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 U.S. District Court for the Northern District of California, No. 4:19-cv-07668-YGR
Hon. Yvonne Gonzales Rogers, Presiding

BRIEF OF THE STATES OF CALIFORNIA, MARYLAND, NEW JERSEY, NEW MEXICO, NEW YORK, OREGON, AND WASHINGTON, THE COMMONWEALTH OF MASSACHUSETTS, THE DISTRICT OF COLUMBIA, AND THE CITY OF NEW YORK AS AMICI CURIAE IN SUPPORT OF DEFENDANT-APPELLEE CITY OF BERKELEY AND AFFIRMANCE OF THE DISTRICT COURT'S DECISION

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

IDENTITY AND INTEREST OF AMICI CURIAE

This case presents the question of whether an express preemption provision related to appliances' energy use in the Energy Policy and Conservation Act (EPCA) forces state and local governments to allow natural gas connections in new buildings, despite their traditional authority over gas distribution. The undersigned States have a substantial interest in this preemption issue, and in the principles courts apply when addressing a claim that a state or local law impermissibly concerns "energy use" under EPCA. In addition, the undersigned States and their agencies, such as the California Air Resources Board, regularly confront, both in court and as part of their legislative and rulemaking processes, arguments that federal statutes expressly preempt state laws and regulations.[1]

This brief is submitted by the States of California, Maryland, New Jersey, New Mexico, New York, Oregon, and Washington, the Commonwealth of Massachusetts, the District of Columbia, and the City of New York pursuant to Rule 29(a)(2) of the Federal Rules of Appellate Procedure. The City of New York received the consent of all parties to file

[1] *Amici* file this brief solely on the limited question of federal preemption, and take no position on the state-law preemption claims, the policy of Berkeley's ordinance, or any other issue not on appeal.

this brief with *amici* States. No party's counsel authored any part of this brief, nor did anyone contribute money to fund its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the midst of a historic energy crisis, Congress enacted the Energy Policy and Conservation Act of 1975 to "conserve energy supplies through energy conservation programs" and, most relevantly here, "provide for improved energy efficiency of . . . major appliances, and certain other consumer products." 42 U.S.C. § 6201(4), (5). Accordingly, Congress authorized the U.S. Department of Energy to establish "energy conservation standards" for consumer and industrial appliances. Congress also decided that such federal standards should be exclusive: rather than face a potential patchwork of federal and state energy conservation standards for appliances, manufacturers should be able to design their products to uniform standards. In 1987, Congress therefore included an express preemption provision stating that, once a federal standard becomes effective for a given "covered product," "no State regulation concerning the energy efficiency, energy use, or water use of such covered product shall be effective with respect to such product." *Id.* §§ 6295, 6297(c).

That provision does not preempt the regulation at issue here, the City of Berkeley's Natural Gas Infrastructure Ordinance, No. 7,672-N.S (the

Ordinance). Congress used precise language to define the key terms that mark out the preempted domain, particularly the "energy use" of a covered product, which Congress defined as the "quantity" of energy consumed by an appliance at its point of use, as measured under a federal test procedure. 42 U.S.C. § 6291(3), (4), (5). But the Ordinance does not address the "quantity" of energy that any appliance consumes. The Ordinance—driven chiefly by the City's concerns over the health, safety, and environmental impacts of natural gas—provides that new buildings in Berkeley will not be constructed with the infrastructure to distribute or deliver gas. This at most concerns the *type* of energy that is available in a building, but not the *amount* of energy any particular appliance consumes.

Because the Ordinance does not address "energy use," the California Restaurant Association's (CRA) arguments about the term "concerning" in section 6297(c) are beside the point. All those arguments depend on an incorrect premise: that the Ordinance's regulation of the type of energy available in new buildings is an "indirect, less-than-explicit" regulation of the quantity of energy appliances in those buildings will use. Appellant's Opening Br., ECF No. 13-1 (AOB) at 28. But CRA advances no interpretation of "concerning" that bridges the distinction between energy type and quantity—nor is there one. When confronted with purportedly

expansive terms like "concerning" in a preemption provision, courts must identify limiting principles to prevent preemption from sweeping beyond Congress's intent: "If 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then . . . preemption would never run its course, for 'really, universally, relations stop nowhere.'" *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) ("*Travelers*") (citations omitted). Here, the decisive limiting principle, grounded in EPCA's text, is that regulations that are indifferent to the quantitative amounts of energy an appliance consumes at point of use do not "concern[] . . . energy use" and are not preempted.

