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, Gonzales Rogers, Presiding

BRIEF OF *AMICI CURIAE* NATIONAL LEAGUE OF CITIES; LEAGUE OF CALIFORNIA CITIES; CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF DEFENDANT-APPELLEE CITY OF BERKELEY AND UPHOLDING OF THE DISTRICT COURT

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DISCLOSURE STATEMENT

Amici curiae the National League of Cities, the League of California Cities, and the California State Association of Counties certify that (1) each has no parent corporation and (2) no publicly held corporation owns 10% or more of any of their respective stocks. Fed. R. App. P. 26.1(a).

Date: February 8, 2022

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes, Ordinances and Resolutions

Rules

Regulations

Constitutional Provisions

Other Authorities

INTEREST OF AMICI CURIAE[1]

The National League of Cities, the League of California Cities, and the California State Association of Counties respectfully submit this amici curiae brief in support of Defendant-Appellee, the City of Berkeley. The National League of Cities (NLC), founded in 1924, is the oldest and largest organization representing U.S. municipal governments. NLC works to strengthen local leadership, influence federal policy, and drive innovative solutions. In partnership with 49 state municipal leagues, NLC advocates for over 19,000 cities, towns, and villages, where more than 218 million Americans live. The League of California Cities (Cal Cities), founded in 1898, defends and expands local control through advocacy efforts in the California Legislature, at the ballot box, in the courts, and through strategic outreach that informs and educates the public, policymakers, and opinion leaders. Cal Cities also offers education and training programs designed to teach city officials about new developments in their field and exchange solutions to common challenges facing their cities. The California State Association of Counties (CSAC) represents California's 58 county governments before the

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[1] Amici certify that counsel of record for the Association and the City have consented to amici filing a brief in support of the City of Berkeley. Fed. R. App. P. 29(a)(2). No party's counsel authored this brief in whole or part, and no person – other than amici, their members, or their counsel – contributed money that was intended to fund preparation or submission of this brief. Fed. R. App. P. 29(a)(4)(E).

California Legislature, administrative agencies, and the federal government. CSAC places a strong emphasis on educating the public about the value and need for county programs and services. CSAC's long-term objective is to significantly improve the fiscal health of all California counties so they can adequately meet the demand for vital public programs and services. NLC, Cal Cities, and CSAC are together referred to as "Amici."

Amici have a strong interest in: (1) protecting their members' duly delegated police powers to protect public health, safety, and the general welfare; and (2) ensuring that circumscribed federal statutes, like the U.S. Energy Policy and Conservation Act ("EPCA"), 42 U.S.C. §§ 6201 et seq., are not overread to grant far broader preemptory scope than their terms dictate and Congress intended. Local governments protect their residents largely by exercising traditional police powers, reserved by the States when crafting the U.S. Constitution, and delegated to these local guardians by the States. The California Restaurant Association's ("CRA's") bid to read EPCA to gut local governments' duly delegated authority over local health concerns has no limiting principle. In fact, local governments' ability to address critical local concerns like resident's health, safety, and welfare, including through local building and land use regulations, would be unjustifiably removed from the sphere of local regulation. A federal appliance standard does not create an individual entitlement to own and operate those appliances at will, and Amici's

special expertise will help the court to contextualize Defendant-Appellee's exercise of local police power within the cooperative federalism system contained in EPCA.

SUMMARY OF ARGUMENT

As described in detail in Defendant-Appellee's brief, in 2019, the City of Berkeley, California (the "City" or "Berkeley") enacted an ordinance prohibiting natural gas connections to most newly-constructed buildings within the City (the "Berkeley Ordinance" or the "Ordinance"). Berkeley Ordinance No. 7,672-N.S. (2019), codified at Berkeley Municipal Code (BMC) §§ 12.80.010 et seq. The U.S. District Court for the Northern District of California upheld the Ordinance against a CRA challenge, which was predicated on the theory that the Ordinance was preempted by EPCA.

The court below granted Berkeley's motion to dismiss CRA's complaint because it found that the Berkeley Ordinance is a proper exercise of the City's police power, expressly reserved under the Tenth Amendment of the U.S. Constitution by the States and duly delegated to the City by the state of California. Pursuant to its police powers, the City has broad authority to regulate in order to protect the public "safety… health and welfare." *Massingill v. Dep't of Food & Agric.*, 102 Cal. App. 4th 498, 504 (2002). Berkeley enacted the Ordinance in response to actual and potential harms to its residents from local air pollution, risk

of gas line explosion, and global climate change, direct action predicated on its broad police powers to protect its residents.

