Oral Argument Scheduled For May 12, 2022
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 *AMICUS CURIAE* AMERICAN GAS ASSOCIATION IN SUPPORT OF THE CALIFORNIA RESTAURANT ASSOCIATION

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DISCLOSURE STATEMENTS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* the American Gas Association hereby submits the following corporate disclosure statement:

The American Gas Association ("AGA") is an incorporated, not-for-profit trade association representing local energy companies that deliver natural gas in the United States. AGA has no parent companies, subsidiaries, or affiliates that have issued publicly traded stock. Some AGA member companies are corporations with publicly traded stock.

No counsel for a party authored this brief in whole or in part, and no person other than the amicus curiae, its members, or its counsel contributed money that was intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

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March 22, 2022

STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

Pursuant to Federal Rule of Appellate Procedure 29(a)(2) and Ninth Circuit Rule 29-3, with the exception of the respondent City of Berkeley, which has expressed its opposition, all other parties in this case have either consented or do not oppose the filing of this *amicus* brief.

Pursuant to Fed. R. App. P. 29(a)(4)(D), counsel for *amicus curiae* AGA certifies that a separate brief is necessary to provide the broad perspective of the companies that AGA represents. As the national advocate for natural gas utility companies, AGA is particularly well-suited to provide the Court important context on subjects at issue in this appeal, which will assist the Court in resolving this case.

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INTERESTS OF THE AMICUS CURIAE

The *amicus curiae* American Gas Association ("AGA") represents critical domestic infrastructure – namely, local natural gas distribution companies that deliver natural gas to homes and businesses. There are more than 77 million residential, commercial, and industrial natural gas customers in the U.S., of which 95 percent — more than 73 million customers — receive their gas from AGA members. AGA is an advocate for natural gas utility companies and their customers, and provides a broad range of programs and services for member natural gas pipelines, marketers, gatherers, international natural gas companies, and industry associates. Today, natural gas meets more than thirty percent of the United States' energy needs.[1]

AGA and its members have a substantial interest in continued investment in and development of natural gas infrastructure, and in ensuring predictable and consistent laws and court rulings that affect that infrastructure. The gas they move heats millions of American homes, and generates over 30 percent of the nation's electricity.[2] Nearly 187 million Americans and 5.5 million businesses use natural

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[1] *See* AGA, *About Us,* https://www.aga.org/about/ (last visited March 21, 2022).

[2] *See* U.S. Energy Info. Admin., *What is U.S. electricity generation by energy source?*, https://www.eia.gov/tools/faqs/faq.php?id=427&t=3 (last visited March 21, 2022).

gas.[3] Demand for natural gas continues to increase because it is abundant, clean, safe, and cost-effective, and reliable infrastructure will be needed for the foreseeable future.[4]

AGA and its members have a substantial interest in the continued ability of natural gas utilities to provide clean and efficient natural gas to consumers across the United States. Additionally, AGA has an interest in ensuring laws and regulations affecting the unique utility framework of regulatory oversight and private investment are consistent with municipal/utility reciprocal legal commitments and constitutional principles.

AGA's member natural gas local distribution companies ("LDCs" or "natural gas utilities") own and operate local natural gas distribution pipeline systems that typically receive natural gas supplies that have been transported on the interstate pipeline system. LDCs deliver natural gas under state-regulated rates and terms of service, directly to residential, commercial, and industrial customers, including restaurants.

This brief should be of assistance to the Court because it provides information about the natural gas distribution industry, which supplies natural gas to the

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[3] *See* AGA, *2022 Playbook*, https://playbook.aga.org/ (last visited March 21, 2022).

[4] *See* U.S. Energy Info. Admin., *Annual Energy Outlook 2020*, https://www.eia.gov/outlooks/aeo/ (last visited March 21, 2022).

consumers and businesses whose use of natural gas appliances is affected by the local statute at issue in this case. Judicial decisions affecting the ability of consumers to use natural gas as an energy source have a direct impact on gas utilities, and in turn any statutorily mandated reductions in natural gas use would affect the rates and services available to from LDCs to their existing consumers. AGA has a direct interest in ensuring that judicial decisions are made in light of a full record as to the role of local regulation on the use and distribution of natural gas under existing regulatory structures and doctrines.

