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

PLAINTIFF-APPELLANT'S OPENING BRIEF

Kylie Chiseul Kim
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK, PLLC
1615 M St. NW #400
Washington, DC 20036
(202) 326-7924
kkim@kellogghansen.com

Courtland L. Reichman
Laura Carwile
Ariel C. Green
REICHMAN JORGENSEN
LEHMAN & FELDBERG LLP
100 Marine Parkway, Suite 300
Redwood Shores, CA 94065
(650) 623-1401
creichman@reichmanjorgensen.com

Sarah Jorgensen
REICHMAN JORGENSEN
LEHMAN & FELDBERG LLP
1201 West Peachtree Street, Suite 2300
Atlanta, GA 30309
(404) 609-1040
sjorgensen@reichmanjorgensen.com

Attorneys for Plaintiff-Appellant
California Restaurant Association

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Ordinances

Rules

Other Authorities

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the California Restaurant Association states that it does not have a parent corporation and that no publicly held corporation owns 10 percent or more of its stock, as it does not issue any stock.

INTRODUCTION

The federal Energy Policy and Conservation Act ("EPCA") expressly preempts any and all state regulations "concerning" the energy use of certain appliances. The City of Berkeley (the "City" or "Berkeley") was looking for a way to ban natural gas appliances in new construction. Dissatisfied with the pace of federal legislation, it sought to pass its own legislation to move more quickly. Berkeley's problem was that it could not ban gas appliances without running afoul of the EPCA and state law. So instead of banning gas appliances, it simply banned the gas piping attached to them. The EPCA's broad preemption provision is not so easy to end-run.

The California Restaurant Association ("CRA") brought this case to address what the City characterized as the first local ordinance of its kind attempting this "new approach" to avoid federal and state laws. Berkeley's Ordinance is designed to seize greater local control over energy policy, beyond the powers that Congress wanted local governments to have. Cities across the state and country are following Berkeley's lead by banning or restricting natural gas.

Moreover, while the City's ordinance is new, state attempts to override federal law are not. There is a rich body of case law addressing the phrase "relating to," which has the same meaning as the EPCA's "concerning." The long history of preemption litigation involving such phrases establishes that they manifest broad preemptive purpose.

"Relating to" is an "expansive phrase" that "Congress characteristically employs . . . to reach any subject that has 'a connection with, or reference to,' the topics the statute enumerates." *Coventry Health Care of Mo., Inc. v. Nevils*, 137 S. Ct. 1190, 1197 (2017) (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383–84 (1992)). Giving the word "concerning" its ordinary meaning means that the preemptive scope of the EPCA must reach beyond "directly" or "facially" regulating the energy use of appliances, and it thus brings the Berkeley Ordinance easily within that preemptive scope.

Moreover, established law makes clear that states cannot evade preemption "concerning" or "related to" a subject of federal regulation simply by avoiding direct reference to that subject. The Supreme Court has held time and again that it does not "make[] any difference" for purposes of preemption when a state "select[s] an indirect but wholly effective means" of achieving a purpose it cannot pursue. *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 569 U.S. 641, 652 (2013) (collecting cases rejecting states' attempts to end-run preemption provisions). After all, reading broad preemption clauses to cover only direct or facial regulations would defy Congress's choice of "language notably 'expansive in sweep.'" *See Coventry*, 137 S. Ct. at 1197 (alteration incorporated) (quoting *Morales*, 504 U.S. at 384).

The sole basis for the District Court's dismissal of the CRA's preemption claim was its erroneous conclusion that the EPCA does not

preempt the City's ordinance because the ordinance "does not *directly regulate* either the energy use or energy efficiency of covered appliances." ER-19 (emphasis added). In other words, because the City's ordinance bans piping in buildings needed to supply natural gas to appliances, it does not regulate the appliance itself and is not preempted by the EPCA. This holding contravenes the plain text of the statute and the long line of preemption cases. Local governments cannot escape the reach of "concerning" by not facially regulating the subject while still doing so in practice. *See, e.g., Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 371–72 (2008) (holding that a state law facially regulating retailers was nonetheless a preempted regulation "related to" motor carrier services because it effectively "determin[ed] (to a significant degree) the services that motor carriers will provide").

The District Court's interpretation was driven by its concern with the reach of statutes that use the broad "concerning" or "relating to" language. To be sure, these broadening phrases are subject to limiting principles, which are well established in the case law. But this case does not present a close question in applying those limiting principles. Phrases like "concerning" and "relating to" have been interpreted to mean "has a connection with" or "would have a significant impact upon." *See Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1759–60 (2018) (cleaned up) (collecting cases and dictionary definitions). The cases also examine whether the challenged ordinance "ha[d] a significant

and adverse impact in respect to the federal Act's ability to achieve its pre-emption-related objectives," and "produce[d] the very effect that the federal law sought to avoid." *Rowe*, 552 U.S. at 371–72 (cleaned up). Under these limiting principles, the question is whether the City's ordinance has a connection with, or an impact on, the quantity of gas used by covered products. It does, as even the District Court recognized. Further, it produces the very effect the EPCA sought to avoid: banning a type of appliance at a local level. If "concerning" has any meaning beyond direct regulation of an appliance — and it does according to the Supreme Court and this Court's cases — it must include cutting the pipe attached to the appliance.

In short, the District Court's revision of the statute allows Berkeley to do precisely what Congress barred it from doing: enact an ordinance concerning the energy use of appliances covered by the EPCA, banning an entire category of such appliances, and validating a patchwork, city-by-city approach to national appliance regulation.

The CRA did not bring this case because it disagrees with the laudable goal of reducing greenhouse gas emissions or wants to obstruct efforts to address climate change. Indeed, the CRA has consistently maintained that it supports an open debate on which approaches to reducing carbon emissions make sense. But states cannot bypass federal law simply because they disagree with it. The answer to Berkeley's disagreement with the approach taken by Congress is to seek change of

the law in question (the EPCA here) or to follow the procedures enumerated for obtaining an exemption. The answer is not to end-run federal laws on the books. In this regard, the District Court's decision has broader implications because by rewriting or ignoring the word "concerning," it affects multiple other areas of law that federal law has preempted. This is particularly important in the energy space, where a national policy to address climate change as well as other important objectives such as reliability, independence, national security, and affordability will be difficult or impossible to achieve if a patchwork of localities can ignore well-established rules of federal preemption.

Accordingly, this Court should apply the plain text of the statute and reverse the District Court's dismissal of the CRA's claims.

STATEMENT OF JURISDICTION

The District Court had jurisdiction over the CRA's federal preemption claim under 28 U.S.C. § 1331. *See, e.g.*, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983). The District Court had supplemental jurisdiction over the CRA's state law claims under 28 U.S.C. § 1367(a).

The District Court entered a final judgment dismissing all of the CRA's claims on July 6, 2021. ER-4. The CRA timely filed its notice of appeal on August 4, 2021. ER-204–206; *see* Fed. R. App. P. 4(a)(1)(A). This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Does the Energy Policy and Conservation Act's use of "concerning" preempt more than merely regulation of the appliance itself, such that Berkeley's ban of gas appliances by banning gas piping in buildings is preempted?

2. Should the District Court's decision to decline supplemental jurisdiction over the CRA's state law claims be vacated and remanded for further consideration because it was based solely on the dismissal of the CRA's federal claim?

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article VI, clause 2 of the United States Constitution provides in pertinent part: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The EPCA's express preemption provision for consumer products states in pertinent part: "[E]ffective on the effective date of an energy conservation standard established in or prescribed under section 6295 of this title for any covered product, 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).

Other pertinent statutes and authorities are reproduced in the Addendum of Authorities. *See* 9th Cir. R. 28-2.7.

