



**ROB BONTA**  
**Attorney General**

**State of California**  
**DEPARTMENT OF JUSTICE**

1515 CLAY STREET, 20TH FLOOR  
P.O. BOX 70550  
OAKLAND, CA 94612-0550

Public: (510) 879-1300  
Telephone: (510) 879-0299  
Facsimile: (510) 622-2270  
E-Mail: Elaine.Meckenstock@doj.ca.gov

May 1, 2023

Mark Langer  
Clerk of the Court  
D.C. Circuit Court of Appeals  
E. Barrett Prettyman Courthouse  
333 Constitution Ave., NW  
Washington, DC 20001

Re: *Ohio v. EPA*, No. 22-1081 (and consolidated); Response to April 24, 2023  
Letter Regarding *California Restaurant Association v. City of Berkeley*, 2023 WL  
2962921 (9th Cir. Apr. 17, 2023)

Dear Mr. Langer:

Respondent-Intervenor California respectfully responds to Petitioner Ohio's letter regarding *California Restaurant Association v. City of Berkeley* ("*Berkeley*"). That decision is irrelevant here.

First, as explained in State Respondent-Intervenors' Brief (46-47), Ohio's attempt to directly challenge California law as preempted under the Energy Policy and Conservation Act of 1975 (EPCA) is not properly presented in these petitions for review of an *EPA action* taken exclusively under the *Clean Air Act*. Indeed, *Berkeley* illustrates how preemption challenges are properly brought: by filing complaints in district courts with jurisdiction.

Second, *Berkeley* does not cure Ohio's failure to assert any injury from California's greenhouse gas standards, EPA Br. 24; Ohio Reply 3, or its failure to establish injury-in-fact, causation, or redressability as to California's zero-emission-vehicle standards, State Resp.-Int. Br. 10-13; EPA Br. 23-28.

Third, *Berkeley* does not substantively support Ohio's claims. That decision considered a prohibition against natural gas infrastructure in new buildings. With one judge concurring only because of Ninth Circuit precedent he found

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questionable and another writing separately to express concerns about standing, the panel held that the city’s prohibition was preempted under a provision prohibiting “regulation[s] concerning the ... energy use” of appliances, where “energy use” is defined as “the quantity of energy directly consumed ... at point of use.” 2023 WL 2962921 at \*4 (quoting 42 U.S.C. §§ 6297(c), 6291(4)). Even if that decision remains Ninth Circuit law, it does not illuminate whether California’s vehicle emission standards are “related to fuel economy *standards*.” 49 U.S.C. § 32919(a) (emphasis added); see Letter at 2 (incompletely quoting preemption provision); State Resp.-Int. Br 49-50.

The *Berkeley* panel also had no occasion to address Congress’s express accommodation of California’s vehicle emission standards in EPCA, *id.* at 47-49, or Congress’s repeated embrace of California’s vehicle emission standards in other statutes—including its decision to fund implementation of the very standards Ohio attempts to challenge here, *id.* at 51. *Berkeley* thus cannot explain why Congress would have taken those steps if it had already preempted California’s standards when it enacted EPCA. *Berkeley*’s analysis of a building code regulation under EPCA’s appliance-efficiency program has no bearing here.

Respectfully submitted,

ROB BONTA

Attorney General of California

ROBERT W. BYRNE

EDWARD H. OCHOA

Senior Assistant Attorneys General

MYUNG J. PARK

GARY E. TAVETIAN

Supervising Deputy Attorneys General

*/s/ M. Elaine Meckenstock*

M. ELAINE MECKENSTOCK

*Attorney for Respondent-Intervenor State of California, by and through its Governor Gavin Newsom, Attorney General Rob Bonta, and the California Air Resources Board*

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### CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2023 I electronically filed the foregoing letter with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the Court's CM/ECF system.

I further certify that all parties are participating in the Court's CM/ECF system and will be served electronically by that system.

Dated: May 1, 2023

/s/ M. Elaine Meckenstock

M. ELAINE MECKENSTOCK

*Attorney for Respondent-Intervenor State of California, by and through its Governor Gavin Newsom, Attorney General Rob Bonta, and the California Air Resources Board*