INTRODUCTION AND SUMMARY OF ARGUMENT

A central issue in this case is the scope and purpose of local and indeed state regulation of local gas distribution utilities and their distribution function and facilities. Contrary to the conclusions of the District Court, local and even state regulators do not have unrestrained regulatory authority over local gas utilities. The question of whether or not the Natural Gas Act ("NGA") preempts local regulation of local distribution is not at issue in this appeal, but the District Court erroneously concluded that because there are limits to federal jurisdiction under the NGA, greater scope for local and state regulation of local distribution may be found in the context of this case. AGA urges the Court to consider strong grounds for rejecting this conclusion.

Local distribution of natural gas by privately-owned utilities is subject to regulation by state commissions, but that regulation focusses on several specific, though related goals: service to all who apply for service; provision of safe, adequate service; a just and reasonable price; and provision of service without undue discrimination. The scope of state public utility regulators' authority to regulate utilities in the public interest is broad and manifested in numerous powers, such as granting utilities certificates to build facilities and provide services, and to regulate rates and services, to approve financing and acquisitions, to audit and review accounts, etc. However, the goal of such regulation is to ensure that the public has

the benefit of the regulated service in accordance with those goals. That authority is not unlimited, nor is it properly addressed to depriving the public of access to the service provided by the utilities.

Local governments play an even more limited role in regulating local natural gas utilities. Municipalities do not have broad authority to determine local gas distribution, and although municipalities often grant utilities franchises (under state authority) to operate distribution facilities within city limits, that authority is quite limited, and does not extend in any broad way to determining whether the service of the utilities is a public benefit or not.

The role of, and limits to, the state and local authorities over local natural gas distribution leads to series of necessary conclusions: (1) the distribution of natural gas by a utility is considered to be a positive benefit to the public as well as an important right for consumers; (2) the state regulators' broad and potent regulatory powers focus on achievement of the specific regulatory goals, not determining that their essential public service is no longer in the public interest; (3) municipalities do not have broad rights to regulate or direct the actions or facilities for gas distribution; and (4) regulatory decisions by the state or municipal authorities is subject to review under, *inter alia*, the doctrine of the regulatory compact.

The regulatory compact is widely accepted as resulting from a 'bargain' struck between the utilities and the state, under which in return for the obligations imposed

on the utility, the utility is entitled to a fair rate of return – a principal that is echoed by controlling Supreme Court rulings on the Constitutional limits to state regulation. By imposing prohibitions of natural gas use, municipalities such as the City of Berkeley would create the likelihood that the local utility's right to a fair return on these principles would be impaired – to the detriment of not just the local utility, but the other customers still being served by the utility.

The District Court also concluded that under precedents limiting the scope of federal jurisdiction under the NGA to exclude local distribution, municipalities such as the City of Berkeley necessarily implies that extensive municipal regulation of local distribution cannot be preempted under other federal statutes. This conclusion is mistaken in at least two respects. Firstly, the cases cited relate to limits of the NGA as to preemption under the NGA, not preemption under other statutes. Second, interstate natural gas pipelines are regulated under numerous other federal statutes, and by other federal regulators, all of which may independently have various preemptive effects without regard to the scope of NGA jurisdiction. Secondly, for the reasons described above, municipal and even state regulators do not exercise unrestrained regulatory authority over local distribution companies, but have limited regulatory roles focused on specific regulatory goals – not *carte blanche* to impose restrictions at variance with the fundamental purpose of both the utility and the public utility regulatory framework.

ARGUMENT

AGA supports the California Restaurant Association ("CRA") in its request for reversal of the District Court's order dismissing CRA's federal preemption claim; AGA opposes local ordinances such as that enacted by the City of Berkeley, whose intended goal and effect will be to unilaterally and without consideration of utility or customer interests curtail access to natural gas (including renewable natural gas, hydrogen, or other gasses transported by local utilities)[5] as an energy source for consumers within the service territory of a natural gas utility, with harm resulting to both consumers denied the opportunity to use natural gas as a fuel, and to the utility and its other remaining customers who could face long-term costs and consequences from the proposed prohibition of new natural gas service. This is a novel exercise of municipal police powers with profound implications to the long-established legal obligations fundamental to the municipal-utility model. The purpose of this brief is to provide context for these concerns that would otherwise be absent from the record.

