Case No. 21-16278

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CALIFORNIA RESTAURANT ASSOCIATION,

Plaintiff-Appellant,

v.

CITY OF BERKELEY,

Defendant-Appellee.

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

BRIEF OF *AMICI CURIAE* ENERGY AND ENVIRONMENTAL LAW PROFESSORS IN SUPPORT OF PETITION FOR REHEARING EN BANC

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June 12, 2023

RULE 29 STATEMENTS

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

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

/s/ Daniel N. Carpenter-Gold
DANIEL N. CARPENTER-GOLD

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

Legislative History Materials

Legal Scholarship

Other Authorities

INTERESTS AND IDENTITIES OF *AMICI*

Amici curiae ("*amici*") are among the nation's preeminent professors of energy and environmental law and policy. They are leading experts in fields including energy regulation; federalism and its application to energy and environmental law; and federal, state, and local utility regulation. *Amici* have produced a large body of award-winning scholarly work on these subjects, including leading casebooks on energy, environmental, and constitutional law. They have an interest in ensuring that cases like this are decided based on a full understanding of the implications for the balance of federal, state, and local power in utility regulation.

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SUMMARY OF THE ARGUMENT

Under carefully crafted and longstanding doctrines of energy regulation, maintained by Congress over decades, state and local governments have the power to regulate utility distribution infrastructure, including natural gas distribution infrastructure. But the panel's holding—that the Energy Policy and Conservation Act ("EPCA") preempts Defendant-Appellee City of Berkeley's ("Berkeley's") ordinance prohibiting the buildout of natural gas distribution infrastructure into certain buildings (the "Ordinance")—misunderstands and misapplies this federalist system of utility regulation, threatening core areas of traditional state and local authority. In reaching its decision, the panel interprets EPCA as preempting any state or local regulation that would "prevent consumers from using [EPCA-covered] products," Op. 15, ECF No. 87-1, even if it would only do so "*indirectly*," Op. 23. This theory transforms the scope of EPCA preemption, which the Court previously understood merely to cover "state standards requiring greater efficiency than the federal standards," *Bldg. Indus. Ass'n of Wash. v. Wash. State Bldg. Code Council*, 683 F.3d 1144, 1145 (9th Cir. 2012), into a broad and indeterminate area of exclusive federal jurisdiction. Further, because EPCA does not provide federal authority to replace the lost state and local authority, the panel opinion creates a regulatory void in a system that Congress intended to be comprehensive.

The panel provides no limiting principle or clarity as to the scope of its ruling, casting uncertainty on heretofore well-established exercises of state and local regulatory power. The only specific question of potential preemption addressed by the panel is whether its theory would force cities to extend or maintain existing natural gas distribution infrastructure outside of buildings, and the opinion offers no principled basis to distinguish such cases, simply putting that question off for future litigation. Op. 22 (asserting that "[t]hat does not follow from our decision" because the panel's "holding doesn't touch on" those areas). In fact, the opinion goes out of its way to raise new potential areas of preemption, which only worsens the confusion—and risk for state and local authority—surrounding the ruling. Op. 23 (declaring that "EPCA would no doubt preempt an ordinance that directly prohibits the use of covered natural gas appliances in new buildings").

If allowed to stand, the panel's decision would therefore throw into question the ability of state and local governments to enact regulations fundamental to their role as regulators of utility distribution, including: denying service to a building or appliance that poses a threat to health and safety or the integrity of the distribution network, restricting unsafe fuel use or appliances, and determining whether and where to maintain infrastructure for providing utility services. The decision is, therefore, "of exceptional importance" to our federalist system of utility regulation, Fed. R. Appellate Proc. 35(a)(2); *amici* urge the Court to review it en banc.

ARGUMENT

I. Local Control of Utility Distribution is Core to Our Federalist System of Utility Regulation, Which Congress has Shown No Intent to Overturn

State and local governments have had authority over local utility distribution for as long as energy infrastructure has existed. *See, e.g.*, Robert L. Swartwout, *Current Utility Regulatory Practice from a Historical Perspective*, 32 Nat. Res. J. 289, 297-305 (1992); William Boyd & Ann E. Carlson, *Accidents of Federalism: Ratemaking and Innovation in Public Utility Law*, 63 UCLA L. Rev. 810, 823-25 (2016). The Supreme Court upheld this authority even as it found that the dormant Commerce Clause barred states from other areas of energy regulation, including interstate energy transmission and interstate sales of energy in the wholesale market. *See, e.g.*, *Pub. Utils. Comm'n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 88-89 (1927); *E. Ohio Gas Co. v. Tax Comm'n of Ohio*, 283 U.S. 465, 471 (1931). These rulings created a regulatory void, however—known as the "*Attleboro* gap,"—in which no state could regulate and Congress had not yet regulated. *See, e.g.*, Jim Rossi, *The Brave New Path of Energy Federalism*, 95 Tex. L. Rev. 399, 409-10 (2016).