While local laws, even if authorized by the police power, may be preempted by state or federal laws, no such preemption exists here. The EPCA provisions, as set out in Berkeley's brief, are highly reticulated, designed, and intended to ensure appliance manufacturers have one, unified set of manufacturing standards with which they have to comply across the U.S., rather than as many as 50 or more state- and local-level standards. EPCA cannot preempt the Berkeley Ordinance because the Ordinance does not set any standards with respect to "the energy performance, or energy use," of appliances regulated by EPCA. 42 U.S.C. § 6297(c). Rather, the Ordinance regulates local gas distribution. Such governance is squarely within the traditional and statutorily defined scope of the City's police powers.

As CRA can offer no clear evidence from the statutory text or history that Congress ever intended such a result when it enacted or later amended EPCA, this court should decline its bid to overturn the decision below on that basis alone. Moreover, as Amici will also detail below, the CRA's extremely broad and tortured reading of EPCA's detailed preemption provision, 42 U.S.C. § 6297(c), would leave many local laws governing building construction, land use, health and safety, and more at risk.

ARGUMENT

I. THE STATES RESERVED THEIR TRADITIONAL POLICE POWERS TO THEMSELVES AND LOCAL GOVERNMENTS WITHIN THE CONSTITUTIONAL STRUCTURE, AND THESE POLICE POWERS UNDERPIN MYRIAD STATE AND LOCAL MEASURES IN PLACE TO PROTECT RESIDENTS' HEALTH AND WELFARE

The police power (both state and local) is a critical piece of the broader system of cooperative federalism upon which the U.S. legal system rests. The Tenth Amendment of the U.S. Constitution reserved to the states, and to the people, all "powers not delegated to the United States by the Constitution, nor prohibited by it." U.S. Const. amend. X. Federal courts recognize the police power held in "the possession by each state [and] never surrendered to the government of the Union, of guarding and promoting the public interests by reasonable police regulations that do not violate the Constitution of the state or the Constitution of the United States." *Chicago, B. & Q. Ry. Co. v. People of State of Illinois*, 200 U.S. 561, 584 (1906). It is fundamental to our system of government that certain areas of traditional state and local regulation, including those relating to protecting public welfare, remain with the states so long as they are not specifically and affirmatively preempted. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) ("we 'start with the assumption that the historic police powers of the States were not to

be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947))).

Most states delegate at least part of these police powers to local governments, which are often best-suited to tailor and exercise these powers as needed to protect their local residents. California fits this mold. California's State Constitution delegates the power to "make and enforce within [a municipality's] limits all local, police, sanitary, and other ordinances and regulations not in conflict with" state law to all cities and counties within its borders. Cal. Const. art. XI, § 7. The delegated police power enables local governments to achieve their "legislative objectives in furtherance of public peace, safety, morals, health and welfare." *Massingill v. Dep't of Food & Agric.*, 102 Cal. App. 4th 498, 504 (2002). Unless specifically preempted by state or federal law, California courts view the police power as "inherent" to local governments. *Big Creek Lumber Co. v. City Of Santa Cruz*, 38 Cal. 4th 1139, 1151 (2006).[2]

The local police power is an important feature of our country's model of cooperative federalism, under which the federal, state, and local governments have

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[2] While exercises of a local government's police power may be preempted by California state law, questions raised by the CRA before the court below relating to preemption by state law are not substantively at issue before this Court. CRA Brief at 51-52. Arguments by the plaintiff-appellants with respect to preemption by U.S. federal law are addressed in Part II, *infra*.

overlapping but distinct sets of authority to regulate in areas for which they are best suited.[3] Local governments are particularly well-positioned to assess risks to their communities, including negative impacts to residents' health, heightened potential for catastrophic incidents, and particular locational vulnerabilities.

