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
Hon. Yvonne Gonzalez Rogers, District Judge

BRIEF OF AMICUS CURIAE NEW YORK STATE PUBLIC SERVICE COMMISSION IN SUPPORT OF REHEARING EN BANC

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INTEREST OF THE *AMICUS CURIAE*

Amicus curiae the New York State Public Service Commission (the Commission), is a New York State regulatory agency which, as relevant to this case, possesses statutory authority over the conveying, transportation, sale, and distribution of natural gas for light, heat, or power. N.Y. Pub. Serv. Law § 5(1)(b). The Commission also has general supervisory authority over all gas corporations that lay down local gas distribution infrastructure. N.Y. Pub. Serv. Law § 66(1). The Ninth Circuit panel ruling, holding that the Energy Policy and Conservation Act (EPCA) preempts a city ordinance that prohibits the installation of natural gas infrastructure in newly-constructed buildings, may erroneously raise questions about the Commission's authority over planned electrification and its authority over local gas distribution infrastructure in New York. Accordingly, the Commission supports the City of Berkeley's petition for rehearing en banc.

The Commission submits this brief as of right pursuant to Federal Rule of Appellate Procedure 29(b)(2) and U.S. Ct. of App. 9th Cir. Rule 29-2(a) because the Commission is an administrative regulatory body within a department of the government of the State of New York. N.Y.

Pub. Serv. Law §§ 3, 4. Counsel for the Commission is authorized to represent and appear on behalf of the Commission in all actions and proceedings concerning the regulatory interests of the Commission. N.Y. Pub. Serv. Law § 12.[1]

SUMMARY

Petitioner City of Berkeley adopted an ordinance that prospectively prohibits the installation of natural gas infrastructure in newly-constructed buildings with certain exceptions not relevant here. Berkeley Mun. Code § 12.80.40(A). The ordinance does not require removal of existing local gas distribution infrastructure. The Respondent California Restaurant Association sued, arguing that EPCA preempted the Berkeley ordinance. The Ninth Circuit reversed the District Court, holding that EPCA preempts Berkeley's regulation because it prospectively prohibits the installation of new, additional natural gas distribution infrastructure on premises where covered natural gas appliances or products are used (the Panel Ruling). In so

[1] The views expressed herein are not intended to represent those of any individual member of the Commission. Consistent with N.Y. Pub. Serv. Law § 12, the Chair of the Public Service Commission is authorized to direct this filing on behalf of the Commission.

holding, the Ninth Circuit panel implicitly overruled the Ninth Circuit's prior interpretation of EPCA's preemption clauses without a mandated discussion and expanded the scope of EPCA preemption far beyond the bounds of its text, structure, or history. The Panel Ruling also effectively required the continued expansion of natural gas as a fuel source in new construction and, as a result, authorized the use of increasing amounts of gas within the City of Berkeley – all while rewriting the relationship between federal and state authority. For these reasons, the full Ninth Circuit should grant rehearing.

REASONS FOR GRANTING THE PETITION

Rehearing en banc is warranted where (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance. Fed. Rule App. Proc. § 35(a)(1)-(2). Both prongs are met here. The Panel Ruling sets a precedent that may potentially expose states and localities that plan to move forward with electrification to litigation risks and contradicts this Circuit's own prior interpretation of the scope of EPCA's preemption provisions.

New York State and localities within New York State have decided to move towards electrification in new constructions in an effort to combat climate change and reduce harmful emissions from fossil fuels. Recent legislation enacted as part of New York State's budget, 2023 Sess. Law of N.Y. Ch. 56, Part RR, § 1, prospectively prohibits the installation of new fossil fuel equipment in new constructions, subject to various exceptions and conditions. The Final Scoping Plan adopted by the New York State Climate Action Council recommended that building codes minimize the near-term installation of additional fossil fuel equipment as a means of ensuring that, going forward, newly-constructed buildings are more resilient to climate change impacts.[2] Final Scoping Plan, at 184. The Commission, in particular, has moved forward with planned building electrification in, for example, its Order Authorizing Utility Energy Efficiency and Building Electrification

[2] New York State Climate Action Council, *New York State Climate Action Council Scoping Plan* (adopted December 19, 2022) (available at https://climate.ny.gov/-/media/Project/Climate/Files/NYS-Climate-Action-Council-Final-Scoping-Plan-2022.pdf).