I. Regulation of Local Gas Distribution by State and Local Authorities Is Limited

As the Court weighs the arguments presented by CRA and the City of Berkeley regarding the preemptive effects of Energy Policy and Conservation Act ("EPCA") and the powers of local governments such as the City of Berkeley to

[5] For the sake of brevity, later references to natural gas will encompass, where appropriate, renewable natural gas, hydrogen or other gasses as well.

exercise police and related powers over natural gas use and distribution, AGA submits that it is essential for the record to reflect accurately the nature and scope of state and local regulation of natural gas distribution, including the purpose of utility regulation, its goals and its scope. The Court should be fully informed as to how gas distribution is regulated, and how it is not regulated.[6] The need for such context is particularly strong in light of the District Court's reliance on the conclusion that "states and localities expressly maintain control over the local distribution of natural gas under related federal statutes," with reference to the NGA.[7] In fact, even state regulation of natural gas utilities is limited in its goals and scope, and local municipal authorities have clearly defined roles in the regulation of natural gas distribution.[8]

Natural gas distribution is regulated by state regulatory agencies, like the California Public Utilities Commission ("CPUC"), under state public utility statutes. Current public utility regulation evolved from earlier state regulation of common carriers and similar entities, particularly railroads,[9] and earlier still, from common

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[6] The discussion below relates to the principal paradigm in the United States, government regulation of investor-owned utilities. Municipally-owned utilities, or other publicly-owned utilities, are subject to different rules and frameworks.

[7] 15 U.S.C. § 717 et seq.

[8] This discussion relates solely to natural gas distribution, which takes place after natural gas is delivered to local gas utilities by interstate pipelines; upstream of that delivery, the transportation and wholesale sales of natural gas is exclusively subject to the NGA, under the oversight of the Federal Energy Regulatory Commission ("FERC").

[9] *See e.g.*, 1 *Energy Law and Transactions* Section 2.03; *see also* Miller,

law regulatory concepts.[10] Courts have long rejected challenges to such regulations of private businesses on the grounds, in effect, that "when private property is devoted to a public use, it is subject to public regulation."[11] This general principle also informed the late early 20th century growth of state regulation[12] as to a range of what we now consider to be public utilities – electric, natural gas, water, telephone and telegraph companies. Indeed, the early 20th century also represented a time during which earlier regulatory structures at the municipal level were replaced with state-wide regulatory rules and administration.[13]

Broadly speaking, the goal of the state utility regulators is to ensure proper oversight as to four principal obligations of public utilities such as gas distribution companies: 1) service to all who apply for service; 2) provision of safe, adequate

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Railroads and the Granger Laws (1971). Prior to railroads, ferries, coaches and certain other activities were subject to common law regulation.

[10] *See e.g.*, *The Concept of a Business Affected with a Public Interest* 7-69, Hall (1940). The Supreme Court, in ruling on railroad case in 1915, quoted in its support "the common law of old." *Pennsylvania R.R. Co. v. Puritan Coal Co.*, 237 U.S. 121, 133 (1915).

[11] *Munn v. Illinois*, 94 U.S. 113, 125 (1877) ("*Munn*"); *see also Olcott v. The Supervisors*, 83 U.S. (16 Wall.) 678, 697, 21 L. Ed. 382 (1873) ("Though the ownership is private the use is public … . The owners may be private companies, but they are compellable to permit the public to use their works in the manner in which such works can be used ….").

[12] *See e.g.*, "Regime Change and Corruption A History of Public Utility Regulation" by Werner Troesken, in *Corruption and Reform: Lessons from America's Economic History*, ed. Edward L. Glaeser and Claudia Goldin (2006) ("*Troesken*").

[13] *Id.*

service; 3) a just and reasonable price; and 4) provision of service without undue discrimination.[14] (California's Public Utilities Code focuses on these obligations.)[15] In order to ensure that these goals are met, public utility regulators have a number of key tools.

One key mechanism to ensure these goals are met stems from state commissions' authority to control entry into the public utility role and associated obligations.[16] This power has broadly been implemented by giving public service

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[14] 1 Energy Law and Transactions Section 2.01. Viewed from a more modern, economic perspective, utility regulation, as to both rates and service, is justified as a means of restraining the potential negative effects of monopoly power in a naturally monopolistic market, which utilities are, both as a result of their "natural monopoly" nature and their possession of certificates that limit the entry of rivals. *See e.g.*, Schmalensee, *The Control of Natural Monopolies* (1979); Bonbright, *Principles of Public Utility Rates* (1961). In this view, now broadly shared, to combat the natural monopolistic tendencies of regulated utilities, regulation acts as a substitute for competition. *See e.g.*, Demsetz, "Why Regulate Utilities?" 11 *Journal of Law & Economics* 55 (1968).