The rest of EPCA's relevant text and structure confirms this conclusion, as do other statutes. EPCA's appliance preemption provisions exhibit a consistent focus on state regulations that compete with federal energy conservation standards, thereby undermining the uniformity that Congress sought to foster. But the Ordinance in no way functions as a rival standard, because it is indifferent to the energy use of any appliance. Moreover, when these provisions are read against the background of the 1938 Natural Gas Act and the long history of state and local regulation of gas distribution, the inference that Congress intended EPCA's appliance program to preempt laws like the Ordinance is implausible. Here again,

because the Ordinance does not create anything like a rival energy conservation standard, but falls squarely within state and local governments' preserved authority over gas distribution, the term "concerning" in section 6297(c) cannot stretch the scope of preemption so far as to encompass the Ordinance.

The District Court was correct that EPCA does not preempt Berkeley's Natural Gas Infrastructure Ordinance, and its decision should be affirmed.

STATUTORY BACKGROUND

EPCA's appliance program creates federal "energy conservation standards" for certain covered consumer and industrial products, and authorizes the Secretary of Energy to adopt further new and amended standards. 42 U.S.C. §§ 6295, 6313. EPCA defines an "energy conservation standard" as a "performance standard which prescribes a minimum level of energy efficiency or a maximum quantity of energy use." *Id.* § 6291(6). These two key terms, "energy efficiency" and "energy use," are both defined quantitatively: "energy efficiency" is the "ratio of the useful output of services from a consumer product to the energy use of such product," and "energy use" is "the quantity of energy directly consumed by a consumer product at point of use." *Id.* § 6291(4), (5). "Energy" is defined as

"electricity, or fossil fuels," with the Secretary authorized to add other fuels as needed. *Id.* § 6291(3).

Just as sections 6295 and 6313 establish federal standards for, respectively, certain covered consumer and industrial appliances, sections 6297 and 6316 prevent States from creating rival standards for those products, with parallel preemption provisions. Section 6297 consists of seven subsections governing preemption of consumer appliance standards. Most relevantly, subsections (b) and (c) govern preemption of state laws *before* and *after* a federal energy conservation standard for a given product becomes effective. Both subsections include a general preemption provision using the same formulation: "no State regulation concerning the energy efficiency, energy use, or water use of the covered product shall be effective with respect to such covered product." *Id.* § 6297(b), (c).[2] Each also includes a series of exemptions for certain state standards for specific products. Before a federal energy conservation standard for a particular product becomes effective, *any* state product standards adopted before a certain date are exempted. *Id.* § 6297(b)(1)(A). But once the federal standard is

[2] "State regulation" includes laws, regulations, and ordinances adopted by states, municipalities, and other political subdivisions, 42 U.S.C. § 6297(a)(2)(A), and is used similarly in this brief.

established, that broad exemption for legacy regulations disappears and a narrower subset of expressly identified types of state standards survive. *See id.* § 6297(c)(1)-(9). Section 6297(d) creates a process for States to obtain a waiver of preemption for particular state appliance standards not already exempted in (b) and (c). Finally, subsections (e) and (f) exempt certain state procurement rules and building codes from preemption when they meet specific conditions.[3]

Section 6316 applies most of section 6297's consumer appliance preemption structure to covered industrial appliances, but with one significant simplification: preemption runs only from the effective date of the applicable federal standard. *Id.* § 6316(a)(10), (b)(2)(A). Section 6316's general preemption provision also uses different language from section 6297: a covered industrial product's federal energy conservation standard "shall, beginning on the effective date of such standard, supersede any State or local regulation concerning the energy efficiency or energy use of a product for which a standard is prescribed or established." *Id.* § 6316(b)(2)(A).

[3] The other two subsections not discussed both concern preemption of state laws that regulate, or infer warranties from, disclosures made about a covered product's energy efficiency, energy use, or water use. *See* 42 U.S.C. §§ 6297(a), (g).

ARGUMENT

Because EPCA contains an express preemption provision, the Court's "task is to identify the domain expressly pre-empted," focusing "in the first instance . . . on the statutory language, which necessarily contains the best evidence of Congress' pre-emptive intent." *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 260 (2013). The relevant domain here, identified expressly in EPCA, is state laws concerning a regulated appliance's "energy use"—"the quantity of energy directly consumed" by an appliance at "point of use." 42 U.S.C. §§ 6291(4), 6297(c). But the Ordinance falls well outside of that domain, because it at most concerns the *kind* or type of energy that a new building makes available to appliances, without regard to "quantity."