STATEMENT OF THE CASE

A. Berkeley's Ban On Natural Gas Piping In New Buildings

When Berkeley first considered banning the use of natural gas in new buildings, it recognized that a natural gas ban would require compliance with state regulatory procedures that were "laborious," "cumbersome," and "complex." ER-87 ¶ 22. Berkeley's council members also recognized that, "[t]o date, the federal, state and local approach to energy use in new buildings has largely been to mandate greater building efficiency and energy conservation, which indirectly results in lower emissions, but does not directly phase out fossil fuel consumption in new buildings." ER-87–88 ¶ 23.

Berkeley was dissatisfied with this approach and wanted an outright ban on natural gas instead. Berkeley therefore pivoted to "a new approach" that would "avoid[] [state] regulations associated with asking permission to amend energy efficiency standards." ER-87 ¶¶ 21–22 (citing City of Berkeley Action Calendar (July 9, 2019)). Under this new approach, Berkeley would refuse to grant permits for buildings that use natural gas piping, thereby eliminating the use of natural gas and natural gas appliances in new buildings while purportedly avoiding state and federal regulations. As Berkeley acknowledged, "[t]he effect of this

legislation will be that builders will be prohibited from applying for permits for land uses that include gas infrastructure." ER-87 ¶ 22.

In August 2019, Berkeley adopted Ordinance No. 7,672-N.S., Berkeley, Cal., Mun. Code §§ 12.80.010 *et seq*. (the "Ordinance"), prohibiting natural gas infrastructure in newly constructed buildings in Berkeley. ER-88 ¶¶ 24–25; *see also* ER-145–49. Berkeley adopted the Ordinance as part of Berkeley Municipal Code Title 12, the Health and Safety Code, and provided that its requirements "shall apply to Use Permit or Zoning Certificate applications." ER-88 ¶¶ 26–27. The Ordinance took effect on January 1, 2020. ER-88 ¶ 25.

Berkeley's ban has two purported "exemptions." ER-88–89 ¶ 28. The first, which allows gas where all-electric appliances are "not physically feasible," Berkeley, Cal., Mun. Code § 12.80.040.A.1, is merely a means for Berkeley to phase in the ban as state regulators make all-electric construction available for additional building types. ER-88–89 ¶ 28 This provision is illusory — it does not offer any exemption for the types of buildings already covered by the ban. The second exemption allows natural gas if the City finds it to be in the "public interest" based on (i) other alternatives that are available, and (ii) issues of safety, health, or welfare of the public, Berkeley, Cal., Mun. Code § 12.80.050.A. *See* ER-88–89 ¶ 28.

B. The Federal Energy Policy And Conservation Act

The Energy Policy and Conservation Act ("EPCA"), 42 U.S.C. §§ 6201 *et seq.*, regulates the energy efficiency and energy use of a variety of consumer and industrial products. The EPCA's standards for "consumer product[s]," a defined term, cover a variety of appliances, including water heaters, furnaces, dishwashers, and kitchen stoves. 42 U.S.C. §§ 6291(1)–(2), 6292(a). The EPCA also contains standards for "industrial equipment," including furnaces and water heaters. 42 U.S.C. § 6311(2)(A). *See generally id.* §§ 6311–6317 (EPCA provisions regarding industrial equipment). The definitions are not tied to who is using the appliance. If a product qualifying as a "consumer product" is used in a commercial enterprise, it nonetheless is a "consumer product."[1] *See id.* §§ 6291(2), 6292(a), 6311(2)(A)(iii).

The EPCA expressly preempts state and local regulations "concerning the energy efficiency" and "energy use" of covered products. 42 U.S.C. § 6297(c). Exempted from this broad preemption provision are state and local building codes that meet certain statutory criteria. *Id.* § 6297(c)(3), (f)(3).[2] Berkeley has not seriously contested, and the District

[1] The CRA pleaded that its members use both "consumer" and "industrial" products, and the District Court's ruling was not based on this definition.

[2] The preemption provision also has several still-more-specific exceptions, none of which Berkeley argues is applicable here. *See, e.g.*, 42 U.S.C. § 6297(c)(4) (exempting from preemption "a regulation concerning the water use of lavatory faucets adopted by the State of New York or the State of Georgia before October 24, 1992").

Court did not find, that its Ordinance would be exempt from preemption. Instead, the court based its ruling on the language of the preemption provision.

The EPCA emerged out of the oil crisis in 1975 and was designed to create a "comprehensive energy policy" to address "the serious economic and national security problems associated with our nation's continued reliance on foreign energy resources." *Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Dev. Comm'n*, 410 F.3d 492, 498 (9th Cir. 2005). In its original form, the EPCA's provisions regarding consumer appliances focused on requiring labeling of appliances, on the theory that consumers would choose more efficient appliances if they had access to accurate information about efficiency. *Id.* at 498–99. The statute provided, however, "that the Secretary of the Federal Energy Administration should utilize energy efficiency standards if the labeling program proved ineffective." *Id.* at 499.

The congressional record memorializes Congress's intent at the time: "[I]t is the Committee's hope that voluntary efforts by manufacturers and better consumer information will make energy efficiency standards unnecessary; however, should the labeling program not suffice, energy efficiency standards should be utilized to achieve the goals of the legislation." H.R. Rep. No. 94-340, at 95 (1975) (ER-198).[3] In

[3] The legislative history cited within this Opening Brief has been included within the CRA's Excerpts of Record as well as the Addendum of Authorities for the Court's convenience.

that early form, the EPCA permitted significant state involvement in appliance regulation. *Air Conditioning*, 410 F.3d at 499. It "allowed state regulations that differed from the federal regulations if the state regulations were justified by a substantial state or local need, did not interfere with interstate commerce, and were more stringent than the federal standard." *Id.*

In 1978, however, Congress passed a range of statutes collectively known as the National Energy Act. As part of that effort, Congress amended the EPCA. *Air Conditioning*, 410 F.3d at 499; Julie Richardson & Robert Nordhaus, *The National Energy Act of 1978*, Nat. Res. & Env't, Summer 1995, at 62, 62–63. Rather than relying exclusively on labeling, the new approach "required the [Department of Energy] to prescribe minimum energy efficiency standards" for certain products. *Air Conditioning*, 410 F.3d at 499. The amendment also strengthened the preemption provisions in the EPCA, allowing state regulations "*only* if the Secretary [of Energy] found there was a significant state or local interest to justify the state's regulation and the regulation would not unduly burden interstate commerce." *Id.*

Despite these new requirements, the Department of Energy did not adopt federal minimum energy standards. *Air Conditioning*, 410 F.3d at 499. Instead, it "initiated a general policy of granting petitions from States requesting waivers from preemption. As a result, a system of separate State appliance standards . . . beg[a]n to emerge and the trend

was growing." *Id.* (alteration incorporated) (quoting S. Rep. No. 100-6, at 4 (1987) (ER-183)).

Congress responded in 1987 by again amending the EPCA. ER-90 ¶ 44. Among other changes, that amendment added the preemption provision at issue here. National Appliance Energy Conservation Act of 1987, Pub. L. No. 100-12, § 7, 101 Stat. 103, 117–22. The purpose of the 1987 amendment was "to reduce the regulatory and economic burdens on the appliance manufacturing industry through the establishment of national energy conservation standards for major residential appliances." S. Rep. No. 100-6, at 2 (ER-181). As Congress recognized, varying state standards created "the problem of a growing patchwork of differing State regulations which would increasingly complicate appliance manufacturers' design, production and marketing plans." *Id.* at 4 (ER-183) (alteration incorporated); *see also* H.R. Rep. No. 100-11, at 24 (1987) (ER-173) ("Section 7 is designed to protect the appliance industry from having to comply with a patchwork of numerous conflicting State requirements.").