[15] The CPUC regulates public utilities pursuant to the California Public Utility Code. See Pub. Util. Code §§ 1—24032. Chapter 3 of the California Public Utility Code sets forth the statutory obligations of public utilities operating in California (i.e., rates and facilities obligations), and confirms that in exchange for satisfying these obligations that the utility is entitled to charge just and reasonable rates. The commission is in turn obligated to ensure that public utilities "furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities … as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public." Pub. Util. Code § 451.

[16] *See e.g.,* Alfred E. Kahn, *"The Economics of Regulation: Principles and Institutions 3"* (1988) (describing the four principal components that distinguish public utilities from other sectors of the economy: control of entry, price-fixing, prescription of quality and conditions of service, and an obligation to serve all applicants under reasonable conditions); *See also* Shelley Welton, "*Public Energy*" 92 N.Y.U.L. Rev. 267 (2017).

regulators the right to issue certificates of public convenience and necessity ("certificates"), or similar authorities, by which they would grant a license, subject to revocation, to serve the public in a defined area and service type, subject to the right to install and operate facilities to provide the service, under conditions in the public interest.[17] By controlling the grants of certificate authority, the state regulatory authorities also can determine, and indeed are typically obligated to determine, whether the applicant utility is capable of providing the proposed service as required by the statute, guarding against entry by unqualified utility providers.[18]

At the municipal level, utilities typically implement their right to serve under a certificate by entering into franchise agreements – contracts – with local governments, under authority typically delegated to the municipalities by the state; franchise agreements allow access for the utilities' facilities over municipal property and rights of way, to reach customers' property, subject to franchise fees.[19] These franchise agreements would therefore grant municipalities a specific, but sharply limited and defined, role in enabling utilities to provide service in accordance with their certificates from the state regulators.

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17 *See e.g.*, Jones, "*Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870-1920*," 79 Columbia L. Rev. 426 (1979).

18 *See* Michael J. Thompson, Joseph S. Koury, and Ryan J. Collins, 2 Energy Law and Transactions § 50.04.

19 *See* Farris & Sampson, Public Utilities: Regulation, Management and Ownership, 62-63 (1973).

In addition to the certificates, state regulators also have direct oversight over the rates and terms of service provided by gas utilities, all of which are submitted to the regulators for approval in the form of tariffs filed by the gas utilities. Although utilities file the rates, typically, approval of the state regulators is required for the rates to become effective. The goal of the regulators is to ensure that the rates are "just and reasonable," which in turn results in rates that do not burden ratepayers with unnecessary costs, but also are sufficient to provide the utility with a fair return on its investment, as measured by the ability to attract capital.[20]

In interpreting the *Hope* standard for rate reasonableness, the D.C. Circuit has noted that, "[s]o long as the public interest, *i.e.*, that of investors and consumers – is safeguarded, it seems that the Commission may formulate its own standards."[21]

In order to ensure that the rate and service goals are being met, state commissions are typically granted related authority beyond the direct oversight of tariff filings. Included in such authority is the oversight of utility accounting practices, to ensure accurate, verifiable and uniform cost and expense information are available for review and enforcement by the regulator and, in many instances, other parties that have been granted statutory authority to review and dispute said

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[20] *See e.g.*, *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944) ("*Hope*").

[21] *Washington Gas Light Co. v. Baker,* 188 F.2d 11 (D.C. Cir. 1950).

information.[22] Complementing this authority, typically state regulators have the authority to conduct audits of the utilities' records.[23] These accounting and auditing rights provided to state regulators help ensure a number of core regulatory concerns, including ensuring that the costs and revenues undergirding the rates are accurate and reasonable, as well as ensuring financial integrity in the utilities, to ensure both continued adequate service and accurate signals for investor confidence. Similarly, state regulators typically also have authority to oversee, or approve, financing by utilities, as well as asset and share sales and acquisitions, as well as mergers.[24] Further, state regulators may even have authority to oversee, review, and approve or reject changes to the corporate structure of parent entities owning utility assets within the parent's corporate umbrella.[25] Similarly, state regulators have a range of authority with respect to approval and oversight of stock issuances or purchases, lease agreements, dividend issuances, and even the debt-equity structure of the utilities.[26]

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22 *See* NARUC 1987 Annual Report on Utility and Carrier Regulation 457-458 (1988) ("*NARUC 1987 Report*"). Many such state and federal grants of accounting oversight stemmed from experiences with abuses by utilities and their parent companies in the 1920s and 1930s, and have become essential elements in state regulation.