Nevertheless, CRA contends the phrase "concerning . . . energy use" is broad enough to encompass the Ordinance, arguing, first, that the Ordinance indirectly creates a "zero natural gas" standard for appliances in new buildings, and second, that the term "concerning" expands the scope of preemption to reach this kind of "indirect" regulation.

Both arguments fail. The electrical appliances in Berkeley's new buildings will not run on "zero gas" subject to a "zero gas" standard, but will consume a non-zero amount of electricity subject to electricity-based standards. It is these non-zero quantities that EPCA precludes the States

from regulating, and the Ordinance has nothing to say about such quantities. Neither does the word "concerning" stretch preemption so far as CRA requires it to: because the Ordinance has nothing to do with "energy use," it cannot "concern[] . . . energy use," regardless of how broadly one reads "concerning." That alone is enough to affirm the District Court's decision, but other limiting principles—found in EPCA's other provisions, in its structure and purpose, and in other statutory schemes, particularly the Natural Gas Act—confirm the District Court reached the right result. These limiting principles confirm state and local governments' longstanding authority over gas distribution systems, which EPCA's preemption provisions were never intended to displace.

I. THE TEXT OF SECTION 6297(C) DOES NOT REACH THE ORDINANCE

A. The Ordinance Does Not Concern Any Covered Product's "Energy Use" Because It In No Way Regulates the Quantity of Energy Consumed by Any Appliance at Point of Use

To be preempted under EPCA's appliance energy conservation program, a state regulation must "concern[] the energy efficiency, energy use, or water use" of a covered product with a federal energy conservation standard in effect. 42 U.S.C. §§ 6297(c), 6316(b)(2)(A). Here, CRA asserts

only that the Ordinance concerns covered products' "energy use."[4] AOB at 21. Congress defined "energy use" as "the *quantity* of energy directly consumed by a consumer product at point of use." *Id.* § 6291(4) (emphasis added); *accord id.* § 6311(3), (4). And "energy" refers to either "electricity, or fossil fuels." *Id*. § 6291(3). Thus, to be preempted, a state regulation must concern the *quantity* of electricity *or* fossil fuels consumed by some covered consumer or industrial appliance at point of use.

But the Ordinance has nothing to do with the quantity of electricity or fossil fuels consumed by any appliance; at most, it "concerns" the *kind* of energy available to the appliances installed in new buildings. Quantity and kind are independent criteria: "energy use" is a "quantity of energy," but that energy can be "electricity, or fossil fuels." 42 U.S.C. § 6291(3), (4).[5] Thus, federal energy conservation standards for residential boilers, for example, first identify the type of fuel the boiler is designed to consume (gas, oil, or

[4] In any event, "energy efficiency" is defined as an appliance's ratio of useful work output to its "energy use," so a regulation concerning a product's energy efficiency must still concern the *quantity* of energy it directly consumes at point of use. 42 U.S.C. § 6291(4), (5).

[5] Unlike electricity, which is electromagnetic energy delivered directly via a current, natural gas is a fuel that releases energy stored in its chemical bonds when combusted. That Congress used the same term "energy" to describe both underscores EPCA's focus on quantities of energy being delivered and its agnosticism as to the form that delivered energy takes.

electricity), then specify the maximum quantity of that energy type the boiler can consume. 10 C.F.R. § 430.32(e)(2)(iii)(B). This system follows directly from EPCA's requirement to set distinct quantitative standards for products within a given class if they run on "different kind[s] of energy." 42 U.S.C. § 6295(q)(1)(A). Where Congress did make fuel type relevant to (federal) regulation, it used unequivocal language: for residential furnaces not used in mobile homes, "the Secretary shall prescribe [a]n . . . energy conservation standard . . . which . . . is not likely to result in a significant shift from gas heating to electric resistance heating." *Id.* § 6295(f)(1)(B)(iii). If Congress had meant to preempt state regulations concerning "kind[s] of energy," *id.* § 6295(q)(1)(A), it knew how to do so. *See Jama v. ICE*, 543 U.S. 341 (2005) (courts "do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, . . . [especially] when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest."). Instead, sections 6297 and 6316 speak only to the quantities of energy an appliance consumes at point of use.

By contrast, the Ordinance, at most, affects only the type of energy available to appliances installed in new buildings; it is entirely indifferent to *how much* of that energy type those appliances consume. The Ordinance

thus does not "concern[] the . . . energy use . . . of [a] covered product" and is not preempted. *Id.* § 6297(c).