Portfolios Through 2025.[3] The Panel Ruling could raise questions about these laws and recommendations and the ability of the Commission to contain or mitigate greenhouse gas emissions, and the Commission's ability to regulate gas distribution companies in accord with the Public Service Law. The Panel Ruling has the potential for engendering needless uncertainty through a misreading of the scope of EPCA's preemption clauses and this Circuit's own precedents interpreting EPCA.

The EPCA preemption provision at issue provides a general rule that "no State regulation concerning the energy efficiency, energy use, or water use of such covered product shall be effective with respect to such product. . . ." 42 U.S.C. § 6297(c). This provision addresses *product* efficiency – the title of the section is "General rule of preemption for energy conservation standards when Federal standard becomes effective for product." 42 U.S.C. § 6297(c). The law contains numerous exceptions to this general rule. 42 U.S.C. § 6297(c)(1)-(9).

[3] Case 18-M-0084, *In the Matter of a Comprehensive Energy Efficiency Initiative*, Order Authorizing Utility Energy Efficiency and Building Electrification Portfolios Through 2025, at 34 (issued January 16, 2020) (*available at* 2020 WL 289744).

State and local building codes have certain requirements they must meet in order to qualify for an exception to preemption under EPCA. 42 U.S.C. § 6297(f).

On its face, EPCA's preemption section is narrow. As relevant here, it is concerned with the "energy efficiency" and "energy use" of *covered products*. These terms are defined in EPCA. "Energy use" means "the quantity of energy directly consumed by a consumer product at point of use, determined in accordance with test procedures. . . ." 42 U.S.C. § 6291(4). "Energy efficiency" is defined as "the ratio of the useful output of services from a consumer product to the energy use of such product, determined in accordance with test procedures. . . ." 42 U.S.C. § 6291(5). From a plain reading of the general rule of EPCA preemption, it is clear that EPCA preempts state regulations that attempt to set "the quantity of energy directly consumed by a consumer product at point of use" and the "ratio of the useful output of services from a consumer product to the energy use of such product." In other words, EPCA creates a national market for appliances, with national energy efficiency standards that manufacturers must meet. Indeed,

this was the interpretation given to EPCA's preemption section by this Circuit 18 years ago.

EPCA was passed in 1975 in order to, among other things, "provide for improved energy efficiency of motor vehicles, major appliances, and certain other consumer products." Pub. Law 94-163, Sec. 2(5). 42 U.S.C. 6297(f) was added in its present form to preempt state-imposed *product or appliance energy efficiency* standards. Congress's purpose in amending the preemption section was to "counteract the systems of separate state appliance standards that had emerged as a result of the DOE's general policy of granting petitions from States requesting waivers from preemption, which caused appliance manufacturers to be confronted with a growing patchwork of differing State regulations which would increasingly complicate their design, production, and marketing plans." *Air Conditioning and Refrigeration Institute v. Energy Resources Conservation and Development Commission*, 410 F.3d 492, 500 (9th Cir. 2005) (internal quotation marks omitted), *cert. denied* 547 U.S. 1205 (2006). As the *Air Conditioning* Court recognized in reference to EPCA and its subsequent

amendments: "[T]he legislative history of the relevant Acts supports a narrow interpretation of the preemption provision." *Id.*

The *Air Conditioning* Court's holding that the legislative history of EPCA supports a narrow interpretation of its preemption provision is independent of the presumption against preemption. While the *Air Conditioning* opinion discusses the presumption against preemption in its discussion of the relevant guidelines for statutory interpretation, the *Air Conditioning* Court found that the legislative history of EPCA was an independent and sufficient reason for reading the preemption provision narrowly. *Id.* The *Air Conditioning* Court properly interpreted the text of EPCA preemption section in light of its legislative history to conclude that EPCA's preemption section should be construed narrowly. *Id.* The Panel Ruling provides no reason to abandon this holding and fails to discuss *Air Conditioning* at all, despite implicitly overruling its holding and rejecting its reasoning.

