a waiver process that can offer an exception to EPCA preemption, 42 U.S.C. § 6297(d), DOE notes that the interpretation of EPCA preemption ultimately adopted by the panel "is likely to put enormous strain on" the Department, drawing it into "needless disputes with States and localities [while] the harms targeted by [their] regulations would continue unchecked." U.S. Amicus Brief filed June 12, 2023 at 20. In other words, local governments' ability to respond to critical health and welfare needs would be thrown into doubt, and the federal-state-local regulatory relationship would be in disarray. Id. at 18-19. DOE's lack of capacity and experience in this area coupled with local governments' wrongfully curtailed authority would yield a regulatory gap leaving critical health and welfare harms unaddressed.

From the perspective of Amicis' local government members, the implications could be severe. The requirement to have run-of-the-mill health and safety standards, climate laws and plans, and even basic zoning requirements reviewed and waived by the DOE would likely result in deep uncertainty among local policymakers, leading to a hesitancy to enact needed and otherwise lawful legislation; a regulatory vacuum while DOE reviews policies submitted for waiver review; and costly litigation over requirements that do not receive EPCA preemption waivers. These risks further support en banc review in this matter.

III. The Panel's Erroneous and Overbroad Reading of EPCA Preemption Gives Rise to Significant Confusion and Uncertainty Regarding Local Authority in Other Regulatory Areas

In addition to curtailing local governments' general police power and creating a potential regulatory vacuum, the panel's overbroad expansion of EPCA preemption improperly encroaches on more specific local authority to set building code requirements and regulate natural gas distribution. Moreover, the panel does so in a way that sows confusion; what a court might find preempted based on the panel's decision cannot be known given the decision's lack of limiting principles.

Even though the panel expressly states that states and local governments may include energy conservation standards for EPCA-covered appliances in a building code via an exception to preemption, Op. 16 citing EPCA § 6297(f), the decision is already causing uncertainty among states and local governments in enacting and implementing their building codes. Following the panel's decision, the Washington State Building Code Council voted to suspend aspects of its

building code,[7] even though Washington's policy mechanism is structured as a building electrification provision in the state's building code rather than as a prohibition on piping contained in a section of municipal code aimed at effectuating the police power, as in Berkeley. Wash. State Building Code §§ C401.1.4, C403.1.4, and C404.2.1. Soon after, a lawsuit was filed seeking to invalidate these aspects of the building code altogether, *Rivera v. Wash. State Building Code Council*, Case 1:23-cv-03070-SAB (E.D. Wash. 2023), opening up further uncertainty for both the State of Washington and the local governments within it relying on the State Building Code's formulation. Other groups have signaled that they, too, are considering opposing existing building codes and other requirements, such as the National Propane Gas Association, the president of which told a trade publication that it was "examining how the decision will affect existing regulations in… Alaska, Arizona, California, Hawaii, Idaho, Montana,

[7] David Iaconangelo, *Washington state hits the brakes on landmark gas ban*, ENERGYWIRE (May 25, 2023), available at https://www.eenews.net/articles/washington-state-hits-the-brakes-on-landmark-gas-ban/.

Nevada, Oregon and Washington," and that he "anticipates the decision to spur more legal action."[8]

The panel decision also significantly curtails local authority over local energy distribution matters. As discussed in detail in an amicus brief submitted to the panel by a group of energy and environmental law professors, local governments use municipalization (converting a utility energy provider to municipal ownership), franchise agreements, and other regulatory tools to set parameters around the distribution of natural gas within their communities. Law Professors Amicus 13. The panel decision's expansion of EPCA preemption to local ordinances with far more indirect impacts over a covered appliance's energy use might also call into question these mechanisms to regulate local gas distribution.

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[8] Brian Richesson, *Federal appeals court overturns Berkeley's natural gas ban*, LPGAS (May 3, 2023), available at https://www.lpgasmagazine.com/federal-appeals-court-overturns-berkeleys-natural-gas-ban/. Quotes are to the article, not the direct words of the National Propane Gas Association president.

Both the panel decision and Judge Baker's concurrence attempt to limit the decision's reach over local gas distribution authority, but do so ineffectually. The panel, for example writes that its decision "doesn't touch on whether the City has any obligation to expand the availability of a utility's delivery of gas to meters." Op. 22. For his part, Judge Baker noted in his concurrence that "EPCA has little, if anything, to say, about a state or local government's regulation of a utility's distribution of natural gas to customers," Op. 45, and that there is no "indication from its text or structure that EPCA speaks to the distribution of natural gas." Op. 42.

Yet neither the panel nor the concurrence offer any further limiting principles. If Berkeley cannot regulate natural gas distribution to newly constructed buildings, consistent with its authority under state law and the federal Natural Gas Act, 15 U.S.C. § 717 et seq, it is entirely unclear what regulation or other activities would qualify as permissible "local government[] regulation of a utility's distribution of natural gas to customers." Op. 45. Local governments are left with significant uncertainty about their lawful authority over natural gas distribution.

IV. Federalism Principles Remain Central to Construing Express Preemption Provisions of Federal Statutes.

Another significant error in the panel decision, and one that raises questions of extraordinary importance, is the decision's failure to grapple with Congress's intent concerning the balance of power between the federal government and the state or local police power. The panel relies on recent Ninth Circuit jurisprudence limiting the obligation of federal courts to employ a presumption against preemption in express preemption cases. Op. 11-12, citing *R.J. Reynolds Tobacco Co. v. County of Los Angeles*, 29 F.4th 542, 552-523 (9th Cir. 2022). In so doing, however, it does not adequately consider that basic principles of federalism require a court to read a statue in light of Congress's intent, or not, to reallocate power to the federal government from states and municipalities. As the City notes in its petition: "courts deciding whether a particular state law is preempted… must strive to maintain the delicate balance between the States and the federal Government, especially why Congress is regulating in an area traditionally occupied by the States." Berkeley Petition at 17 citing *R.J. Reynolds* at 552. *See also*, Op. 24 (J. O'Scannlain concurring).

Respect for the principles of federalism in determining a federal statute's preemptive scope is an issue of paramount importance to Amicis' local

government members, who operate wholly within the constraints of federal and state law. An erroneous failure to consider how Congress intended to strike the appropriate federal-state balance will not only yield an incorrect reading of whether a local law is preempted in a particular instance, but will also wrongfully undercut the local police power. Op. 24 (J. O'Scannlain concurring), *citing* *Medtronic* at 485.

CONCLUSION

For the reasons above, and for the reasons set forth more fully in the City's petition, the Court should grant Berkeley's petition for en banc rehearing.

Respectfully submitted,

/s/ Michael Burger
MICHAEL BURGER
Counsel of Record
AMY E. TURNER
Sabin Center for Climate Change Law
435 West 116th St.
New York, NY 10027
(212) 854-2372
michael.burger@law.columbia.edu

Attorneys for Amici Curiae

June 12, 2023

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the Court's CM/ECF system, which will send notice of such filing to all counsel who are CM/ECF registered users.

/s/ Michael Burger

MICHAEL BURGER

June 12, 2023