Under the 1987 amendment, while states still could seek permission to establish their own standards, "achieving the waiver is difficult." S. Rep. No. 100-6, at 2 (ER-181). It would require showing an unusual and compelling local interest, and the waiver could not be granted if the "State regulation is likely to result in the unavailability in

the State of a product type or of products of a particular performance class, such as frost-free refrigerators." *Id.*

Moreover, and particularly important here, Congress intended to allow only "performance-based codes" that "authorize builders to adjust or trade off the efficiencies of the various building components so long as an energy objective is met." S. Rep. No. 100-6, at 10–11 (ER-189–90). To avoid preemption, a state building code provision must "establish 'credits' for various conservation measures, to provide, to the greatest degree possible, one-for-one equivalency between the energy efficiency of these differing measures and the credits provided for such energy efficiency." *Id.* at 11 (ER-190). Congress accomplished this through the use of the exemptions from preemption, discussed below. While the EPCA's preemption provision is broad, it returns substantial ground for concurrent state and local regulation so long as the building code requirements in the exemptions are satisfied. Those exemptions center on even-handed conservation objectives that provide builders choice, including the choice of using appliances of various types and various energy sources. *See* 42 U.S.C. § 6297(f)(3); S. Rep. No. 100-6, at 10–11 (ER-189–90); *infra* pp. 38–41.

Congress has made a handful of minor amendments to the EPCA's preemption provision since 1987 — typically to add specific exceptions, *see, e.g.*, Energy Policy Act of 2005, Pub. L. No. 109-58, § 135(d), 119 Stat. 594, 634 — but none are relevant here.

C. The California Restaurant Association's Suit

In November 2019, the CRA filed this suit alleging that the Berkeley Ordinance is preempted by the EPCA and violates several provisions of California law. ER-221 (ECF No. 1). The CRA brought this case because it has members that do or seek to do business in Berkeley and are harmed by the Ordinance. ER-85–86 ¶ 15. Those members include restaurants that "rely on gas for cooking particular types of food, whether it be flame-seared meats, charred vegetables, or the use of intense heat from a flame under a wok," as well as for heating space and water, for backup power, and for affordable power. ER-84–85 ¶ 8. The CRA's members "will be unable to prepare many of their specialties without natural gas" and will lose speed and control over the "manner and flavor of food preparation." *Id.* Berkeley's Ordinance harms the CRA's members, who will not be able to move into or build new buildings while also preparing food in the manner and with the speed necessary and using a reliable and affordable energy source. ER-84–86 ¶¶ 8, 14–15.

The City challenged the first complaint on several grounds, including standing and ripeness. The CRA agreed to amend the complaint to provide greater detail, and therefore the District Court dismissed the first complaint without prejudice for the CRA to amend. ER-112; *see also* ER-134–35. The CRA filed an amended complaint, ER-81–111, and Berkeley moved to dismiss, arguing that the CRA lacked

standing, the case was not ripe, and the Ordinance is not preempted, ER-65–67.

At oral argument on Berkeley's motion, the District Court acknowledged that the Ordinance reflected the city "trying to use a backdoor approach to do something that you cannot do through the front door." ER-34 at 11:4–6. Questioned about what purpose the Ordinance could have except "to ban all natural gas appliances," Berkeley admitted that "[t]he purpose of the legislation, which will result in no natural gas appliances in newly constructed buildings that are not exempt, is to transition the City infrastructure away from natural gas" and prepare for a world in which "natural gas service will be obsolete." ER-34–35 at 11:10–12:6. And Berkeley agreed that "[t]he effect [of the Ordinance] is to eliminate all natural gas appliances" because "[y]ou can't run a natural gas appliance if you don't have natural gas lines." ER-45 at 22:8-18.

The District Court again dismissed the CRA's claims on July 6, 2021. ER-5–23. First, the court rejected Berkeley's standing and ripeness challenges. ER-12–16. The court found that the CRA had standing based on its allegations that its members use covered consumer and industrial products under the EPCA and that at least one of its members would operate a restaurant in a newly constructed building in Berkeley using natural gas appliances but for the Ordinance. ER-13. And the court concluded that the CRA's facial preemption challenge to

the Ordinance was ripe because it could be adjudicated without further factual development regarding the Ordinance's application. ER-14–15.

Finding jurisdiction, the District Court went on to grant Berkeley's Rule 12(b)(6) motion as to the federal preemption claim. As the court explained, "[t]he crux of the CRA's argument is that the Ordinance concerns the quantity of natural gas consumed by appliances in the buildings it regulates because, by barring the connection to gas pipes required to use natural gas, the Ordinance requires that *no* natural gas is used." ER-18–19; *see also* ER-18 ("In other words, the Ordinance requires that *zero* quantum of natural gas be used in new construction."). Despite acknowledging that "this argument has some logic" and that "the language employed by the EPCA is broad," the District Court nonetheless ruled that the Ordinance is not preempted because it "does not *directly regulate* either the energy use or energy efficiency of covered appliances." ER-19 (emphasis added); *see also* ER-19, 21 (noting that the Ordinance does not "facially" regulate appliances). It reasoned that EPCA preemption had to be "interpreted in a limited manner" because a different statute, the Natural Gas Act, has historically left "local natural gas infrastructure" under the control of states and cities. ER-20–21. Given that context, the court concluded that "regulating the underlying natural gas infrastructure" in a way that "indirectly has an impact on the products available" was not preempted. ER-21–22.

The CRA timely appealed on August 4, 2021. ER-204–06; Fed. R. App. P. 4(a)(1)(A).

SUMMARY OF ARGUMENT

I. The District Court erred in dismissing the CRA's federal preemption claim. Its sole basis for doing so was its erroneous conclusion that the preemption provision covers only facial regulation of the energy use of covered appliances. This ruling contradicts the plain text of the statute. Case law establishes that phrases such as "concerning" or "relating to" manifest broad preemptive purpose and necessarily cover more than direct regulation. Congress used broad language here to preempt any state attempt to regulate "concerning" the "energy use" of certain appliances. To give any effect to the word "concerning," the statute must mean that if a city cannot ban natural gas appliances, it cannot cut the pipe connecting those appliances in order to achieve the very objective that Congress sought to prevent. The District Court's contrary conclusion fails to give any weight to the word "concerning."

Any concern with limiting principles on the reach of the preemptive scope is addressed by clear case law holding that local governments cannot take an indirect path to a preempted destination. Neither the District Court nor the City contends that the City could directly ban gas appliances.

Moreover, the EPCA's statutory structure, history, and purpose all confirm Congress's intent to regulate this space. While the EPCA leaves

local governments room to regulate if they meet statutory criteria, there is no real dispute that Berkeley has not done so here. Finally, that a different statute (the Natural Gas Act) does not preempt Berkeley's Ordinance is not relevant to whether the *EPCA* does.

II. Because the EPCA preempts Berkeley's Ordinance, the District Court's basis for dismissing the CRA's supplemental state law claims disappears. The District Court declined to exercise supplemental jurisdiction solely on the ground that it had dismissed the CRA's federal claim. Accordingly, that ruling should be vacated and the state claims remanded for further proceedings on the merits.

STANDARD OF REVIEW

The issues in this appeal were ruled on in the District Court's Order Granting in Part and Denying in Part Motion to Dismiss. ER-4–23. This Court's review of a Rule 12(b)(6) dismissal is de novo. *Carlin v. DairyAmerica, Inc.*, 705 F.3d 856, 866 (9th Cir. 2013).

ARGUMENT

I. Berkeley's Ordinance Is Preempted.

Express preemption is a question of statutory interpretation. *See e.g.*, *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016). As with any other question of statutory interpretation, when the statute is "unambiguous," the "inquiry begins with the statutory text, and ends there as well." *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 631 (2018) (attribution omitted); *accord Franklin Cal.*, 136 S. Ct. at

1946 (applying this rule in a preemption case); *Connell v. Lima Corp.*, 988 F.3d 1089, 1097 (9th Cir. 2021) (same).

The District Court at first appeared to recognize this bedrock principle, stating that a preemption claim is an "exercise of statutory construction" that starts "with the text of the provision in question, and move[s] on, as need be, to the structure and purpose of the Act." ER-17. And the court acknowledged that the case here is one of express preemption. ER-16–17.