A. Berkeley Properly Exercised Its Police Powers In Enacting Its Ordinance to Protect the Health, Safety, and Welfare Of Its Residents

Berkeley used the "fundamental power [from which] local governments derive their authority to regulate land through planning, zoning, and building ordinances, thereby protecting public health, safety and welfare" when passing the Ordinance at issue here. *Fonseca v. City of Gilroy*, 148 Cal. App. 4th 1174, 1181

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[3] *See*, *e.g.*, Hi. Rev. Stat. § 46-1.5(13) (granting counties in Hawaii general police powers, including "the power to enact ordinances deemed necessary to protect health, life, and property"); Ida. Const. art. 12, §2 (a local government in Idaho "may make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with" state law); Mont. Code §§ 7-1-4123(1)&(2) (empowering local governments to adopt laws to "preserve peace and order and secure freedom from dangerous or noxious activities" and to "secure and promote the general public health and welfare"); Nev. Rev. Stat. §§ 268.003 & 268.0035 (granting local governments authority to address "matters of local concern," a term defined to include "public health, safety and welfare"); Ore. Rev. Stat. § 221.916 (empowering local governments to exercise any and all police regulations concerning the public morals, public safety, public health and public convenience of the inhabitants of any such city"); and Wash. Const. art. XI, § 11 (specifying that "[a]ny county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws").

(Ct. of App., 6th D.Cal. 2007).[4] Berkeley assessed its own local circumstances – population, geography, risk tolerance – and developed the Berkeley Ordinance to respond to those circumstances. The Ordinance was a direct response to the risks and impacts the City Council identified in its legislative findings, designed to "reduc[e] the environmental and health hazards produced by the consumption and transportation of natural gas." BMC § 12.80.010(H). Among the City's legislative findings are those based on air quality risks (stating that the Ordinance is "reasonably necessary because of health and safety concerns as Berkeley residents suffer from asthma and other health conditions associated with poor indoor and outdoor air quality exacerbated by the combustion of natural gas," BMC § 12.80.010(C)); risk of explosion ("Structures in Berkeley are located along or near the Hayward fault, which is likely to produce a large earthquake in the Bay Area," BMC § 12.80.010(B)(4)); and several relating to the impacts of global climate change on the City and its residents and to natural gas combustion's contribution to global climate change. BMC §§ 12.80.010(A), (B)(1), (B)(2), (B)(3), (D), (E) & (H). Moreover, Berkeley's legislative findings broadly conclude, based on these threats, that "[a]ll-electric building design benefits the health, welfare, and

[4] While the Natural Gas Act, 15 U.S.C. § 717 et seq., is beyond the scope of this brief, we note that the Act's exception from preemption for local gas distribution buttresses the City's police power in this regard. (*See S. Coast Air Quality Mgmt. Dist. v. FERC*, 621 F.3d 1085, 1092 (9th Cir. 2010)).

resiliency of Berkeley and its residents." BMC § 12.80.010(F). Thus, both the stated purposes and likely effects of the Ordinance are to protect the health, safety, and welfare of Berkeley residents – specifically, by lessening local air pollution, lowering the risk of gas explosions, and blunting the impacts of global climate change by reducing greenhouse gas emissions.

1. The Berkeley Ordinance is designed to lessen local air pollution, leading to lower rates of pollution-caused illnesses and death for its residents

In developing the Berkeley Ordinance, the City clearly articulated its use of its police power in the Ordinance's legislative findings, noting that the measure was "reasonably necessary because of health and safety concerns as Berkeley residents suffer from asthma and other health conditions associated with poor indoor and outdoor air quality exacerbated by the combustion of gas." BMC § 12.80.010(C). The legislative findings further state that "all-electric building design benefits the health, welfare, and resiliency of Berkeley and its residents," BMC § 12.80.010(F), and that the law's intent in phasing out natural gas infrastructure is to "reduc[e] the environmental and health hazards produced by the consumption and transportation of natural gas." BMC § 12.80.010(H). These sorts of harms – poor health outcomes due to ambient air pollution, hazardous air emissions indoor and outdoor air quality, and more – are of exactly the kind sought to be addressed by, and traditionally regulated by, local governments through their

police powers. Berkeley's express reference of these concerns[5] indicates that the Berkeley Ordinance is aimed at improving air pollution and health outcomes for residents. This reasoning alone is enough to justify the Ordinance as a proper exercise of Berkeley's local police power.

Local governments throughout the Ninth Circuit regulate activities that contribute to local air pollution. For example, Multnomah County, Oregon regulates wood-burning heating appliances (fireplaces, wood stoves, and the like) and outdoor burns of yard waste or for recreational purposes, in order "to reduce air pollution that negatively affects public health." Multnomah Cnty. Code §§ 21.450 et seq. Phoenix, Arizona regulates fireplaces and wood stoves due to their impacts to air quality. Phoenix Mun. Code §§ 40-1 et seq. Boise, Idaho, among many others, regulates tailpipe emissions from vehicles for the same reason. Boise City Code §§ 4-4-1 et seq. Berkeley's regulation of natural gas distribution is no different – it protects Berkeley residents from air pollution harm. *See* BMC § 12.80.010(C).