Congress closed the *Attleboro* gap with the Federal Power and Natural Gas Acts, while explicitly and intentionally maintaining local control over utility distribution. *See* 16 U.S.C. § 824(b) (excluding "facilities used in local

distribution" from federal jurisdiction); 15 U.S.C. § 717(b) (excluding "the local distribution of natural gas"); *see also, e.g.*, *S. Coast Air Quality Mgmt. Dist. v. Fed. Energy Regul. Comm'n*, 621 F.3d 1085, 1091 (9th Cir. 2010) ("[T]he Natural Gas Act specifically exempted from federal regulation the 'local distribution of natural gas' . . . ." (quoting 15 U.S.C. § 717(b)). In the intervening decades, Congress has faithfully maintained this federalist system. *See, e.g.*, *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 279, 304 (1997) (noting Congress's "unbroken recognition" of state authority over distribution and that "Congress did nothing to limit the States' traditional autonomy to authorize and regulate local gas franchises," despite changes to other areas of utility regulation); Boyd & Carlson, *Accidents of Federalism*, 63 UCLA L. Rev. at 822-35 (reviewing history of utility regulation and noting Congress's continued respect for state authority).

There is no indication in the text, structure, or history of EPCA that Congress intended to alter this longstanding balance of federal and state power. The relevant portions of the statute create a detailed program of nationwide appliance conservation standards, *see, e.g.*, 42 U.S.C. § 6295(c)(1) (setting separate efficiency standards for each of twelve different types of air conditioner),

but say nothing about the infrastructure that provides energy to those appliances.[1] Similarly, EPCA's preemption provisions are extremely detailed as to which appliance regulations are preempted, but do not reference any regulations relating to infrastructure. *See id.* § 6297(b)-(c) (whether a standard is preempted can depend on the specific product it regulates, the issuing state, the date of issue, and whether a federal standard has been established). The panel's opinion implies that Congress took pains to carefully lay out the preemptive scope of EPCA with regard to individual appliance standards, while simultaneously eliminating large portions of local utility regulations with no discussion at all—an unlikely scenario. *Cf. United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 412 (1999) ("[W]here precisely targeted prohibitions are commonplace, and where more general prohibitions have been qualified by numerous exceptions . . . , a statute . . . that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter.").

The history of EPCA's amendments confirms that Congress never intended the scope of EPCA preemption to reach beyond appliance standards. Two amendments provide the core language relevant to this case: the National Energy

[1] Although the panel opinion addresses only natural gas, EPCA preemption applies equally to other fossil fuels, and to electricity. 42 U.S.C. § 6291(a)(3) (defining "energy" as "electricity, or fossil fuels").

Conservation Policy Act ("NECPA"), which preempted "requirement[s] respecting energy use or energy efficiency of a type (or class) of covered products," Pub. L. 95-619, § 424(a), 92 Stat. 3206, 3264 (1978), and the National Appliance Energy Conservation Act of 1987 ("NAECA"), which tweaked this language to its current form, preempting "regulation[s] concerning the energy efficiency or energy use of [a] covered product." Pub. L. 100-12, § 7, 101 Stat. 103, 118.

The legislative record indicates that Congress had no intention to expand EPCA preemption beyond appliance conservation standards in either law—and certainly not far enough to reach core areas of local decision-making over distribution infrastructure, such as where to allow natural gas supply lines. The justification behind NECPA's preemption was that "compliance with all state *standards* would be very costly." S. Rep. No. 95-409, at 39 (1977) (emphasis added); *see also* H.R. Rep. No. 95-1751, at 117 (1978) (Conf. Rep.) ("Both the House and Senate [versions of NECPA] modified EPCA to establish a period of automatic preemption of State standards prior to the establishment of a Federal standard."). NAECA's amendments, meanwhile, were intended to "follow[] substantially the preemption requirements in [NECPA]." H.R. Rep. No. 100-11, at 23 (1987); *see also* 133 Cong. Rec. 3070 (1987) (statement of Sen. Johnston) (sponsor's description of NAECA as having "two basic principles": "to establish efficiency standards" and "to preempt State efficiency standards"). Thus, the

language changes in both amendments were meant to continue the preemption of state appliance standards, not to fundamentally alter the scope of EPCA preemption.