23 *NARUC 1987 Report* at 468.

24 *NARUC 1987 Report* at 493-497.

25 *See PPL Elec. Util's Corp. v. Pa. Publ. Util. Comm'n,* Docket No. 624 C.D. 2019, 2020 Pa. Commw. Unpub. LEXIS 521, *32-33 (Pa. Cmwlth. Oct. 27, 2020) (Internal citations omitted).

26 1 Energy Law and Transactions Section 205[3].

These broad and intrusive authorities granted to state authorities – direct authority to approve the charges for service, authority to grant or deny entry and to oversee accounting and financing/acquisition/sales by the utilities – are far-ranging in scope. Yet, all are in direct furtherance of the central goals of the regulators, to ensure reasonable rates, service to those who seek it, and continued safe and adequate service to the public at a fair rate of return to the utility.

Moreover, the obligations imposed by the public utility statutes and regulatory commissions, when fulfilled by the public utility via investment in the necessary assets to meet such obligations, merge to create a further regulatory concept: the "regulatory compact." The concept of the regulatory compact is discussed at more length in Section III of this brief.

II. State and Local Authorities Do Not Have Broad, Much Less Unrestrained Regulatory Authority as to Gas Utilities.

For purposes of the issues raised in this appeal, AGA submits that the background facts discussed in Section I compel several conclusions.

First, the distribution of natural gas by a utility is considered to be a positive benefit to the public, such that it is imbued with the public interest sufficiently to support regulation, and further that the legislature concluded that the obligation to provide it, and safeguards against abuses in the pricing and provision of natural gas distribution, show that access to natural gas is an important right for consumers,

protected by the structure of the public utility laws and the obligations imposed on the utility.

Second, that although the state regulators have broad and potent powers to ensure that the goals of regulation are met – reasonable prices, broad access, safe and reliable supplies, not unduly discriminatory services, fair rate of return to the utility – those powers are focused on achievement of specific regulatory goals. State regulatory authorities' role is not to micro-manage the operations of the regulated utility, or to determine that its fundamental purpose of supplying natural gas in accordance with regulatory requirements is no longer in the public interest, but to ensure that the result of the utility's tariff, organization and actions are to meet the above-noted regulatory goals.

Third, that the relationship between the utilities and municipalities is not one in which municipalities have any broad scope to regulate or direct the actions or facilities for gas distribution. As counterparties to franchise holders, municipalities can negotiate franchise agreements and receive appropriate franchise fees from the utilities. However, municipalities have not had any regulatory role with respect to natural gas distribution, nor do they have broad authority to govern utility operations or facilities under their general police powers. Natural gas distribution utilities are subject to specific regulations imposed by state regulators under state public utility codes, typically focused to pursue specific statewide regulatory goals. Conversely,

municipalities have not been authorized to regulate utilities. Indeed, there are instances in which attempted municipal regulation of an area more appropriately left up to the state utility regulator have been rejected.[27]

Fourth, as discussed below in Section III in greater detail, any regulatory decision by the state regulator, and any decision by municipalities that might impact the utility operations or viability of gas utilities, is subject to review under, *inter alia*, the doctrine of the regulatory compact. A state or municipal action that has a substantial impact on the ability of a gas utility to perform its obligations or earn a return, may be considered a violation of the regulatory compact and constitutional principles protecting property and due process and thus invalid.

III. Unilateral Municipal Bans on Utility Infrastructure or Energy Use Violate Constitutional Principles Protecting Property and Due Process.

The "regulatory compact," broadly defined, is a term describing the mechanism in which utilities are vested with an enforceable right to recover its costs incurred in fulfilling its obligations as a public utility, even when the regulator may not wish to allow such recovery.[28] That concept is broadly accepted as a guiding

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[27] *See PPL Elec. Utils. Corp. v. City of Lancaster*, 214 A.3d 639 (Pa. 2019); *City of Allen v. Public Utility Comm'n of Texas*, 161 S.W.3d 195 (Tex. App.—Austin 2005, no pet.)