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[5] The City consistently expressions similar concerns in other contexts, *e.g.*, *Existing Bldgs. Electrification Strategy, Admin. Draft,* City of Berkeley (Apr. 2021), https://www.cityofberkeley.info/uploadedFiles/Planning_and_Development/Level_3_-_Energy_and_Sustainable_Development/Draft_Berkeley_Existing_Bldg_Electrification_Strategy_20210415.pdf.

While air pollution does not respect municipal boundaries, air quality does vary significantly from place to place, and even within communities, depending on proximity to sources of pollution.[6] Where, as here, a local government determines that fossil fuel combustion in buildings creates local air pollution, they may wield their police power to protect public health and welfare. *See Massingill*, 102 Cal. App. 4th at 504.

2. The Berkeley Ordinance is responsive to other safety risks, including seismic conditions and risk of explosion, from natural gas combustion

The police power enables local governments to respond to a host of safety conditions and risks beyond impacts to air quality. In particular, Berkeley points to the explosion risk inherent to natural gas in its legislative findings, noting that "Structures in Berkeley are located along or near the Hayward Fault, which is likely to produce a large earthquake in the Bay Area," BMC § 12.80.010(B)(4), and that "Berkeley… is extremely vulnerable to wildfires." BMC § 12.80.010(B)(3). Berkeley's Ordinance precluding extension of new equipment lines that could explode, causing injury and death, into the buildings where people

[6] *See*, *e.g.*, Christopher W. Tessum, David A. Paolella & Julian D. Marshall, *PM2.5 polluters disproportionately and systemically affect people of color in the United States*, SCI. ADVANCES (Apr. 28, 2021).

live, work, and gather is thus firmly grounded its police power to protect its residents in the most fundamental, physical manner.

The documented risk of gas leaks, fires, and explosions – whether combined with a major seismic event or not – more than justifies Berkeley's use of its police power to regulate natural gas lines to its buildings. Local governments rely on this authority to address a range of safety risks, and a finding that the Berkeley Ordinance is preempted would imperil their ability to effectively protect their residents.

3. Hundreds of local governments are responding to climate change, recognizing they are vulnerable to climate change impacts

Hundreds of local governments around the U.S. have committed to reduce greenhouse gas emissions considerably in the coming decades,[7] and many others have committed to a one hundred percent clean or renewable energy supply.[8] Those local governments have determined such actions to reduce greenhouse gas

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[7] Samuel A. Markolf, Ines M.L. Azevedo, Mark Muro & David G. Victor, *Pledges and Progress*, Brookings (Oct. 2020) at 1, https://www.brookings.edu/research/pledges-and-progress-steps-toward-greenhouse-gas-emissions-reductions-in-the-100-largest-cities-across-the-united-states/.

[8] *Ready for 100*, Sierra Club, https://www.sierraclub.org/ready-for-100.

emissions are necessary to protect resident health and safety[9] and thus, they are well within a local government's police powers.

Berkeley has long prioritized reducing greenhouse gas emissions because of their physical climate consequences. Beginning with its 2009 ballot Measure G, Berkeley pledged an eighty percent reduction in the City's greenhouse gas emissions by 2050 as compared to 2000 levels. Measure G, Resolution No. 63,518-N.S. (2009). Since then, the City has adopted a resolution pledging to become a "Fossil Fuel Free City," Resolution No. 64,480-N.S. (2018), made a Climate Emergency Declaration, Resolution No. 68,486-N.S. (2018), and committed to achieving net zero greenhouse gas emissions by 2045. Resolution No. 69,852-N.S. (2021). The City also developed a Climate Action Plan in 2009, and most recently provided a progress update in 2020.[10] Berkeley's Ordinance is an integral part of its commitment to using its police power to protect its local residents health and

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[9] Heather Leighton, *How climate change is going to affect cities, urban spaces*, URBAN EDGE BLOG, Rice Univ. Kinder Inst. for Urban Rsch. (Sept. 3, 2019), https://kinder.rice.edu/urbanedge/2019/09/03/how-climate-change-going-change-cities-urban-spaces; Laura Millan Lombraña and Sam Dodge, *Whatever Climate Change Does to the World, Cities Will Be Hit Hardest*, BLOOMBERG GREEN (Apr. 18, 2021), https://www.bloomberg.com/graphics/2021-cities-climate-victims/.