But the District Court's analysis then departed from this straightforward approach. Relying on outdated Ninth Circuit precedent, it applied a "presumption against preemption" and an associated "principle that express preemption statutory provisions should be given a *narrow* interpretation." ER-17 (emphasis added by the District Court) (quoting *Air Conditioning*, 410 F.3d at 496).[4] That presumption is irreconcilable with subsequent Supreme Court decisions and is not the law in cases of express preemption. *See* Jay B. Sykes & Nicole Vanatko, Cong. Rsch. Serv., R45825, Federal Preemption: A Legal Primer 3–6 (2019).

[4] The confusion on this point may be partly attributable to Berkeley's arguments on conflict preemption. *See* ER-72–73. In its opposition brief, the CRA made clear that it had raised an express preemption argument, not conflict preemption, and that Berkeley's arguments about the difficulty of such a conflict claim bore no relevance here. *See* ER-64.

Applying a presumption against preemption makes no sense with express preemption provisions. In contrast with conflict preemption, express preemption means that Congress has already indicated an intent to abrogate state law. Where, as here, a "statute contains an express pre-emption clause, [courts] do not invoke any presumption against pre-emption but instead focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." *Franklin Cal.*, 136 S. Ct. at 1946. The Ninth Circuit has recently affirmed the *Franklin California* standard, even in areas where states have traditionally regulated. *See Int'l Bhd. of Teamsters, Local 2785 v. Fed. Motor Carrier Safety Admin.*, 986 F.3d 841, 853 (9th Cir. 2021) ("[A] state's traditional regulation in an area is not, standing alone, sufficient to defeat preemption in the face of an express preemption clause." (citing *Franklin Cal.*, 136 S. Ct. at 1946)), *cert. denied sub nom. Trescott v. Fed. Motor Carrier*, No. 20-1662, 2021 WL 4507755 (U.S. Oct. 4, 2021).[5]

[5] To the extent *Air Conditioning* permitted or required courts to apply a presumption against preemption or read preemption provisions narrowly, it "is no longer binding precedent" in light of the Supreme Court's intervening decision in *Franklin California* and the Ninth Circuit decision in *International Brotherhood* holding that no such presumption or interpretive rule exists. *See In re Nichols*, 10 F.4th 956, 962 (9th Cir. 2021). A three-judge panel "may depart from [an earlier panel decision] if a subsequent Supreme Court opinion 'undercuts the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable.'" *Id.* at 961 (alteration incorporated) (quoting *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc)). This Court "ha[s] not hesitated to overrule [its] own precedents when" this standard is met. *Id.* at 962.

In short, the District Court's interpretation reads "concerning" out of the statute. This interpretation not only contradicts the plain language but also contravenes the statutory structure and purpose.

A. The EPCA's Plain Text Preempts The Ordinance — The District Court Could Only Reach Its Conclusion By Effectively Rewriting The Statute.

1. *The Ordinance is a regulation concerning covered products' energy use because it requires natural gas appliances to use zero energy.*

Statutory interpretation starts with the text and ends there if clear. *See Franklin Cal.*, 136 S. Ct. at 1946. The EPCA's express preemption provision for consumer products states:

> [E]ffective on the effective date of an energy conservation standard established in or prescribed under section 6295 of this title for any covered product, **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) (emphasis added). Because the Ordinance is a "State regulation concerning" the "energy use" of "covered product[s]," it is preempted. To see why, take those terms piece by piece:

First, a "State regulation" means "a law, regulation, or other requirement of a State or its political subdivisions." 42 U.S.C. § 6297(a)(2)(A). That includes local regulations, such as the City ordinance at issue here.

Second, "energy use" means "the quantity of energy directly consumed by a consumer product at point of use." 42 U.S.C. § 6291(4). As

the District Court recognized, ER-19, *zero* natural gas is a "quantity" of natural gas. And natural gas, in turn, is "energy," which is defined to include "fossil fuels." 42 U.S.C. § 6291(3). A ban on natural gas, or a regulation that requires use of zero natural gas, is thus regulation of a "quantity of energy," *id.* § 6291(4).

Third, "covered products" for consumers are the types of products listed in 42 U.S.C. § 6292, which include "water heaters," "furnaces," "dishwashers," and "kitchen ranges and ovens." 42 U.S.C. §§ 6291(2), 6292(a). That list includes many types of appliances that, but for the Ordinance, would often use natural gas, like water heaters, furnaces, and stoves. *See* ER-9 (describing covered products); ER-95 ¶ 63 (describing CRA members' use of these covered products). The CRA properly pleaded that the City's Ordinance affected "covered products;" the District Court did not hold otherwise.

Fourth, "concerning" is not defined in the statute and so takes its ordinary meaning. *Taniguchi v. Kan Pacific Saipan, Ltd.*, 566 U.S. 560, 566 (2012) ("When a term goes undefined in a statute, we give the term its ordinary meaning."). That meaning is broad: "'Concerning' is defined as 'relating to.'" *Air Conditioning, Heating & Refrigeration Inst. v. City of Albuquerque*, Civ. No. 08-633 MV/RLP, 2008 WL 5586316, at *7 (D.N.M. Oct. 3, 2008) (quoting Black's Law Dictionary 289 (6th ed. 1990)); *accord Concerning*, Merriam-Webster, https://www.merriam-webster.com/dictionary/concerning (last visited Oct. 17, 2021) (defining "concerning"

as "relating to" or "regarding"); *see also Lamar*, 138 S. Ct. at 1759–60 (collecting dictionaries and cases).

The long history of preemption litigation involving "relating to" establishes that "relating to" "expresses a broad pre-emptive purpose." *Coventry*, 137 S. Ct. at 1197 (cleaned up). "Relating to" is "broad," "deliberatively expansive" language, "conspicuous for its breadth." *Morales*, 504 U.S. at 383–84 (collecting cases); *accord Dilts v. Penske Logistics, LLC*, 769 F.3d 637, 643 (9th Cir. 2014). Courts "must give effect to this plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning." *Shaw*, 463 U.S. at 97.

Putting it all together, the Ordinance is a "State regulation concerning" the "energy use" of "covered products." By banning natural gas piping in newly constructed buildings, it "concerns" "the quantity of energy" consumed by natural gas appliances because it mandates that those products must use zero natural gas. Indeed, that was its stated intent, to ban the use of natural gas by appliances.

So too for industrial appliances. Similar to its treatment of consumer products, the EPCA governs the energy efficiency and energy use of certain industrial appliances. *See generally* 42 U.S.C. §§ 6311–6317. And as with consumer products, the statute expressly preempts "any State or local regulation concerning the energy efficiency or energy use of a product for which a standard is prescribed or established" in the

federal statute. *Id.* § 6316(b)(2)(A). Again, applying the statutory definitions, the Ordinance is a "regulation concerning" the "energy use" of covered industrial products.

First, the Ordinance is a "local regulation." 42 U.S.C. § 6316(b)(2)(A). *Second*, "energy use," for purposes of the industrial standards, is "the quantity of energy directly consumed by an article of industrial equipment at the point of use." *Id.* § 6311(4). Again, zero is a "quantity," and "energy" includes natural gas. *Id.* § 6311(7) (referring to the consumer standards for the definition of "energy"). *Third*, while the list of covered industrial products is slightly different, it similarly includes furnaces and water heaters. *Id.* § 6311(2)(B). Those products are "industrial" if they (i) do not qualify as consumer products, and (ii) are "distributed in commerce for industrial or commercial use" to "any significant extent." *Id.* § 6311(2)(A). Those definitions and the ordinary meaning of "concerning" fit together in exactly the same way as their consumer-product counterparts.[6]

[6] The CRA alleged that its members would use natural gas appliances covered by both the consumer and industrial statutory provisions were it not for the restrictions in the Ordinance. *See, e.g.*, ER-97 ¶ 63. Although the CRA's members are businesses, they still use appliances classified as "consumer products" under the EPCA. Whether a product is a "consumer" product does not depend on the individual user but on its distribution and use in general. The statute defines consumer product as one that is "distributed in commerce for personal use or consumption by individuals" "to any significant extent." 42 U.S.C. § 6291(1). The District Court concluded that the CRA had standing for all its claims, citing the CRA's allegation "that its members use both appliances under the 'consumer' and 'industrial' categories under the EPCA." ER-13.