B. None of CRA's Arguments Connect the Ordinance to the Quantity of Energy an Appliance Consumes at Point of Use

1. The Ordinance Does Not Set a "Zero Natural Gas" or "Zero Energy" Standard for Appliances

CRA attempts to manufacture a connection between the Ordinance and the "quantity of energy directly consumed" by covered products with a rhetorical sleight of hand: it asserts the Ordinance effectively prescribes a "zero natural gas" standard for appliances, arguing that "*zero* natural gas is a 'quantity' of natural gas." AOB at 22. In other words (so the argument goes), because the Ordinance effectively requires all appliances installed in new buildings to run on electricity, it necessarily means the Ordinance establishes a zero gas standard. But this "zero as a quantity" argument is divorced from EPCA's text and the program of energy conservation standards it creates. EPCA's standards regulate the amount of energy of the type the appliance is *designed* to use, not some other type of energy that the appliance could never use. A typical electric toaster oven might run on 1200 watts; that is the amount of energy the appliance "consumes" at its "point of use." 42 U.S.C. § 6291(4). But under EPCA, no manufacturer or vendor

would certify this oven as running on "zero cubic feet of natural gas per hour" (or "zero gallons of propane per hour," or "zero liters of kerosene per hour"). It makes just as little sense to describe it as being subject to a "zero gas standard." Rather, the Ordinance leaves undisturbed whatever electricity-based federal standard governs each electric appliance.

Neither does the Ordinance create a "zero energy" standard for gas appliances. AOB at 21, 23. Although this version of CRA's argument is framed solely in terms of gas appliances, "zero" is still not the quantity of energy that any such appliance will "directly consume[]" at its "point of use." 42 U.S.C. § 6291(4). Any gas appliance placed in a building with no gas hook-up will simply never be used; it has no "point of use" at all. But that reality does not create a *standard* governing how much energy the appliance could use if it were put into operation. A gas hot water boiler, for example, would be subject to the same 82% federal energy efficiency standard, *see id.* § 6295(f)(3)(A), even if disconnected and idle, and its compliance with that standard would be determined according to measurements "during a representative average use cycle or period of use," *see id.* § 6293(b)(3). *See also* Appellee's Answering Br., ECF No. 25 (Ans. Br.) at 23-24 ("quantity" must be measured according to federal test methods). Congress thus set the bounds of "energy use" according to a given

product's actual levels of operation, not *whether* the product is in fact operated. And the Ordinance clearly does not require any gas appliance to operate—*i.e.*, to perform useful work—on "zero" gas. Ans. Br. at 18.

Because the Ordinance does not concern the quantity of energy consumed in use by any covered product, it falls outside EPCA's scope of preemption.

2. The Term "Concerning" Does Not Expand the Scope of EPCA Preemption to Reach the Ordinance

CRA's core argument on appeal is that the term "concerning" in Section 6297(c) broadens the scope of preemption far enough to reach the Ordinance. AOB at 28-33. CRA relies particularly on case law interpreting other terms in other preemption provisions, especially the phrase "relating to" in the Federal Aviation Administration Authorization Act (FAAAA), 49 U.S.C. § 14501(c), and the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1144(a). That argument fails for two reasons.

First, even if the Court were to accept that the word "concerning" adds breadth to the preemption provision, that breadth cannot nullify or alter the defined statutory terms that Congress used to identify the relevant domain: here, "energy use." For example, in applying the FAAAA's preemption of state laws "related to a price, route, or service of any motor carrier . . . with

respect to the transportation of property," 49 U.S.C. § 14501(c)(1), the Supreme Court did not have to engage with the potential reach of "related to" in order to hold that the disposal of towed vehicles in storage was not within the preempted domain. *Dan's City Used Cars*, 569 U.S. at 262-64. The Court instead focused on the statutory terms that followed "related to," particularly the phrase "with respect to the transportation of property," which "massively limits the scope of preemption." *Id.* at 261. Because the disposal of towed vehicles had nothing to do with a motor carrier's *property-transportation* services, the Court held that state laws regulating such disposals simply "f[e]ll outside [FAAAA's] preemptive compass." *Id.* at 263. Similarly, this Court recently held that the Clean Air Act "clearly does not" preempt the application of local anti-tampering laws to vehicles that are not "new," based solely on the words following "relating to" in the relevant Clean Air Act preemption clause: "By its terms, § 209(a) preempts state and local regulations 'relating to the control of emissions from new motor vehicles.' . . . The provision does not apply to post-sale vehicles." *In re Volkswagen "Clean Diesel" Mktg., Sales Prac., & Prod. Liab. Litig.*, 959 F.3d 1201, 1218 (9th Cir. 2020).