[10] *Climate Action Plan*, City of Berkeley (June 2009), https://www.cityofberkeley.info/uploadedFiles/Planning_and_Development/Level_3_-_Energy_and_Sustainable_Development/Berkeley%20Climate%20Action%20Plan.pdf. *See* updates at https://www.cityofberkeley.info/climate/.

safety, as "Berkeley is already experiencing the repercussions of excessive greenhouse gas emissions as rising sea levels threaten the City's shoreline and infrastructure, which have caused significant erosion, have increased impacts to infrastructure during extreme tides, and have caused the City to expend funds to modify the sewer system." BMC § 12.80.010(B)(2).

Berkeley's well-documented history of climate action illustrates its imperative to protect the public welfare by reducing greenhouse gas emissions, and local governments all over the country are similarly situated. If the Berkeley Ordinance is not upheld as a straightforward exercise of the municipal police power, local governments will face barriers in fighting climate change. Reducing greenhouse gas emissions is a fundamental part of protecting public health and safety within Berkeley and in communities nationwide.

B. Berkeley's Ordinance is One of Many Measures Through Which Local Governments Across the Country Protect Residents by Exercising Traditional Police Powers

Across the nation, thousands of municipal governments use their traditional police powers to protect their residents' welfare on a daily basis, and state and federal governments rely on them to fulfill this unique role. In California, courts have relied on local police powers to uphold actions as varied as groundwater regulation, *Baldwin v. County of Tehama*, 31 Cal. App. 4th 166 (Ct. of App., 3d D.Cal 1995); property lot line adjustments pursuant to local land use authority,

Sierra Club v. Napa Cnty. Bd. of Supervisors, 205 Cal. App. 4th 162, 173 (Ct. of App., 1st D.Cal 2012); and prohibitions on school-age children's presence in certain public places during school hours. *Harrahill v. City of Monrovia*, 104 Cal. App. 4th 761 (Ct of App. 2d D. Cal 2002).

Beyond California's borders, local governments similarly exercise protective measures based on their unique police powers.[11] For example, courts routinely uphold wide-ranging exercises of municipal police powers to designate no parking zones on certain rights-of-way, *Town of Dillon v. Yacht Club Condominiums Home Owners Ass'n*, 2014 CO 37, 325 P.3d 1032 (2014); to prohibit certain medical marijuana facilities, *Cannabis Action Coal. v. City of Kent*, 180 Wash. App. 455 (2014), aff'd, 183 Wash. 2d 219 (2015); and even to limit the number of dogs per household, *Bal Harbour Vill. v. Welsh*, 879 So. 2d 1265, 1267 (Fla. Dist. Ct. App. 2004), to name only a very small subset. More recently, local governments have used their police powers to regulate with respect to greenhouse gas emissions (*see* laws in New York City (Local L. 97 (2019) and St. Louis, Missouri (Ord. 71132 (2020)) and to set Covid-19 safety measures.[12] Calling into question Berkeley's

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[11] The perilous results of applying CRA's tortured theory of EPCA preemption to these ordinary exercises of police power are examined in Part II(C), *infra*.

[12] *See*, *e.g.*, *COVID-19 Local Action Tracker*, Nat'l League of Cities (last accessed Jan. 31, 2022), https://www.nlc.org/resource/covid-19-local-action-tracker/.

police powers would open up a long-settled foundation of our U.S. legal system – that local governments may act to protect their residents.

II. CRA'S ATTEMPT TO USE EPCA'S NARROW PREEMPTION CLAUSE IS UNSUPPORTED BY BOTH THE HISTORY AND SCOPE OF THAT FEDERAL STATUTE

As detailed in Part I, *supra*, the Constitution reserved states' traditional police powers, and created no federal police power. U.S. Const. amend. X; U.S. v. Morrison, 529 US 598, 618 (2000). Nonetheless, laws exercising traditional police power may be preempted by federal laws when a federal statute expressly states that it preempts state and/or local law (express preemption), when the federal statute occupies a "field" of regulation (field preemption), or when a federal statute and a local statute conflict (conflict preemption). *Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Dev. Comm'n*, 410 F.3d 492, 495 (9th Cir. 2005), citing *English v. General Elec. Co.*, 496 U.S. 72, 78–79, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990). [13] CRA's claim here is one of express preemption. Yet even where Congress intended to preempt some state and local laws, "express preemption statutory provisions should be given a narrow interpretation." *Air*

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[13] The decision below upholding the Ordinance did not reach state preemption claims. However, California law provides that, "[w]hen local municipalities regulate in areas over which they have traditionally exercised control… absent a clear preemptive intent from the Legislature, that such regulation is not preempted by state law." *Sierra Club v. Napa Cnty Bd. of Supervisors*, 205 Cal. App. 4th 162, 173 (Ct. of App., 1st D.Cal 2012).