2. The District Court wrote "concerning" out of the statute.

No one disputes that the purpose of the Ordinance is to ban natural gas appliances. The District Court acknowledged that "the Ordinance makes impossible and therefore effectively prohibits the use of gas appliances." ER-8. It recognized that the Ordinance's effect "is to eliminate all natural gas appliances"; after all, "[y]ou can't run a natural gas appliance if you don't have natural gas lines." ER-45. Berkeley agrees. *See id.* (responding to the District Court's observation with "That's correct"). Indeed, that was the point. ER-87 ¶ 22; *see also* ER-34 at 11:10–12:6 (Berkeley admitting that "[t]he purpose of the legislation, which will result in no natural gas appliances in newly constructed buildings . . . , is to transition the City infrastructure away from natural gas" and prepare for natural gas to be "obsolete"). The City sought to ban natural gas appliances and created a test case to see whether it could sidestep federal and state regulations.

The only dispute is whether the word "concerning" captures Berkeley's ban on natural gas piping. But the word "concerning" must reach some regulation other than direct regulation of the energy use of appliances (the subject of the preemption provision) lest the term be rendered superfluous. *See Walters v. Metro. Educ. Enters.*, 519 U.S. 202, 209 (1997) ("Statutes must be interpreted, if possible, to give each word some operative effect."); *see also Shaw*, 463 U.S. at 97 (holding that courts "must give effect" to the "plain" meaning of "relate to" "unless there is

good reason to believe Congress intended the language to have some more restrictive meaning"). If Congress intended to preempt only direct regulation of appliances, it could easily have done so. For example, it could have preempted local "regulation *[of]* the . . . energy use . . . of such covered product," or local "regulation [*covering*]" energy use of certain products.[7] Instead, Congress chose to preempt local "regulation *concerning* the . . . energy use . . . of such covered product." 42 U.S.C. § 6297(c) (emphasis added). The Court must read the statutory provision to give *some meaning* to the word "concerning" — which requires that the provision reach at a minimum something beyond express regulation of the appliances themselves. *See, e.g.*, *Coventry*, 137 S. Ct. at 1197 ("Relating to" is an "expansive phrase" that "Congress characteristically employs . . . to reach any subject that has 'a connection with, or reference to,' the topics the statute enumerates." (quoting *Morales*, 504 U.S. at 383–84)). Here, banning the building's piping needed to supply natural gas to appliances effectively bans those appliances. It is one step removed physically, but it does the same thing functionally. Put another way, if "concerning" means anything beyond the appliance itself (and the cases

[7] There is a line of cases distinguishing "relate to" from "covering" and interpreting the latter more narrowly, but even "covering" as interpreted in this case law has a broader meaning than the District Court gave to "concerning" here. *See, e.g.*, *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 665 (1993) (finding that "covering" is "a more restrictive term" than "relating to" and "indicates that pre-emption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law"); *see also* Sykes & Vanatko, *supra*, at 10–11.

say it must), it reaches the pipe that would be attached to the appliance to supply gas.

The District Court's reasoning confirms that "concerning" must have some meaning. To reach the conclusion that "concerning" did not capture the Ordinance, the District Court had to delete that word from the statute and rewrite the statutory text to say "directly regulating" (or perhaps "facially regulating") in its place. Under the guise of interpreting the word "concerning," the District Court concluded that the Ordinance was not a regulation "concerning" covered products' energy use because it "does not directly regulate" or "facially . . . address" those products' energy use. *See* ER-19 ("[T]he Court cannot determine how the EPCA expressly preempts" the Ordinance because it "does not directly regulate either the energy use or energy efficiency of covered appliances."); *id.* (noting that "[t]he Ordinance facially does not address" energy use of appliances); ER-21 (concluding that EPCA preemption does not "sweep beyond the preemption of state and local statutes directly regulating" appliances); *id.* (noting that the "Ordinance does not facially regulate or mandate any particular type of product or appliances"). The District Court did not cite any other statutory language or definition of "concerning" that would require such a direct or explicit regulation of the appliance itself. It cited nothing that would apply a meaning of "concerning" in the EPCA that differs from its ordinary meaning and how it is used in other federal statutes.

If Congress had meant to limit preemption to "direct" or "facial" regulations of covered products' energy use, it would have simply prohibited regulation of appliances' energy use. *See Morales*, 504 U.S. at 384 (noting that preemption clauses with "relating to" language are meant to be "broad", "expansive", and "sweep[ing]"). Congress has taken that narrower approach in other preemption provisions. *See, e.g.*, 7 U.S.C. § 16(e)(2) (preempting "any State or local law that prohibits or regulates gaming or the operation of bucket shops (other than antifraud provisions of general applicability)" in specified circumstances); 8 U.S.C. § 1188(h)(2) (preempting "any State or local law regulating admissibility of nonimmigrant workers"); 15 U.S.C. § 6760(a) (preempting certain state laws "purporting to regulate insurance producers"). By insisting here that the ordinance must directly regulate the preempted subject, the District Court failed to give effect to the statute Congress wrote.

3. The District Court's interpretation of "concerning" is inconsistent with controlling precedent.

There is a rich body of case law addressing the phrase "relating to," which has the same meaning as "concerning." Both the Supreme Court's and this Court's preemption cases involving broad "related to" or "concerning" provisions have repeatedly landed in the same place: These provisions' broad language encompasses at least some indirect, less-than-explicit regulations. Reading these provisions to instead cover only direct or facial regulations would be contrary to Congress's choice of "language

notably 'expansive in sweep.'" *See Coventry*, 137 S. Ct. at 1197 (alteration incorporated) (quoting *Morales*, 504 U.S. at 384); *see also Dilts*, 769 F.3d at 645 (noting the "settled preemption principle[]" that "a state law may 'relate to'" the subject of a federal statute "even if its effect is only indirect"). If Congress wanted to bar only laws directly regulating a given subject matter, it would forbid *regulating* it, rather than regulating *relating to* or *concerning* it. *Morales*, 504 U.S. at 385. It is no surprise, then, that the Supreme Court has held time and again that it does not "make[] any difference" for purposes of preemption when a state "select[s] an indirect but wholly effective means" of achieving a purpose it cannot pursue. *Am. Trucking Ass'ns*, 569 U.S. at 652 (collecting cases rejecting attempts to dodge preemption provisions).

The Supreme Court has recognized that "'concerning' means 'relating to' and is the equivalent of 'regarding, respecting, about.'" *Lamar*, 138 S. Ct. at 1759–60 (quoting Webster's Third New International Dictionary 1759 (1976)); *see also Morales*, 504 U.S. at 383 (defining "relating to," in part, as to "concern"); *City of Albuquerque*, 2008 WL 5586316, at *7 (recognizing that "concerning" in the EPCA's preemption provision means "relating to" (attribution omitted)). "Use of the word 'respecting' in a legal context generally has a broadening effect, ensuring that the scope of the provision covers not only its subject, but also matters relating to that subject." *Lamar*, 138 S. Ct. at 1760. "[W]hen asked to interpret statutory language including the phrase 'relating to'"

the Supreme Court "has typically read the relevant text expansively." *Id.* at 1759–60 (citing cases involving various statutes, including the Employee Retirement Income Security Act ("ERISA")); *see also United States v. Wiles*, 642 F.3d 1198, 1201 (9th Cir. 2011) ("[T]he ordinary meaning of the phrase 'relating to' is a broad one — 'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with.'" (cleaned up)).[8]