So too here. Berkeley's Ordinance has nothing to say about the defined term "energy use" that follows "concerning": the "quantity" of "electricity,

or fossil fuels" that a covered product consumes at its point of use. 42 U.S.C. §§ 6291(3)-(4), 6297(c). Thus, it does not "concern" this subject matter, however narrowly or expansively one reads "concerning."

For a similar reason, the precedents CRA cites on "indirect" regulations are inapposite, because nothing in the Ordinance "take[s] an indirect path to a preempted destination." AOB at 17. Whether a regulatory path is "direct" versus "indirect" is not a helpful test for preemption here: the "destination" is simply not preempted. *Cf. Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 385 (2015) (whether the Natural Gas Act preempts a particular state law turns on "the *target* at which the state law *aims*"). Even under CRA's argument, the "target" at which the Ordinance "aims" is still only the type of energy consumed by appliances—a matter outside EPCA's preemption provisions. *See Dan's City Used Cars*, 569 U.S. at 252-53 (because state law did not address "transportation activities," it had "neither a direct nor an indirect connection" to motor carriers' "transportation services" and was not preempted).

Second, even considered under the cases on which CRA relies, "concerning" does not extend EPCA preemption to the Ordinance. These cases interpret ERISA and FAAAA preemption provisions that differ considerably from EPCA's, and, as the Supreme Court has construed them

in light of their purpose and surrounding language, are intended to reach more broadly.[6] And under these cases, the Supreme Court still requires courts to construe terms like "concerning" and "related to" according to the statutory objectives. This approach, grounded in congressional intent, does not endorse the broadest possible reading of a preemption provision: "If 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course. . . . That is a result no sensible person could have intended." *Gobeille*, 577 U.S. at 319 (cleaned up); *see also Cal. Div. of Labor Stds. Enforc. v. Dillingham Constr., N. A.*, 519 U.S. 316, 335 (1997) ("*Dillingham*") (Scalia, J., concurring) ("[A]s many a curbstone philosopher has observed, everything is related to everything else"). Rather than stretch terms like "concerning" to their farthest conceivable extent, courts must identify "limiting principle[s]" in the statute's text, structure, and purpose. *Maracich v. Spears*, 570 U.S. 48, 59-60 (2013); *see also Rutledge v. Pharma. Care Mgmt. Ass'n*, 141 S. Ct.

[6] Much of the Court's recent instruction on "relating to" comes in interpreting ERISA's preemption provision, which "may be the most expansive express pre-emption provision in any federal statute." *Gobeille*, *v. Liberty Mut. Ins. Co.*, 577 U.S. 312, 327 (2016) (Thomas, J., concurring). The Court's warning against over-reading "relating to" thus applies all the more so to preemption provisions that are deliberately more modest in reach.

474, 480 (2020) (courts look to the "objectives of the . . . statute as a guide to the scope of the state law that Congress understood would survive").

Here, the Court need look no further than the definition of "energy use" for its limiting principle: only state regulations that address the "quantity" of energy consumed by covered appliances at point of use "concern[] . . . energy use." While this construction of "concerning . . . energy use" could extend preemption beyond the "direct regulation of appliances" (AOB at 26), as the exemptions in sections 6297(e) and (f) indicate (*see, infra*, at 24-25), it nonetheless does not reach the Ordinance, which has nothing to do—indirectly or directly—with the quantity of energy a covered product consumes at its point of use. This construction also gives meaning to every term in the provision; at the same time, it avoids sweeping in state and local laws on natural gas policy, utilities, and buildings that the District Court and both parties agree are not preempted. *See* AOB at 35-37; Ans. Br. at 37-38; *cf.* Energy & Envtl. Law Profs.' Amicus Br. at 15-19; Local Govts. Amicus Br. at 28-33.

Thus, whether or not one engages with the alleged breadth of the term "concerning," the Ordinance does not concern any appliance's energy use, and is not preempted.

II. SECTION 6297'S OTHER PROVISIONS CONFIRM THAT CONGRESS DID NOT INTEND TO PREEMPT STATE AND LOCAL LAWS LIKE THE ORDINANCE

The distinction between *quantities* and *types* of energy should resolve this case. To the extent it does not, section 6297's other provisions confirm Congress did not intend to preempt state or local infrastructure regulations like the Ordinance. Courts read provisions "in their context and with a view to their place in the overall statutory scheme," and "fit, if possible, all parts into an harmonious whole." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). The text and structure of EPCA's appliance standard preemption provisions, read holistically, show an intent to secure regulatory uniformity for manufacturers of covered appliances by ensuring they can design, produce, and market their products under one set of federal energy conservation standards. Accordingly, EPCA preempts a state regulation that functions as a rival energy conservation standard undercutting such uniformity. But the Ordinance in no way functions as a rival standard. This confirms that it does not "concern[] the . . . energy use" of a covered product. 42 U.S.C. § 6297(c).