Conditioning at 496. The court below correctly ruled that the Ordinance was a valid exercise of police power, designed to protect Berkeley residents' health and safety, and was not preempted by a federal law grounded in commerce powers enacted to protect national appliance markets against infinite local variations in energy conservation standards.

A. EPCA's Origins and Context Illuminate its Purpose and Scope, Which are Unrelated to Local Governments' Regulation of Gas Distribution

At the time of the founding, states ceded to the federal government a variety of powers, among them the authority to regulate with respect to interstate commerce. U.S. Const. art. 1, § 8. EPCA is grounded in the federal government's commerce clause power, and grew out of the Congressional desire to effectuate a consistent set of energy conservation standards on which appliance manufacturers could rely, no matter where in the national markets their products were sold. S. Rep. No. 100-6 (1987) and H.R. Rep. No. 100-11, at 24 (1987). That is, EPCA created national appliance standards to support nationwide markets, and, to ensure that appliance manufacturers would not have to design fifty different dishwashers meeting fifty different efficiency or energy usage levels. Id. EPCA is not designed to ensure market demand for any such appliances, but rather to create a uniform set of design standards. To that end, EPCA specifically preempts local laws that set

standards with respect to the energy efficiency or energy use of "covered appliances," including many common building appliances. 42 U.S.C. § 6297(c).

Berkeley does not have the authority to regulate the energy efficiency or energy use of appliances regulated under EPCA. Nor did it do so here. For example, Berkeley could not enact a law requiring all dishwashers used within its borders to consume less than 307 kilowatt hours per year of energy or less than five gallons of water per cycle, the current federal standards for standard-sized dishwashers. 10 C.F.R. § 430.32(f). The Berkeley Ordinance does not set any such standard. Rather, it prohibits natural gas connections to "Newly Constructed Buildings," a subject that is neither regulated by EPCA nor included in the EPCA's preemption provisions. Had Congress intended to go so far beyond appliance energy conservation standards to control local choices about providing particular fuel sources or infrastructure, it would have done so expressly. "Courts must presume that a legislature says in a statute what it means and means in a statute what it says." *Nesovic v. United States*, 71 F.3d 776 (9th Cir. 1995).

B. CRA's Attempts to Shoehorn the Ordinance into EPCA's Preemption Provision Fall Short

CRA's contention that EPCA preempts the Berkeley Ordinance because, in its reading, the Ordinance "concerns" the energy use of EPCA-covered appliances, CRA Brief at 33, falls short on various grounds, addressed at length in the City's Brief. *See* Berkeley Brief throughout. We concur with Berkeley's analysis. First,

the Ordinance does not define, limit, or set a standard with respect to the "quantity of energy directly consumed by" a consumer or industrial appliance. CRA Brief at 21, citing 42 U.S.C. § 6291(4). The Berkeley Ordinance regulates natural gas distribution, a subject neither regulated by EPCA nor contemplated by its preemption provisions. It does not regulate appliances or their energy use. Manufacturers need not change their natural gas appliances or navigate a patchwork of standards. Their products must continue to meet only the standards promulgated by EPCA regulations. Owners of new buildings in Berkeley will in most instances necessarily choose a manufacturer's electric appliance options over gas options, but all options may be manufactured, marketed and sold as usual, so long as they meet the EPCA standards (even in Berkeley, the vast majority of buildings predate the Berkeley Ordinance and therefore can use gas or electric appliance options). Simply put, the Berkeley Ordinance does not "concern" the energy use of these appliances. It regulates the gas distribution system.