The District Court's reading of "concerning" to require a direct or facial regulation cannot be reconciled with these precedents. The District Court relied on a single case as supporting its reading of "concerning": the Supreme Court's decision in *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A.*, 519 U.S. 316 (1997). But *Dillingham* does not support the District Court's reading. It only supports the proposition that there is some outer limit to what the phrase "relate to" means, which of course there is. That case concerned ERISA, which preempts state laws that "relate to any employee benefit plan" as defined in the statute. 29 U.S.C. § 1144; *Dillingham*, 519 U.S. at 335 & n.3. *Dillingham* held that the law at issue — a California prevailing wage statute that imposed particular standards on apprenticeship

[8] In *City of Albuquerque*, the district court interpreted the EPCA's preemption provision and correctly determined that "[t]he use of the word 'concerning' suggests that Congress intended the preemption provision to be expansive." 2008 WL 5586316, at *6. *See also id.* at *7 ("The Supreme Court has repeatedly emphasized that the words "relating to" express a broad preemptive purpose.").

programs — bore "so tenuous a relation" to ERISA plans as to not "relate to" an ERISA plan. *Dillingham*, 519 U.S. at 334; ER-20. But in drawing that conclusion, *Dillingham* applied a "two-part inquiry" that the Supreme Court had developed in earlier ERISA cases: A law "relates to" an ERISA plan if it (a) "has a connection with" or (b) makes "reference to such a plan." 519 U.S. at 834 (cleaned up); *see id.* at 324–25 (explaining that the "reference to" prong is satisfied "[w]here a State's law acts immediately and exclusively upon ERISA plans . . . or where the existence of ERISA plans is essential to the law's operation"). In applying *Dillingham* here (which is not necessary, given the clarity of the statutory language), the District Court appears to have focused solely on the "reference to" prong of *Dillingham*, requiring an explicit reference to the energy use of appliances, and to have ignored the other half of the test — the "connection with" prong. In *Dillingham*, the state wage law did not force any particular choice about the preempted subject matter (employee benefit plans), so any "connection" was too remote, 519 U.S. at 329–30. Here, by contrast, the Ordinance results in exactly what Congress sought to prevent, the unavailability of a whole category of appliances — that is, the "connection" with the subject of the preemption clause is extremely close.

What is more, the cases since *Dillingham* confirm that "concerning," while not unbounded, is not limited to "directly" or "facially" regulating. In *Rowe v. New Hampshire Motor Transport Ass'n*,

supra, for example, the Court reaffirmed that a "related to" preemption provision can apply even when "a state law's effect on" the subject of federal preemption "is only indirect," 552 U.S. at 370 (attribution omitted). This established law contravenes the District Court's conclusion that the City ordinance is not preempted because it does not facially affect the energy use of covered appliances. *Rowe* confirmed that at the very least, laws with "a significant impact related to Congress's deregulatory and pre-emption-related objectives" are preempted by a "related to" provision. *Id.* at 371 (cleaned up).

Applying those principles, the Supreme Court in *Rowe* concluded that a state law was impermissibly "related to" the prices of motor carriers like trucking services because, although the law did not directly regulate trucking companies, it accomplished the same result by prohibiting retailers from accepting deliveries from trucking companies that did not follow certain rules. *See* 552 U.S. at 368–69, 372. That the state law was "less 'direct' than it might be" could not save it from preemption because it "produce[d] the very effect that the federal law sought to avoid." *Id.* at 372; *see also id.* at 373 (noting that allowing this type of law "could easily lead to a patchwork of state" laws, which would be "inconsistent with Congress' major legislative effort to leave such decisions, where federally unregulated, to the competitive marketplace"). Put another way, states cannot evade preemption "concerning" or "related to" a subject of federal regulation just by taking an indirect path

to the destination they are prohibited from reaching directly. *See Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987) (concluding that states cannot "do indirectly what they could not do directly").

Just as in *Rowe*, the Ordinance here is preempted. If a state cannot impose otherwise preempted regulations on trucking companies by moving the regulations one step down the distribution chain to retailers, Berkeley is forbidden from imposing an otherwise preempted ban on natural gas appliances by moving the ban one step up the chain to natural gas piping. That "concerning" is a broad term does not mean that it should not be given its ordinary effect, and the limiting principles on "relating to" in the case law in fact confirm that here, the EPCA's preemptive scope encompasses Berkeley's ordinance.

4. Concerns about "sweeping" implications are unjustified.

Rejecting the District Court's unsupported "direct or facial" requirement does not leave broad preemption provisions unbounded. The central limiting principle is always congressional intent. *See Dilts*, 769 F.3d at 642 ("[C]ongressional intent is the ultimate touchstone." (cleaned up)); *see also Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45 (1987) (noting that "[t]he purpose of Congress is the ultimate touchstone" in preemption cases (attribution omitted)); *Miller v. C.H. Robinson Worldwide, Inc.*, 976 F.3d 1016, 1021 (9th Cir. 2020) (same); *Californians for Safe & Competitive Dump Truck Transp. v. Mendonca*, 152 F.3d 1184, 1187 (9th Cir. 1998) (describing congressional intent as "the crux of this

case"). This general principle has varied formulations, often focusing on the law in question's "significant impacts" on congressional objectives. *See, e.g., Rowe,* 552 U.S. at 371–72 (focus on regulations with "significant impacts" on Congress's objectives or that attempt to take alternate routes to a prohibited result); *Morales*, 504 U.S. at 388 (focus on when, "as an economic matter," a regulation has "the forbidden significant effect" on that subject); *Cal. Trucking Ass'n v. Su*, 903 F.3d 953, 960 (9th Cir. 2018) (question is whether a state or local law has any "significant impact on Congress's . . . objectives").

This approach avoids the "sweeping" implications the District Court was concerned about, ER-20, without resorting to judicial revision of the language Congress chose. For example, it preserves "generally applicable background regulation[s]" at least when they have "no significant impact" on the issue Congress sought to address. *Su*, 903 F.3d at 961; *see also Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 264 (2013) (noting that generally applicable regulations like zoning laws would not be preempted by the provision at issue in *Rowe*, even if they tangentially affect trucking operations); *Ward v. United Airlines, Inc.*, 986 F.3d 1234, 1243 (9th Cir. 2021); *Dilts*, 769 F.3d at 646. "[E]ven the most notoriously extensive statutory regimes enacted by Congress have limits," and "[t]he EPCA must be similarly interpreted" to have some limits on preemption. ER-19–20. After all, in some sense, "everything is related to everything else," but the scope of a broad preemption clause

cannot be truly unlimited. *See Dillingham*, 519 U.S. at 335 (Scalia, J., concurring). But this case does not test those limits.

Given those settled principles, there should be no concern that cities would have to provide natural gas access where there is none. *See* ER-22 ("The plain meaning of EPCA does not require[] a city to extend natural gas infrastructure"); ER-20 ("Nothing in the EPCA requires that localities provide let alone continue to maintain natural gas connections."). The EPCA says nothing about whether a state or local government must ensure access to natural gas, and the CRA's reading does not require that result. The EPCA's plain language prohibits regulations concerning the energy use of covered appliances; that necessarily means that a local government cannot ban natural gas appliances, but it does not force a city to take action to provide something that does not already exist in the marketplace. Put another way, the EPCA does not preempt the *absence* of regulation. This distinction between preempting bans and requiring affirmative, proactive support for a given industry makes sense and aligns with the regulation of other matters. For example, Congress may preempt state laws banning nuclear power plants without requiring all states to build them. Likewise, the CRA's interpretation of the EPCA is fully consistent with the fact that some cities do not have natural gas service; the EPCA impacts those cities only if they regulate concerning the energy use of

covered appliances, and even then, those cities may regulate energy use as long as they do so in compliance with the EPCA's requirements.[9]