The broader legislative context of a preemption provision can also be helpful in understanding its scope. *See, e.g.*, *Travelers*, 514 U.S. at 665-67 (interpreting ERISA's preemption clause in light of other federal statutes

encouraging certain state regulation). In this case, the Natural Gas Act's careful preservation of local authority to regulate gas distribution—the same authority Berkeley exercised to adopt the Ordinance—as well as the longstanding division of federal, state, and local power that statute reflects, strongly indicate that Congress did not, in EPCA, preempt local infrastructure laws like the Ordinance.

A. The Structure and Purpose of EPCA's Appliance-Related Preemption Provisions Confirm that Congress Preempted Only State Regulations that Set Rival Standards for a Covered Appliance's Energy Use

Read as a coherent whole, EPCA's appliance-related preemption provisions are designed to subject covered appliances to uniform energy conservation standards, promulgated by the federal government. Like other express preemption clauses, these provisions "confer[] on private entities . . . a federal right to engage in certain conduct subject only to certain (federal) constraints." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1480 (2018). Specifically, preemption here confers a right on appliance manufacturers to design each of their covered products to comply with one federal "energy conservation standard," *i.e.*, one "minimum level of energy efficiency or a maximum quantity of energy use." 42 U.S.C. § 6291(6); *see Air Cond. & Refrig. Inst. v. Energy Res. Conserv. & Dev. Comm'n*, 410 F.3d

492, 500 (9th Cir. 2005) (section 6297 meant to "counteract the systems of separate state appliance standards" that imposed on manufacturers "a growing patchwork of differing State regulations which would increasingly complicate their design, production and marketing plans" (quoting S. Rep. No. 100-6, at 4)); Ans. Br. at 17. But as shown in Part I, *supra*, the Ordinance in no way prescribes a "minimum level of energy efficiency or maximum quantity of energy use," and thus does not impose any alternative energy conservation standard on appliance manufacturers. 42 U.S.C. § 6291(6).

The common thread through section 6297's subsections—*i.e.*, its general preemption provisions, exemptions to preemption, and waiver provisions—is the potential for a state regulation to create, one way or another, a distinct energy conservation standard for a given class of covered products, and thereby disrupt the uniformity of the federal standard. The consistency with which Congress directed section 6297's provisions to this potential disruption confirms a distinct state energy conservation standard is the kind of rival standard that Congress intended to preempt.

For example, preemption waivers are available under section 6297(d) for a state law that "provides for any energy conservation standard" or other requirement "with respect to [the] energy use" of covered products. *Id.*

§ 6297(d)(1)(A). But the Secretary may *not* grant a waiver if she finds the state regulation "will significantly burden" the appliances' manufacturers, based on, among other factors, "the extent to which the State regulation would cause a burden to manufacturers to redesign and produce the covered product." *Id.* § 6297(d)(3). With this text, Congress made its driving concern—the risk of competing design requirements for appliance manufacturers—abundantly clear.

The general preemption statements in sections 6297(b) and (c) are similarly focused on preventing rival energy conservation standards. Section 6297(c) provides that, after a federal standard for a given consumer appliance is effective, no state regulation concerning the energy use of such product "shall be effective with respect to such product," while section 6316 states that a federal industrial appliance standard will "supersede" such state regulation. This language indicates the preempted state regulation must operate in some manner similar to a product-specific federal energy conservation standard, such that a federal standard can displace or take priority over it. *Cf. Rutledge*, 141 S. Ct. at 484 (Thomas, J., concurring) (because "supersede" in ERISA's preemption clause "suggests a replacement or substitution," "the first step is to ask whether a provision in

ERISA governs the same matter as the disputed state law, and thus could replace it").[7]

The specific preemption exemptions in sections 6297(b) and (c)—which all involve state laws regulating the energy or water use of specific classes of covered products—likewise reinforce the inference that these are the precise kinds of laws Congress intended EPCA to preempt. For example, subsection (b)(1)(A) exempts state-law "requirements for fluorescent lamp ballasts," "flow rate requirements" for showerheads and faucets, and "water use requirements" for toilets and urinals adopted before certain dates. Subsection (c)(9) exempts California regulations for "metal halide lamp fixtures" adopted before 2011. Each of these state regulations is a quantitative standard that dictates how much energy or water a specific appliance can consume. *See also* 42 U.S.C. §§ 6297(b)(4), (6), (7); 6297(c)(1), (4)-(9). And by making the adoption of a federal energy