The legislative history also explains why Congress did not "limit preemption to facial regulations of products." *See* Op. 15-16. Congress used broadening language—referring to regulations "respecting" energy use in NECPA and "concerning" energy use in NAECA—to ensure preemption of regulations that would directly address an appliance's energy use, but might not be "standard[s]" on their face. S. Rep. No. 95-1294, at 118 (1978) (Conf. Rep.). The conference report gives as an example "a State prohibition on gas pilot lights," which would save energy by preventing gas from being wasted by a constantly burning flame. *Id.* While such a regulation might not be *labeled* an "efficiency standard[]," it would still directly "affect[] gas range energy efficiency" and should therefore be preempted. *Id.* In other words, in using general terms like "respecting" and "concerning," Congress had in mind the preemption of "design regulations relating to the energy efficiency of . . . [a] product," not regulations like the Ordinance, which do not relate to the energy efficiency of any product's design. 124 Cong. Rec. 34,563 (1978).

Finally, NAECA's text and legislative history demonstrate that the reference to "building codes" added by that law does not entail an expansion of the statute's

preemptive scope to cover regulations like the Ordinance. *See* Op. 16-17 (citing 42 U.S.C. § 6297(f)). That subsection provides preemption exceptions for state or local standards "contained in a State or local building code," which the panel opinion suggests is an "indicat[ion] that EPCA preempts building codes, like Berkeley's ordinance." *Id.* Notably, neither party considers the Ordinance to be a building code.[2] But putting that aside, the subsection does not, on its face, expand EPCA's preemptive scope, and it was not Congress's intent to do so: The building-code exception was designed to prevent building codes from "effectively requiring the *installation of [a] product* with an efficiency exceeding the applicable Federal standards." S. Rep. No. 100-6, at 11 (1987) (emphasis added). Further, the building-code exception was specifically designed around "energy efficiency" standards for "central heating and cooling equipment and water heaters." *Id.* at 10. Thus, this element of NAECA, like the rest of the statute, indicates an intent to preempt appliance conservation standards, not regulations unrelated to the energy efficiency of individual appliances, like the Ordinance.

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[2] ER-96 (Plaintiff-Appellant California Restaurant Association's allegation that "the Ordinance is not eligible for exemption from preemption under [42 U.S.C. §] 6297(f)(3) because it is not in a building code for new construction"); ER-144 (statement in Berkeley's Motion to Dismiss that the "Ordinance is within the scope of [Berkeley's] police power because it is not a 'building standard'"). The issue was not briefed on appeal and the panel provides no analysis supporting its conclusion; it is therefore unclear how the panel made this determination.

II. If the Panel Opinion Stands, It Will Leave a Regulatory Void in a System Congress Intended to be Comprehensive

The panel opinion not only expands federal preemption at the cost of longstanding state and local power, but also provides no replacement for that authority. EPCA has no provision allowing the federal government to determine where natural gas distribution infrastructure may be expanded, let alone to fill in the numerous other areas of state and local regulation that are threatened by the opinion's logic; it only allows the creation of appliance-specific standards. *See* 42 U.S.C. § 6295(a) (authorizing only "conservation standards" for "products"); Br. United States Supp. Appellee at 23, ECF No. 33 ("Because the Ordinance does not regulate the energy use or efficiency of covered products, the Department could not adopt it as an energy conservation standard.").