The Panel Ruling's implicit overruling of the *Air Conditioning* Court's interpretation of EPCA also breaks with Circuit precedent. This Circuit has held that "[t]he presumption in this Court is that three-judge panels are bound by prior precedent." *Tingley v. Ferguson*,

47 F.4th 1055, 1074 (9th Cir. 2022), *pet. en banc denied* 57 F.4th 1072 (9th Cir. 2023). "[W]here the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority, a three-judge panel should consider itself bound by the later and controlling authority, and should reject the prior circuit opinion as having been effectively overruled." *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc); *accord Gay v. Parsons*, 61 F.4th 1088, 1094 (9th Cir. 2023). As this Circuit has explained:

> "The 'clearly irreconcilable' requirement from *Miller* is a high standard to meet. It is not enough for there to be some tension between the cases or for the intervening authority to cast doubt on this Court's prior authority. As long as we can apply prior circuit precedent consistently with or without running afoul of the intervening authority, we must do so."

Tingley, 47 F.4th, at 1074–75 (internal citations and quotation marks omitted). The Panel Ruling provides no reason for abandoning the narrow interpretation of the EPCA preemption clauses given by the *Air Conditioning* Court, no discussion of whether that interpretation is irreconcilable with past precedent, and no discussion of the *Miller* standard for overruling past precedent.

Nor is it clear how the Panel Ruling can be reconciled with recent Supreme Court case law. The Supreme Court "requires Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property." *Sackett v. EPA*, 598 U.S. ___, ___, 143 S.Ct. 1322, 1341 (2023), citing *United States Forest Service v. Cowpasture River Preservation Assn.*, 590 U.S. ___, ___, 140 S.Ct. 1837, 1849-50 (2020). The Supreme Court also presumes that "Congress does not 'hide elephants in mouseholes' by 'alter[ing] the fundamental details of a regulatory scheme in vague terms or ancillary provisions.'" *Id.*, at ___, 143 S.Ct., at 1340, citing *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001). It would be exceedingly strange for Congress to amend EPCA to regulate infrastructure development in states and localities, a traditional state power, via energy conservation standards for covered products – a rewriting of the balance between federal and state power which Congress never discussed when it amended EPCA to add the preemption section and which has taken nearly 40 years to become apparent.

Congress struck that balance between state and federal power in the natural gas industry nearly a century ago in the Natural Gas Act. 15 U.S.C. §§ 717-717z. Congress divided jurisdiction in such a way that FERC regulated "the transportation of natural gas in interstate commerce," "the sale in interstate commerce of natural gas for resale," and "natural gas companies engaged in such transportation or sale." *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 379 (2015). "The Act leaves regulation of other portions of the [natural gas] industry—such as production, local distribution facilities, and direct sales—to the States." *Id.* As the Supreme Court has explained, the Natural Gas Act "was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way." *Id.*, at 385 (internal quotation marks omitted). To suggest, as the Panel Ruling does, that "the Natural Gas Act only prevents FERC from regulating the local distribution of gas" upends this longstanding division of responsibilities between federal and state authorities by adopting an excessively broad interpretation of EPCA's preemption section instead of maintaining the narrow interpretation that the Circuit had previously adopted.

California Rest. Assoc. v. City of Berkeley, 65 F.4th 1045, 1055 (9th Cir. 2023).

The narrow interpretation of preemption is crucial in this case because it would have limited the Panel Ruling's interpretation, which reads EPCA as ensuring that a consumer can use a covered product instead of simply setting the energy efficiency standards an appliance manufacturer must meet to sell a covered product – a leap that is unsupported by the text, structure, or legislative history of EPCA. To take EPCA amendments that this Circuit previously stated were intended to counteract a system of varied state appliance energy efficiency standards in favor of a national market for covered products, and read it as now preempting certain local control over natural gas distribution infrastructure in buildings – which could potentially be read to require that natural gas be available in all new buildings – turns the statute on its head. Far from preempting state regulations to ensure a national market in energy efficiency standards, the Panel Ruling has interpreted EPCA into potentially guaranteeing the continued use of natural gas as a fuel and, in doing so, potentially preventing the responsible political entities from taking steps to

implement their plans to combat climate change, limit emissions, and regulate new infrastructure.

CONCLUSION

The Petition for en banc review should be granted.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 29(a)(5) because it contains 2,253 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Century Schoolbook 14-point font, a proportionally spaced typeface.

No party's counsel authored any part of this brief, nor did any person contribute money to fund its preparation or submission; the brief was prepared by counsel for *amicus curiae* New York State Public Service Commission

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Dated: June 12, 2023
Albany, New York

CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2023, I caused the foregoing brief to be electronically filed with the Clerk of the United States Court of Appeals for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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