[7] Conspicuously, CRA never explains how the Ordinance can be "effective" (or ineffective) "with respect to such product." 42 U.S.C. § 6297(c). CRA's efforts to apply section 6297(c) to the Ordinance raises several questions CRA never confronts: What product does "such product" refer to, here? Is a hypothetical, future appliance not yet purchased for a not-yet-constructed building a sufficient referent? If so, how is the Ordinance "effective," or made ineffective, "with respect to" it? CRA does not attempt to fit the Ordinance to this text, but even supposing it could, the language Congress used is distinctly unaccommodating to CRA's scenario.

conservation standard for a specific appliance the pivot point between subsection (b) and (c)'s different lists of exceptions, section 6297 here again underscores that EPCA preemption is intended to cause federal, product-specific, quantitative standards to override any state-law counterparts.

Finally, the exemptions for state procurement rules and building codes in sections 6297(e) and (f) shed light on how Congress anticipated a state law might lead to rival energy conservation standards, even when not in the form of product regulations enforced against the manufacturer. Thus, the exemption in subsection (e) for state procurement standards that are "more stringent than the corresponding Federal energy conservation standards" indicates one way a State could create a rival energy conservation standard outside "direct" or "facial" product regulations: a requirement that state agencies purchase appliances that are more efficient or energy-conservative than applicable federal standards can in effect "prescribe[] a minimum level of energy efficiency or a maximum quantity of energy use" for covered products. 42 U.S.C. § 6291(6); *cf. Engine Mfrs. Ass'n v. S. Coast Air Qual. Mgmt. Dist.*, 541 U.S. 246, 254 (2004) (holding certain fleet purchasing rules enforced vehicle "emission standards" under Clean Air Act's relevant preemption clause). In a similar way, a building code that falls outside the exemption in subsection (f)—*e.g.*, one that requires builders to install

appliances exceeding the corresponding federal efficiency standard—can effectively create a rival energy conservation standard. *Building Indus. Ass'n of Wash. v. Wash. State Building Code Council*, 683 F.3d 1144, 1152 (9th Cir. 2012) (upholding building code that "did not require higher efficiency products as the only way to comply with the code" under § 6297(f)) (cleaned up)).

Together, subsections (e) and (f) indicate that, while section 6297(c) does reach beyond standards directly enforceable against appliance manufacturers, the provision is still focused on state regulations that require manufacturers to redesign their products to be more energy-efficient or energy-conservative than the federal government requires. This focus reinforces the limited breadth of "concerning" in section 6297(c), as well: because statutory objectives are a guide to the scope of preemption, *Rutledge*, 141 S. Ct. at 480, state regulations that do not function as rival energy conservation standards, and do nothing to foster the burdensome "patchwork" of such standards that Congress feared, do not "concern" the energy use of covered products.

Here, the Ordinance does not require appliance manufacturers to design to some alternative energy use standard, and does nothing to foster the patchwork of rival standards that Congress sought to prevent. Any electric

appliance that complies with its federal energy conservation standard may be installed in a new building, and is unaffected by the Ordinance. And no gas-fueled appliance, regardless of the quantity of gas it burns, will work in a new building if it requires a wall hook-up. Thus, nothing in the Ordinance requires manufacturers to design to a distinct, Berkeley-only energy-efficiency standard for any product. *See also* Ans. Br. at 18. Accordingly, it is far from surprising that, as the *amici* supporting CRA detail in their brief, the Ordinance does not resemble the energy conservation standards the Department of Energy crafts and involves none of the economic and technical characterizations of particular appliances that such standards employ. *See* ECF No. 17, at 7-9. It makes sense that an energy conservation standard requires an "engineering analysis of design options" for a covered product and the effect of those design choices on the product's price and performance. *Id.* It makes equal sense that an ordinance on the construction and siting of gas pipes in buildings does not. All this simply confirms that the word "concerning" does not expand the scope of preemption to encompass state laws that are indifferent to the quantity of energy consumed by covered appliances, such as the Ordinance.