The panel opinion therefore leaves a regulatory void of unknown size at the heart of local utility regulation. No regulator has authority to replace the preempted Ordinance or, under at least one interpretation of the opinion, to decide at all when or whether gas, electric, or water infrastructure can be built in new buildings. The panel's opinion implies that no regulator can prevent any EPCA-covered appliances from being installed, or prohibit any type of fuel that such an appliance could use, raising serious questions about the continued viability of basic health and safety standards such as electric codes and fuel regulations. *See* Op. 23; *infra* Pt. III. And the panel's central logic—that any regulation that stops utility service

to a building could be subject to EPCA preemption—could extend this gap much further, to areas such as utility franchising; public-safety power shutoffs for wildfire prevention; or even water conservation, since restricting water uses in an area could effectively prevent EPCA-covered appliances from operating. *See, e.g.*, Sacramento Mun. Util. Dist., *2022 SMUD Wildfire Mitigation Plan* 33 (2022)[3] (Utility has "authority to de-energize select distribution circuits"—that is, shut off power to local customers—if "a wildfire threat is imminent" or "when requested by local . . . officials."); Cal. Code Regs. tit. 23, §§ 876.1-879.3 (authorizing state agency to issue "curtailment orders" stopping the use of water except as needed for "minimum human health and safety needs"); Br. *Amici Curiae* States California, Arizona, et al. Supp. Rehearing En Banc 6-10 (discussing other regulations threatened by the panel opinion).

This regulatory gap directly contradicts Congress's clear intent to "impose a comprehensive regulatory system" of natural gas governance and prevent the creation of any regulatory "no-man's land." *Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 19, 28 (1961). Any shortfall in federal power should be made up for by state jurisdiction. *See, e.g.*, *Fed. Energy Regul. Comm'n v. Elec. Power Supply Ass'n*, 577 U.S. 260, 289 (2016) ("Some entity must have

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[3] *Available at* https://www.smud.org/-/media/Documents/In-Our-Community/Safety/Wildfire-Safety/2022-SMUD-Wildfire-Mitigation-Plan.ashx.

jurisdiction to regulate each and every practice that takes place in the electricity markets . . . ."); *Panhandle E. Pipe Line Co. v. Mich. Pub. Serv. Comm'n*, 341 U.S. 329, 333 (1951) ("In the absence of federal regulation [of natural gas], state regulation is required in the public interest."). The panel's interpretation of EPCA thus creates a gaping hole at the core of a system that Congress intended to be seamless—an unreasonable reading.

III. The Panel's Opinion Calls into Question Key Elements of State and Local Control over Utility Service

As discussed above, Congress has carefully maintained a system of utility regulation that provides some energy regulation at the federal level, but retains a primary role for state and local governments in regulating distribution. This balance should not be disturbed without clear indication of an intent by Congress to do so, which neither EPCA's text nor its legislative history provides. *E.g.*, *Sackett v. Env't Prot. Agency*, 598 U.S. ____, 143 S. Ct. 1322, slip op. at 23 (2023) (Congress must "enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power . . . ." (quotation marks and citations omitted)); *see also* Pet. 17-19, ECF No. 92. Nevertheless, the panel proposes a reading of EPCA that not only invalidates Berkeley's decision about when and where local natural gas infrastructure should be built, but also carves out a space of new, exclusive federal jurisdiction at the hyperlocal level.

In striking down the Ordinance, the panel eliminates an important element of local control over utility distribution, namely, the ability of state and local governments to limit the extent of their distribution infrastructure. Expanding utility infrastructure into a new building entails a host of concerns for the larger distribution network: If the infrastructure and the appliances that connect to it are poorly installed or used, they can affect the service provided to other customers and create safety risks. For this reason, state and local governments frequently regulate "behind the meter"—that is, regulate infrastructure and the installation and configuration of appliances that are not owned by utilities. *See, e.g.*, Cal. Pub. Utils. Comm'n Gen. Order 58A, § 22(c) (requiring "inspection of appliances in use by [a] customer," "adjustments to insure safe and efficient use of the gas service," and service cutoff where "unsafe or hazardous conditions exist");[4] Long Beach, Cal., Mun. Code § 15.40.240 ("The gas utility shall not furnish service to gas apparatus or appliances" if it would be "detrimental to . . . the distribution system" or if the customer "uses gas at an unreasonably high rate during peak hours.").[5]

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[4] *Available at* https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M185/K569/185569235.pdf.

[5] For this reason, Judge Baker's assertion that the Ordinance "does not implicate a utility's distribution of natural gas" because it regulates behind-the-meter infrastructure, Op. 42-45, misses the point: Behind-the-meter regulations are common and important for a distribution network's safety and reliability.