[28] Jim Rossi, "*The Common Law 'Duty To Serve' and Protection of Consumers in an Age of Competitive Retail Public Utility Restructuring*," 51 V. and L. Rev. 1233 (1988).

principle in public utility regulation. In *Gypsum*,[29] in addressing disputes over how to treat certain affiliated contracts of a utility, the Supreme Court of Indiana framed its analysis in the "bedrock principle behind utility regulation," "the so-called 'regulatory compact,' which arises out of a 'bargain' struck between the utilities and the state." The court explained the "quid pro quo" nature of the compact, as well as the basis of fair rate of return regulation in the compact.[30] Many other courts have adopted this concept in their assessment of utility cases.[31] Service by gas utilities is thus subject to a broader implied contract, under which the gas utility has rights arising from its performance of its side of the regulatory compact, and both state and municipal authorities' actions must be viewed in light of those utility rights. Both

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[29] *United States Gypsum, Inc. v. Indiana Gas Co.*, 735 N.E.2d 790, 797 (Ind. 2000) ("Gypsum").

[30] *Id*.

[31] *See e.g.*, *US W. Communs., Inc. v. Utils. & Transp. Comm'n*, 949 P.2d 1337, 1361 (Wash. 1997) ("In a rate case the public is entitled to prompt, expeditious, and efficient service. Quid pro quo, the company is entitled to rates which are fair, just, reasonable and sufficient to allow it to render such services."); *Delmarva Power & Light Co. v. PSC*, 803 A.2d 460, 462-64 (Md. 2002) (citing the regulatory contract as the background or framework of its analysis of the state commission's restructuring and partial deregulation of electric and natural gas utilities in Maryland); *Borough of Duncannon v. Pa. Pub. Util. Comm'n*, 713 A.2d 737 (Pa. Cmwlth. 1998) (the regulatory commission could condition a proposed abandonment on a contribution, consistent with the utility's bargain to obtain monopoly rights in exchange for regulation under the state's utility code); *Office of Pub. Util. Counsel v. PUC of Tex.*, 104 S.W.3d 225, 227-28 (Tex. Ct. App. 2003).

state and municipal authorities are limited in their authority to take steps that would violate the regulatory compact.

The Supreme Court has also provided guidance limiting state and local authorities' actions potentially violative of property rights and due process. This is perhaps best explained by Justice Kennedy, who identified three inquiries that indicate whether a given law is unconstitutionally arbitrary. They are: (1) whether the statute destroys "reasonable certainty and security, which are the very objects of property ownership"; (2) the degree of retroactive effect; and (3) whether the legislation imposes an "actual, measurable cost" that results from the activity at issue.[32]

As applied to natural gas utilities' rights and responsibilities under the regulatory compact, local ordinances like the one adopted by the City of Berkeley violate the regulatory compact, as well as all three prongs of Justice Kennedy's inquiry. Indeed, as explained in more detail above in Section I, the regulatory compact exists for the purpose of providing "reasonable certainty and security" to both the utility and the state. By effectively prohibiting the use of natural gas in new buildings, the City of Berkely has undercut natural gas utilities' reasonable certainty and security to earn a reasonable rate of return going forward. Further, such

[32] *Eastern Enterprises v. Apfel,* 524 U.S. 498, 539-550 (1998) (Kennedy, J., concurring in the judgment and dissenting in part).

regulation is undoubtedly retroactive, as local utilities serving cities such as the City of Berkeley will have made extensive commitments to both their own infrastructure and upstream infrastructure in the form of capacity rights on interstate pipelines based on the projected growth in end-use consumption by LDCs customers. By subverting end-use consumption, the City of Berkely will have, in effect, retroactively rendered unnecessary previous investments in infrastructure made by local utilities in interstate pipeline commitments and in their own facilities. The costs of stranding natural gas infrastructure (*i.e.*, property) could substantial, and if other communities implement similar laws, the cumulative impact could be significant.

The utility legal and regulatory framework reflects a balance of the interests of private enterprise (the local utilities) and public welfare. State and local governmental authorities are required to allow utilities to earn a return on their investments "sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and attract capital."[33] In return, the utility makes highly concentrated investments in assets that are fixed and immobile. The interests of both the consumer and the investor must be balanced.[34] By unilaterally

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33 *See Hope.*, 320 U.S. at 603.

34 *Id.*

banning new natural gas infrastructure or use, the City of Berkeley has acted without regard to the interests of either and both will ultimately be harmed.

Additional and related public harms would proceed from the challenged local ordinance. Credit and investor capital vital to maintaining utility services flows to utilities because of regulatory certainty and anticipated demand. The former is within the sole control of the regulator. The latter is within the sole control of the market. Uncertainty on either end, diminishes the value of the investment. Banning energy infrastructure or end-use heightens investment risk and thus harms invested capital.[35] The negative consequences of such harms to investment access would affect not only the citizens of the City of Berkeley, but all of the customers served by the local utility.