The second reason CRA's argument must fail is that it relies on a strawman – EPCA's building code exemption. 42 U.S.C. § 6297(f)(3). The building code exemption allows for state and local building codes to include *standards* for EPCA-covered appliances that are more stringent than EPCA standards, so long as the code meets seven statutorily defined conditions. 42 U.S.C. § 6297(f)(3). These conditions provide that the building code must offer compliance options, at least

one of which employs appliances that meet only EPCA's standards and not the more stringent standard referenced in the building code, 42 U.S.C. §§ 6297(f)(3)(A) &(B), and that such options must be offered on a "one-for-one basis" vis-à-vis cost and/or energy savings. 42 U.S.C. § 6297(f)(3)(C). CRA contends that because the Berkeley Ordinance does not offer compliance options, it is not eligible for this exemption from EPCA preemption.

This argument is entirely misplaced. The Berkeley Ordinance is not a building code, nor is it a construction standard that arguably should be codified in a building code. It is a local ordinance regulating natural gas distribution, and sets no standards for appliances. As Berkeley's 2019 building code amendment made clear, the City recognized that when regulating within EPCA's purview, in order to avoid preemption of its electrification-focused "reach" building code, it must offer compliance options. Berkeley Energy Code § 19.36.040; Ord. No. 7,678- N.S. (2019). That code did, in fact, offer such compliance options – some that used all-electric appliances, and some that did not. Id. Because Berkeley's Ordinance is outside the scope of a building code, CRA's attempt to erect this strawman cannot stand.

C. Indirect impacts from local ordinances regulating resident's health, welfare, and safety are well outside the purview of EPCA's narrow preemption clause

As the court below concluded, an indirect and attenuated relationship between natural gas infrastructure and some EPCA-regulated appliances cannot provide an appropriate basis for concluding that local governments may not regulate natural gas infrastructure. Dist. Ct. Order at 18 ("the fact that an ordinance focused on natural gas *piping* for new buildings may have some downstream impact on commercial appliances is insufficient" for EPCA to preempt such ordinance) (emphasis in original). To find otherwise could result in the preemption of many other local laws having "downstream impact[s] on commercial appliances" – laws that Congress never intended EPCA to preempt. CRA suggests no limiting principle, and its attempt to use EPCA as an unwieldy bludgeon would imperil local government's ability to protect and promote local health, safety, and welfare. Even more troubling, there is no obvious way to fill the enormous regulatory gaps that would result from overbroad application of EPCA preemption to such a wide range of local laws the federal government has not traditionally regulated in – including laws pertaining to land use, building standards, and others designed to protect local health, safety, and welfare.

Below, the City provided several examples of local requirements that would be at risk under CRA's overly broad reading of EPCA preemption: local zoning

ordinances that prescribe or disallow multifamily residential buildings (more energy efficient, by and large, than single-family homes); local decisions regarding franchise agreements with natural gas utilities; even long-standing air emissions rules regulating emissions of nitrogen oxides from EPCA-regulated appliances, as are in effect in many areas of California. Berkeley Mot. to Dismiss at 18-19 (citing Sacramento Metro. Air Qual. Mgmt. Dist. Rule 414).

Amici set out the following additional adverse consequences that CRA's overbroad and untenable reading of EPCA preemption would produce. For example, while EPCA offers a preemption exception for appliance energy standards codified in state and local building codes so long as the code complies with certain statutory conditions, 42 U.S.C. § 6297(f), many other building code provisions relate tangentially to (or, to use the District Court's terminology, "have some downstream impact on,") a building's appliances, and are broadly understood as unrelated to regulating the energy use of EPCA-covered appliances. The International Building Code (IBC), a model code adopted by most states and many local governments, has entire chapters covering a building's electrical and mechanical systems, IBC chs. 27 & 28 (2021), which specify how buildings may be constructed safely in light of the complex and potentially dangerous apparatus within them. The International Mechanical Code (IMC) is incorporated by reference into the IBC, and contains numerous provisions regarding the provision

of energy within buildings, including to appliances. Consider, for example, the following provision: "A relief valve shall be installed on the discharge line of fuel-oil-heating appliances." IMC § 1307.4 (2021). This provision clearly has some downstream connection to the energy use of EPCA-covered appliances, but it does not regulate *appliances* in a way that EPCA contemplates or preempts. Rather, it regulates with respect to the safety of a *building* energy system.