The panel opinion, by interpreting EPCA to preempt any state or local regulation that "prevent[s] [EPCA-covered] appliances from *using* natural gas," Op. 7, would reach even these commonplace and commonsense behind-the-meter regulations. After all, cutting off service to a customer because their appliances create a safety risk would appear to "prevent[] such appliances from *using*" the utility service in question—and the panel offers no guidance on, or textual basis for, drawing that line. And while some behind-the-meter regulations protect against energy waste, they do so by regulating the installation and use of appliances, not their design, and therefore should not be subject to EPCA preemption.

The panel also announces that "EPCA would no doubt preempt an ordinance that directly prohibits the use of covered natural gas appliances in new buildings." Op. 23. This calls into question many other health and safety regulations, from restrictions on fuel types, *e.g.*, N.Y.C. Admin. Code § 24-173 (prohibiting use of coal as a fuel, outside of power plants and certain cookstoves), to building codes that restrict which appliances can be installed in a residence, *e.g.*, Int'l Code Council, *2021 International Residential Code* § G2445.3 (prohibiting unvented room heaters over a specified size).

Similarly, the panel's reading of EPCA preemption raises a serious question as to whether a state or local government could ever remove, or refuse to extend,

utility service at a level broader than the individual meter. This is a key question for utility regulation, because the extension or retraction of utility service often entails costs or savings for the entire customer base. *See, e.g.*, Jim Rossi, *The Common Law "Duty to Serve" and Protection of Consumers in an Age of Competitive Retail Public Utility Restructuring*, 51 Vand. L. Rev. 1233, 1252-60 (1998) (discussing utilities' considerations in extending or continuing service). Clearly, making utility service unavailable to an area would have an effect on EPCA-covered appliances in that area similar to the effect that making utility service unavailable to a building would have on appliances in that building: both "effectively eliminate[] the use of an energy source." Op. 15 (quotation marks omitted).

Despite the importance of the issue and the potential impact of its opinion, the panel did not offer a limiting principle that would cabin their interpretation of EPCA preemption to the Ordinance. The only acknowledgment of these consequences in the panel opinion—referencing Berkeley's concern that the panel's reading would require it to "affirmatively make natural gas available everywhere"—brushes off the question. Op. 22 ("That does not follow from our decision today. . . . Our holding doesn't touch on whether the City has any obligation to maintain or expand the availability of a utility's delivery of gas to meters."). This dismissal of the issue, without analysis, provides scant protection

for this core state and local authority. It will inevitably lead to confusion among state and local governments, regulated entities, and the courts that will have to resolve the question in litigation—litigation which has already begun. Pls.' Mot. Prelim. Inj. at 6, *Rivera v. Wash. State Bldg. Code Council*, No. 1:23-cv-3070 (E.D. Wash. June 1, 2023) (challenging Washington's energy code based on panel opinion); Mem. Supp. Mot. Dismiss at 3-5, *Sherzai v. LG Electronics USA, Inc.*, No. 2:23-cv-429, (E.D. Cal. May 12, 2023) (arguing, based on panel opinion, that EPCA preempts tort claim predicated on health impacts of manufacturer's appliances).

The suggestion in Judge Baker's concurrence that EPCA preemption is limited to those regulations with which "EPCA's text or structure suggests [a] concern," Op. 42, is likewise insufficient to protect state and local authority. A concurrence cannot check the logic of the panel opinion. *E.g.*, *Duarte v. City of Stockton*, 60 F.4th 566, 574 (9th Cir. 2023). And the question of whether "EPCA's text or structure" is intended to address regulations like the Ordinance is no limiting principle at all, but rather the central issue in the case. Regardless, neither the text nor the structure of EPCA indicate that the Ordinance should be preempted, and the specific textual connection Judge Baker highlights—EPCA's reference to "building codes"—does not demonstrate concern with regulations like the Ordinance. *See supra*, Part I.

CONCLUSION

The panel opinion in this case radically expands EPCA preemption, creating a regulatory void in a system Congress meant to be seamless and threatening core areas of state and local power, including basic health and safety regulations. These are "question[s] of exceptional importance," Fed. R. Appellate Proc. 35(a)(2), and *amici* therefore urge the Court to rehear the case en banc.

Respectfully submitted,

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June 12, 2023

CERTIFICATE OF SERVICE

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

/s/ Daniel N. Carpenter-Gold
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June 12, 2023

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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