To be clear, the CRA's interpretation would not "compel localities to continue to provide natural gas in all but the rarest of circumstances," ER-20, or compel municipalities lacking natural gas infrastructure altogether to create a franchise, *cf.* ER-61–62. The EPCA concerns appliances used within buildings, not the distribution of natural gas infrastructure throughout an entire municipality. A generally applicable law controlling natural gas distribution systems at the city level would likely be too "tenuous, remote, or peripheral" to the subject Congress preempted: regulation of which appliances can go into a home or business. *Cal. Trucking Ass'n v. Bonta*, 996 F.3d 644, 656 (9th Cir. 2021), *petition for cert. filed*, No. 21-194 (U.S. Aug. 11, 2021). But Berkeley's Ordinance does not concern citywide distribution of natural gas infrastructure. There is no dispute that such infrastructure exists. Berkeley's Ordinance bans natural gas appliances from individual residences and businesses. This building-level regulation attempts to

[9] Berkeley also argued in the District Court that the CRA's interpretation of the EPCA would ban all sorts of ordinary local regulations affecting EPCA-covered appliances, suggesting, for example, that requiring walk-in freezers to have multiple exits for safety would be precluded. *See* ER-78–80; *see also* ER-142–44. But these regulations would not be barred by the CRA's interpretation of the EPCA as long as they do not "concern" "energy use" and frustrate Congress' intent to preempt local governments from forbidding certain types of appliances.

govern where Congress said states cannot. The plain language of the EPCA forbids this invasion.

As discussed above, precedent in this Court and the Supreme Court already establishes limiting principles that, unlike the District Court's replacement of "concerning" with "directly regulating," give effect to broadly written preemption provisions. But the Ordinance here is not saved by any of those limiting principles. The Ordinance's broad, express preemption language and its statutory structure comfortably reach the conduct at issue here. And to the extent this Court wants to look beyond that to ensure that this result is in accord with congressional intent, it is immediately clear that this Ordinance is an intentional effort admittedly designed to accomplish exactly what Congress wanted to prevent — bar an entire category of appliances at the local level. This is no mere background regulation; it is not legislation on another topic that just so happens to have some tangential effect on the preempted subject matter; instead, it directly and significantly undermines congressional objectives in the EPCA. Under that framework, the principles outlined in *Dillingham* and its progeny for applying broad language like "concerning" strongly favor preemption here.

* * * * *

Ultimately, the District Court's incorrect reading of "concerning" to cover only "direct" or "facial" regulations of appliances' energy use is the lynchpin of its analysis. It is the sole reason the court concluded that an

ordinance that bans *connections to natural gas piping* rather than bans *natural gas appliances* would evade preemption. As a result, reading "concerning" to mean what it says requires reversing the District Court's dismissal of the CRA's federal preemption claim.

B. The EPCA's Structure Supports Preemption.

Because the plain text of the statute resolves this case, there is no need to go further. *Franklin Cal.*, 136 S. Ct. at 1946. In any event, the other indicators of congressional intent — the "ultimate touchstone," *Dilts*, 769 F.3d at 642 — further support preemption here. In addition to the statutory text, congressional intent can be discerned from "the statutory framework surrounding" that text, "the structure and purpose of the statute as a whole," and the traditional state regulations in the area. *Miller*, 976 F.3d at 1021 (quoting *Dilts*, 769 F.3d at 642); *Su*, 903 F.3d at 960. Here, the available evidence demonstrates that the natural reading of "concerning" encompasses at minimum functional bans of broad categories of EPCA-covered appliances (like banning all gas appliances).

1. The EPCA's strict exemption provisions make clear that "concerning" has its ordinary, broad meaning.

The EPCA's structure further underscores that Congress intended to broadly preempt state and local regulations, with only specific exemptions. When, as here, Congress "explicitly lists a set of exceptions" to preemption, the nature of those exceptions is persuasive evidence of

Congress's intent. *See Rowe*, 552 U.S. at 374; *see also Ret. Fund Tr. of the Plumbing etc. v. Franchise Tax Bd.*, 909 F.2d 1266, 1276 (9th Cir. 1990) (considering as relevant in a preemption inquiry that Congress "intended [a statute's] preemptive scope to be broad and its exceptions to be narrow"); *Gordon v. Virtumundo, Inc.*, 575 F.3d 1040, 1061 (9th Cir. 2009) (similar).

As discussed, the EPCA begins with a broad provision preempting any "[s]tate regulation concerning the energy efficiency, energy use, or water use" of a covered product. 42 U.S.C. § 6297(c). It then offers specific exceptions to that broad rule, including one allowing regulations contained in building codes that meet certain requirements. *See id.* § 6297(c)(3), (f)(3) (consumer products); *id.* § 6316(b)(2)(B) (industrial products). Those requirements are strict. To qualify for the consumer exemption, a building code must, for example, "permit[] a builder to meet an energy consumption or conservation objective for a building by selecting items whose combined energy efficiencies meet the objective." *Id.* § 6297(f)(3)(A). It must provide credits "on a one-for-one equivalent energy use or equivalent cost basis" for products that exceed the applicable standards. *Id.* § 6297(f)(3)(C). And, among other things, it must specify an "energy consumption or conservation objective . . . in terms of an estimated total consumption of energy." *Id.* § 6297(f)(3)(F); *see also id.* § 6297(f)(3)(B), (D)–(E), (G). The thrust of these requirements is that to qualify for the exemption, a building code must set a general,

even-handed energy conservation or consumption objective and allow builders the freedom to choose a mix of products to meet that objective. *See id.* § 6297(f); *see also* S. Rep. No. 100-6, at 10–11 (explaining that Congress meant to allow only "performance-based codes" that "authorize builders to adjust or trade off the efficiencies of the various building components so long as an energy objective is met").[10]

Notably, moreover, the exemption to preemption focuses on *building codes* — indicating that Congress intended that the statute's preemptive scope would reach state and local building codes. It simply cannot be that local building codes are categorically outside the scope of the preemption provision, or there would be no reason to exempt certain building code provisions from that scope. The District Court's determination that the EPCA cannot reach so far as to affect local building codes, ER-7, is thus at war with the statutory language and structure.

This statutory structure reflects Congress's intent to preempt a broad swath of local regulation concerning energy use while leaving local governments a carefully defined space to legislate alternatives within their building codes. Congress thus left local governments a role in

[10] Berkeley, of course, appeared to recognize exactly this point when it complained that the energy conservation objective approach to regulation did not allow it to go far enough to eliminate gas appliances. *See supra* p. 7.

setting energy policy — but only so long as they stay within the guiderails Congress selected.

2. It is not seriously disputed that the Ordinance does not qualify for any exemption from preemption.

The Ordinance is exactly the sort of regulation that falls outside the building code exemption — a point the City does not seriously dispute. The Ordinance, for example, does not set an "energy consumption or conservation objective for a building" that allows builders to select items that meet the objective; instead, it requires builders to use only electric appliances while banning all natural gas appliances. *See* ER-96–97 ¶¶ 66–69. As this Court has held, the exemption does not permit local regulations to "favor[] certain options over others" or to favor "particular products or methods." *Bldg. Indus. Ass'n of Wash. v. Wash. State Bldg. Code Council*, 683 F.3d 1144, 1151, 1146 (9th Cir. 2012).

Building Industrial Ass'n involved Washington regulations that required an aggregate 15% reduction in new buildings' energy consumption. *See* 683 F.3d at 1149. The state agency implementing the standard offered "different ways of achieving" it, including "by addressing the 'efficiency of a building's shell,' or 'efficiency of a home's heating equipment,' or 'efficiency of other energy consuming devices.'" *Id.*[11] This Court concluded that those regulations fell within the

[11] There was "no dispute" that Washington's building code "concerned" appliances' energy use and fell within the preemption

exception to preemption because they only "require[d] builders to reduce a building's energy use by a certain amount," allowing builders to "choose how to meet that requirement." *Id.* at 1145. But the Court emphasized that the EPCA would not exempt from preemption a regulation "requir[ing] a builder, as a matter of law, to select a particular product or option." *Id.*; *see id.* at 1153.