Multiple additional IMC provisions set standards for pipings and fittings, many of which deliver energy to building appliances. IMC ch. 13 (2021). These pipings and fittings bear a similar relationship to the energy use of EPCA-covered appliances as do the building natural gas connections prohibited by the Berkeley Ordinance, but no one contends that the IMC provisions are subject to EPCA preemption (nor that they are otherwise required to obtain an exemption to EPCA preemption, as described *supra*). The International Energy Conservation Code (IECC), also incorporated by reference in the IBC, contains numerous requirements relating to building energy efficiency, the provision of energy to buildings, and even the workings of building appliances. For example: "New buildings with an HVAC system serving a gross conditioned floor area of 100,000 square feet (9290 m^2) or larger shall include a fault detection and diagnostics (FDD) system to monitor the HVAC system's performance and automatically identify faults." IECC § C403.2.3 (2021). While this provision regulates an EPCA-

covered appliance, it does not set a standard with respect to energy efficiency or energy use, and is therefore not preempted by EPCA. The IBC also includes fire safety provisions, including requiring a gas detection system in certain buildings. IBC § 916 (2021). A building's gas detection system would almost certainly monitor gas from the energy sources powering the building and its appliances, arguably implicating the "energy use" of covered appliances, but it would strain credulity to extend EPCA preemption to this requirement.

These widely-accepted and -adopted building code provisions tangentially relate to appliances but do not set energy efficiency or energy use standards for them. In this way, they are akin to the Berkeley Ordinance. In both instances, requirements are set with respect to equipment or infrastructure that is used alongside an appliance that may be covered by an EPCA standard, but neither one sets an energy conservation standard relating to an appliance or requires manufacturers to change anything about how they manufacture, market, or sell the appliance. Finding that EPCA somehow preempts the Berkeley Ordinance would require the court to conflate a prohibition on certain gas piping with an energy conservation standard for the appliance itself. Such conflation defies logic, and would call into question countless building code provisions across the country.

Beyond building codes, states and local governments also pass a wide array of laws relating to building energy efficiency and building energy performance.

For example, Reno, Nevada's Energy and Water Efficiency Program, Reno Admin. Code § 14.30.001 et seq., requires commercial and multifamily buildings to meet one of several energy performance targets (e.g., obtaining a minimum ENERGY STAR score of 50, or achieving an energy use rating in the top 50% as compared to properties of similar type). In order to achieve compliance with Reno's standard, some building owners may choose to comply, in part, by using appliances that use less energy than those meeting but not exceeding the standard prescribed under EPCA regulations. This sort of regulation of the whole building, rather than of appliances, has always been the traditional domain of state and local governments. Despite some "downstream impact" on a building owner's choice of appliance, whole-building standards of this kind are not intended to be, nor has the CRA argued they should be, preempted by EPCA. But CRA's overbroad reading of EPCA preemption would put this kind of local regulation directly in EPCA's cross hairs.

Even more troubling, CRA's bid to read EPCA preemption as swallowing the Berkeley Ordinance would also call into question the many local zoning requirements frequently and traditionally enacted to organize communities by land uses. For example, a residential zone that disallowed large commercial and industrial operations – some version of which exists in the vast majority of municipalities across the U.S. – would by default prevent the use of any

commercial or industrial appliances in that zone. Many of these appliances are regulated by standards promulgated under EPCA. As with the other local laws and regulations discussed herein, regulation under EPCA does not mean that these appliances are not subject to other forms of regulation, especially but not exclusively when the impact is so indirect.

Finally, it is worth noting that many areas of the country have no natural gas service whatsoever because the local government does not have a franchise with a gas utility to provide it. In other words, natural gas use is effectively prohibited community-wide, not just in newly-constructed buildings as in the Berkeley Ordinance. As the District Court noted, "CRA's interpretation would compel localities to continue to provide natural gas in all but the rarest of circumstances. Nothing in the EPCA requires that localities provide let alone continue to maintain natural gas connections." Dist. Ct. Order at 16. EPCA does not preempt or prohibit local governments from opting not to enter into a natural gas franchise, or from declining to extend gas services into new parts of a municipality, even though these policy decisions effectively preclude the use of appliances powered by natural gas. Nor could EPCA preempt Berkeley's policy decision not to extend natural gas infrastructure to newly constructed buildings within its borders.

CONCLUSION

The Berkeley Ordinance regulates gas distribution in Berkeley, not appliances. This is fully within the scope of the City's police powers. It does not touch on areas regulated by EPCA, and Congress never intended for EPCA's conservation standards to preempt local regulation in traditional and statutorily defined areas of local authority. To accept the CRA's EPCA preemption arguments would require the court to read into EPCA an incursion on local authority that simply is not there.

For all the foregoing reasons, Amici respectfully urge the court to uphold the decision below.

Date: February 8, 2022

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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