Finally, in attempting to reduce natural gas consumption by prohibiting new natural gas infrastructure investment, to the detriment of the regulatory compact under which local utility service is provided, Berkeley is plainly attempting to do indirectly what it cannot do directly, *i.e*., assume the role of a highly localized utility regulator. Indeed, it is a long-established constitutional principle that "what cannot

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[35] The FERC has recognized as much before, noting that "[w]e have learned from our experience in the natural gas area the importance of addressing competitive transition issues early and with as much certainty to market participants as possible." *Notice of Proposed Rulemaking, Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities,* FERC Stats. & Regs. ¶ 32,514 at 33,049, 60 Fed. Reg. 17,662 (1995).

be done directly cannot be done indirectly."[36] In this instance, Berkeley has done exactly that. The resulting regulatory uncertainty may inevitably impede and discourage investments in utilities, threatening all consumers and businesses that rely on those utilities for cost-effective and reliable access to electricity, natural gas, and water.

IV. Limits to the Preemptive Effect of the Natural Gas Act Do Not Preclude Preemption by Other Federal Statutes.

In its July 6 order dismissing CRA's complaint, the District Court premised its denial of CRA's preemption argument on the grounds that the NGA expressly reserved regulatory authority as to natural gas distribution as to state and local governments: "states and localities expressly maintain control over the local distribution of natural gas under related federal statutes."[37] The Court further relied on this Court's prior statement that "*all aspects related to the direct consumption of*

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[36] *See, e.g.*, *Vinnedge v. Shaffer*, 35 Ind. 341, 343 (Ind. 1871) (holding that statute which prohibited married women from alienating real property included mortgages because "what cannot be done directly cannot be done indirectly"); *Packard v. City of Lewiston*, 55 Me. 456, 459 (Me. 1867) (invalidating portion of state statute at conflict with national statute because it was "clearly an attempt to do indirectly what cannot be done directly"); *Washington v. State,* 13 Ark. 752, 753 (Ark. 1853) (invalidating portion of statute prohibiting persons from setting up billiards tables without paying for a license since "there is no power to do that indirectly which cannot be done directly"); *Cummings v. Mo.,* 71 U.S. 277, 325 (1866) (invalidating state and federal law requiring individuals in certain professions to swear an oath that they never gave aid to the rebellion as an ex post facto law and bill of attainder) ("The legal result must be the same, for what cannot be done directly cannot be done indirectly.").

[37] July 6 Order, p. 17.

gas . . . remain within the exclusive purview of the states."[38] From these premises, the District Court concluded that it could not conclude that the EPCA preempted the City of Berkeley's Ordinance:[39]

> where the Ordinance is exercising authority expressly deferred to states and localities. The Berkeley Ordinance does not facially regulate or mandate any particular type of product or appliance. Instead, the Ordinance focuses on regulating the underlying natural gas infrastructure.

This conclusion is mistaken, for at least two reasons. First, the NGA cases cited by the District Court relate to the question of whether the *NGA* preempts local or state action, not, as asserted by the District Court, the NGA's limited scope precludes preemption by *other* federal statutes. Second, for the reasons discussed in detail in Section I above, even as to local distribution that is not governed by the NGA, state and local regulation of public utilities' engaged in distribution of natural gas is not, in fact, pervasive and all-encompassing, but rather is limited to specific regulatory goals, leaving scope for preemption by other federal statutes or sources that do not address those goals.[40]

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[38] July 6 Order, p. 17, *quoting S. Coast Air Quality Mgmt. Dist. v. F.E.R.C.*, 621 F.3d 1085, 1092 (9th Cir. 2010)(emphasis supplied by the District Court) ("*South Coast Air Quality*").

[39] July 6 Order, p. 17.

[40] AGA notes that CRA did not argue that the NGA, or any other federal statutes relating to natural gas and/or energy regulation, preempt the Ordinance, and further submits that the issue of preemption of the City of Berkeley's ordinance under the Natural Gas Act was not before the District Court and has not been placed before this Court for decision in this case.