B. Reading EPCA against a Backdrop of State and Local Regulation of Natural Gas Infrastructure Further Confirms the Ordinance Is Not Preempted

Lastly, EPCA operates within a broader statutory context that confirms Congress did not intend for its preemption provision to reach state and local gas infrastructure laws like the Ordinance. In construing the reach of preemption provisions, courts hesitate to read these as preempting state or local authority that Congress elsewhere sought to encourage or preserve. Thus, the Supreme Court held that States' regulation of health care rates was not preempted by ERISA based in part on the National Health Planning and Resources Development Act, in which Congress funded grants to encourage just such state rate regulation. *Travelers*, 514 U.S. at 665-67. The Court similarly held the Fitzgerald Act, in which Congress had encouraged States to formulate labor standards for apprenticeships, made it unlikely that such state standards fell under ERISA preemption: "Congress' silence on the pre-emption of state statutes that Congress previously sought to foster counsels against pre-emption here." *Dillingham*, 519 U.S. at 331 n.7.

Here, the congressional policy of preserving state and local authority over gas distribution in the Natural Gas Act of 1938, 15 U.S.C. 717 *et seq.*, assists the Court's understanding of EPCA preemption's scope in the same way. Sections 1(b) and (c) of the Natural Gas Act assert federal authority

over interstate transport of natural gas, but carefully avoid asserting this authority over *intra*state transactions and the local distribution of natural gas. 15 U.S.C. §§ 717(b)-(c). The Natural Gas Act "was drawn with meticulous regard for the continued exercise of state power [over natural gas retail], not to handicap or dilute it in any way." *Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n of Ind.*, 332 U.S. 507, 517-18 (1974); *see generally* Energy & Envtl. Law Profs.' Amicus Br., at 8-14. The power to regulate distribution infrastructure—the pipes that bring gas into homes and buildings—is precisely the power that Berkeley has exercised in the Ordinance here. As in *Travelers* and *Dillingham*, it would make no sense for Congress, without comment, to curtail the state authority it had so carefully preserved in the Natural Gas Act. True, the Natural Gas Act did not "forevermore disclaim[]" federal regulation of local gas infrastructure, or "create an unassailable, exclusive state right to regulate [local] gas pipes without any federal oversight." AOB at 49-50. But the point is that Congress in the Natural Gas Act expressly recognized state governments' prerogative to regulate in this space, such that it is reasonable to expect that any change in congressional direction would be similarly express. In *Dillingham*, Justice Thomas, writing for a unanimous Court, allowed that "[i]t is not . . . inconceivable for the ERISA Congress to intend the pre-emption of state statutes resulting from

the pre-existing Fitzgerald Act"; but the Fitzgerald Act did nonetheless "aid [the Court's] conclusion" that an intent to preempt such state laws was a particularly unlikely inference from ERISA's language. 519 U.S. at 331 n.7. Here, similarly, it is implausible that Congress chose to disturb the federal-state balance it had struck in the Natural Gas Act with EPCA's appliance provisions—which have literally nothing to say about gas pipes. *See Bond v. United States*, 572 U.S. 844, 858 (2014) ("If the Federal Government would radically readjust the balance of state and national authority, those charged with the duty of legislating must be reasonably explicit about it." (cleaned up)).

This conclusion is all the more secure when one views the Natural Gas Act not as a legislative idiosyncrasy, but as Congress's considered effort to reflect the longstanding history of state and municipal gas regulation. *Bond*, 572 U.S. at 857 ("Part of a fair reading of a statutory text is recognizing that Congress legislates against the backdrop' of certain unexpressed presumptions." (cleaned up)). A backdrop of relevant state and local regulation can shed light on Congress's intent, insofar as this history of regulation informs what kinds of actions Congress would understand to concern or relate to a certain subject matter, or not. *See, e.g.*, *Maracich*, 570 U.S. at 61-62 (relying on state regulations of attorneys and ethics rules to

hold that, because an attorney's solicitation of clients was a "distinct form of conduct" from litigation, it did not fit within a statutory provision for conduct "in connection with" litigation).

Since well before EPCA's enactment, state and local authorities have regulated the siting, safety, and general policy of installing gas infrastructure in buildings. *See* Energy & Envtl. Law Profs.' Amicus Br. at 13-14; Local Govts. Amicus Br. at 29-33 (citing examples). These state- and locally regulated matters fall far afield from the manufacture or design of energy-conserving appliances. This only reinforces the conclusion that what the Ordinance regulates and what EPCA preempts are "distinct forms of conduct." *Maracich*, 570 U.S. at 61-62.

CONCLUSION

For the foregoing reasons, the Ordinance is not preempted and the Court should affirm the judgment below.

Dated: February 8, 2022

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number: 21-16278

I am the lead counsel for *amici curiae* the State of California et al.

This brief contains 6,494 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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I hereby certify that on February 8, 2022, I electronically filed the following documents with the Clerk of the Court by using the CM/ECF system:

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