Regarding the first issue, the preemptive effect of the NGA, it is flatly incorrect to contend that the existence of the NGA, and the limited scope of its own reach at the distribution level, in any way prevents other federal statutes from preempting state and local action, when preemption principles would support that conclusion based on the terms and intent of the other federal statutes. Like that of the state commissions (and municipalities), the scope of NGA authority as exercised by the FERC is substantial, but does not extend to all aspects of natural gas pipeline activities. The FERC issues certificates of public convenience and necessity, regulates rates and services, approves of new construction and siting, and exercises various oversight rights (accounting, audits, reporting, enforcement) to ensure that its certificate, rate and service authority is preserved. However, other federal statutes simultaneously govern many aspects of the interstate natural pipelines' operations in parallel with FERC's authority under the NGA. Most notably, the Department of Transportation's Pipeline and Hazardous Materials Safety Administration ("PHMSA") comprehensively regulates the safety standards and performance of natural gas pipelines pursuant to the Pipeline Safety Act of 1968,[41] as amended, and through regulations implementing that statute.[42] The National Transportation Safety Board ("NTSB") investigates and reports on certain accidents involving natural gas

[41] *See* 40 U.S. Code § 60102 *et seq.*
[42] *See e.g.*, 49 C.F.R. Part 191.

pipelines,[43] pipeline construction is subject to approvals and regulation by a number of environmental and other agencies (state and federal), and within the past year or so, the Department of Homeland Security's Transportation Security Agency has issued Security Directives to many natural gas pipelines requiring that they ensure certain cybersecurity provisions are in place.[44] This listing is illustrative only, and far from exhaustive, but highlights the fact that in terms even of natural gas pipeline planning and operation, numerous federal laws govern specific actions or obligations. Manifestly, the existence of the NGA, and the limits of its purview, does not have an effect on the preemptive effects of those other statutes. Indeed, in the seminal case of *Schneidewind v. ANR Pipeline Co.*,[45] the Supreme Court found that a preemption question requires an examination of federal intent,[46] but that intent inquiry focused on the intent of Congress as to preemption of state action by that statute, not whether the statute would affect the preemptive scope of another, separate federal statute.

Nothing in the cases cited by the District Court suggest otherwise. The *South Coast Air Quality* decision addressed whether the NGA preempted state regulation

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[43] *See* https://www.ntsb.gov/about/history/Pages/default.aspx (last visited March 21, 2022).
[44] *See* https://www.dhs.gov/news/2021/07/20/dhs-announces-new-cybersecurity-requirements-critical-pipeline-owners-and-operators (last visited March 21, 2022).
[45] 485 U.S. 293 (1988).
[46] *Schneidewind v. ANR Pipeline Co.*, 485 U.S. at 300 (1988).

as to natural gas – *i.e.*, whether the challenged action lay inside or outside the preemptive effect of the NGA,[47] not whether the existence of, or scope of, NGA regulation could affect or limit the preemptive effect of another federal statute. Simply stated, the limits to the preemptive effect of federal regulation of local distribution under the NGA is not relevant to the question of the preemptive effect of another, different federal statute, such as EPCA.

The second point on this subject is discussed in detail in Section I to this brief: the regulatory authority of the state utility regulators and municipal authorities as to local distribution by utilities is in fact limited as well, and is not comprehensive, as suggested by the District Court. Both the goal and scope of state utility regulators as to local gas distribution by utilities is not all-encompassing, but rather is focused on the principal goals of utility regulation, which relate to reasonable rates, comprehensive access to gas service, safe and secure gas supply, and not unduly discriminatory service.[48] The role of municipalities in regulating utility gas distribution is in fact well-defined, restricted chiefly to the negotiation and administration of franchise agreements, rather than comprehensive application of local police powers.[49] The record reflects that the Ordinance was, avowedly, an effort to "transition the City infrastructure away from natural gas," and to advance a

[47] *South Coast Air Quality*, 621 F. 2d at 1092.
[48] *See* pp. 7 -14, *supra*.
[49] *See* p. 11, *supra*.

situation in which "natural gas service will be obsolete."[50] This stated goal – far removed from municipal franchise management – is not supportable as being reserved to local regulation by the NGA, as the District Court found, and instead is far more liable to being preempted as argued by CRA.

CONCLUSION

The Court should consider the arguments raised in this brief, which support the relief sought by CRA in this case, including reversal of the District Court's dismissal of CRA's federal claim below.

Respectfully Submitted,

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Dated: March 22, 2022

[50] ER-34-35 at 11:10-12:6.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CERTIFICATE OF COMPLIANCE FOR BRIEFS

This brief contains 6,256 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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/s/ Michael L. Murray

Date March 22, 2022

CERTIFICATE OF SERVICE

I hereby certify that on March 22, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all registered CM/ECF users.

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