Berkeley's Ordinance falls on the wrong side of that line. Unlike the Washington regulations, the Ordinance requires a builder to use certain options (electric appliances) while prohibiting others (gas appliances), rather than allowing the builder to choose how to accomplish a neutral aggregate energy objective.

C. The District Court Ignores The Import Of The EPCA's History And Purpose, Which Support Preemption.

In passing the operative version of the EPCA, the Senate emphasized its desire to avoid "the unavailability in the State of a product type or of products of a particular performance class." S. Rep. No. 100-6, at 2 (ER-181). It sought to ensure "even-handed" standards that were not "unfairly weighted" to particular products. *Id.* at 10–11 (ER-189–90). Such standards would avoid a "patchwork" of regulations

---

provision, even though it was framed in terms of the overall energy use of an entire building, including appliance-related and non-appliance-related energy use, and did not mandate a choice of particular appliances. *Bldg. Indus. Ass'n*, 683 F.3d at 1148.

in which an appliance would be legal in some places but not others. *Id.* at 4 (ER-183); *see also* H.R. Rep. No. 100-11 at 24 (ER-173).

The history of Congress's amendments to the EPCA underscores its intent to preempt state and local regulations regarding appliances' energy use. *See* ER-90–92 ¶¶ 36–48. As discussed above, Congress has amended the EPCA several times, incrementally increasing federal regulation of energy standards and moving away from a previously laissez-faire approach. *Supra* pp. 9–13. The original EPCA focused on labeling the energy efficiency of consumer appliances so that consumers could choose more efficient options. *Air Conditioning*, 410 F.3d at 499; *see supra* p. 10–11. But each subsequent amendment further emphasized the federal government's intent to regulate appliances' energy use and efficiency at the federal level and to further limit local governments' abilities to set their own standards. *See supra* pp. 11–13. Congress ultimately narrowed the path for a state to avoid preemption, defining specific criteria for an exemption and purposefully making it "difficult" to "achiev[e] the waiver." S. Rep. No. 100-6, at 2 (ER-181).

Allowing individual cities to ban natural gas appliances would undercut these very goals. Congress intended that such decisions be made at the federal level so that appliance manufacturers would be governed by one uniform set of standards and the same categories of products would be available nationwide. Congress also intended that the regulation of appliances' energy use and efficiency follow the approach of

setting neutral energy conservation and consumption objectives that allow builders choice of how to meet those goals. Thus, unlike in *Dillingham*, a local ban on the use of natural gas appliances is not "remote from the areas with which [the federal preemptive statute] is expressly concerned," 519 U.S. at 330. Rather, it is like the preempted ordinance in *Rowe*, which "ha[d] a significant and adverse impact in respect to the federal Act's ability to achieve its pre-emption-related objectives," and "produce[d] the very effect that the federal law sought to avoid." 552 U.S. at 371–72 (cleaned up); *see also Dilts*, 769 F.3d at 647 (noting that when "a law does not refer directly" to the subject of federal preemption, "the proper inquiry is whether the [challenged] provision, directly or indirectly, . . . interferes with" Congress's goals (attribution omitted)).

Berkeley wants to do exactly what Congress wanted to prohibit: ban an entire category of appliances at the local level, leading to a patchwork approach in which certain appliances are unavailable in certain cities. The City's ordinance vitiates Congress's intent by banning access to the energy source necessary for those appliances and then claiming that the ban is not preempted because there is too indirect a connection between a building's gas pipes and the gas appliances used within that building.

The District Court acknowledged some of this congressional history and purpose, but then brushed it off. The District Court does not fully explain, however, how this congressional history and purpose, rather

than showing that Congress intended broad preemption, can serve to *limit* the plain meaning of "concerning." The Court's apparent reliance on the claim that this is "traditional" state regulation that Congress may not have meant to disturb, and that "concerning" should therefore be interpreted narrowly, is misplaced. *Cf. Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992) ("[U]nder the supremacy clause, . . . any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." (cleaned up)). Whether this is a traditional area of state regulation is neither here nor there, since the statute's express preemption language, its structure, and its history of amendments all establish that Congress intended to preempt regulations in state and local building codes concerning the energy use of appliances. *See Int'l Bhd.*, 986 F.3d at 853 ("[A] state's traditional regulation in an area is not, standing alone, sufficient to defeat preemption in the face of an express preemption clause." (citing *Franklin Cal.*, 136 S. Ct. at 1946)).

Unlike in the long line of cases challenging ordinary state employment laws under statutes like ERISA, there has been no showing here that laws like the Berkeley Ordinance were routine when the relevant federal preemption provision was enacted. *Cf. Dillingham*, 519 U.S. at 329–30. To the contrary, more than thirty years after the EPCA preemption provision was amended in 1987, Berkeley recognized that its efforts reflected a "new approach." ER-87 ¶¶ 21–22 (citing City of

Berkeley Action Calendar (July 9, 2019)). Far from being a traditional sort of local regulation that Congress likely intended to leave unperturbed, the Ordinance is an effort to expand local power over energy regulations in a way inconsistent with Congress's goals when it enacted the current EPCA preemption provision in 1987. That amendment, as noted above, was intended to *prevent* greater state variability by making waivers harder to obtain and by expanding the preemptive scope.

The facts here are a far cry from cases like *Dillingham*, where the Supreme Court found that state regulations like the one at issue were widely adopted at the time Congress enacted the preemption provision. *See Dillingham*, 519 U.S. at 329–30; *Mendonca*, 152 F.3d at 1187. Those cases turn on the idea that Congress is unlikely to have used broad language to abrogate such traditional state laws without any explicit indication that it was doing so. Here, in contrast, the amendment history of the EPCA indicates that Congress sought to prevent just such an expansion of state and local power by limiting the states' ability to obtain a "waiver" from federal regulations and allowing concurrent regulation only when it meets defined requirements.

The District Court also gave a nod to states' traditional power to adopt "health and safety" regulation, ER-22, but that is not an exemption from preemption under the EPCA. There is no basis to read in a carve-

out for state and local regulation whenever it appeals to such a broad goal; that would swallow the general rule of preemption.

Moreover, the court's assumption that Berkeley can use its police powers to regulate natural gas infrastructure for health and safety reasons is simply incorrect. California state law preempts local building standards unless they are locally modified in accord with express statutory grants, *not* based on general police powers. *See Bldg. Indus. Ass'n of N. Cal. v. City of Livermore*, 52 Cal. Rptr. 2d 902, 906–07 (Ct. App. 1996); *ABS Inst. v. City of Lancaster*, 29 Cal. Rptr. 2d 224, 228 (Ct. App. 1994); *Briseno v. City of Santa Ana*, 8 Cal. Rptr. 2d 486, 488–90 (Ct. App. 1992). The same logic applies to the EPCA. There are statutory exemptions from preemption, and they do not include "health and safety." To be sure, a general health and safety regulation that only tangentially affects gas appliances could, in theory, be acceptable. But when a local government regulates concerning the "energy use" of covered appliances, it must do so in accord with the statutory requirements.

This distinction can be seen in this Court's and the Supreme Court's cases on generally applicable employment laws that only tangentially affect a particular preempted federal subject matter. *See, e.g.*, *Rowe*, 552 U.S. at 375; *Ward*, 986 F.3d at 1243; *Su*, 903 F.3d at 961; *Dilts*, 769 F.3d at 646. Unlike those laws, Berkeley's Ordinance is narrowly targeted to affect the use of appliances — the exact subject matter at issue in the EPCA. That targeting is reminiscent of the preempted state law in *Rowe*,

which "focuse[d] on" the core subject of the federal law (there, trucking) by barring retailers from accepting deliveries from trucking services that did not comply with the state's rules. 552 U.S. at 371; *see also id.* at 376 (emphasizing that the preempted law "aim[ed] directly at" the subject of the federal law). Just like the purpose of the *Rowe* state law was to impose rules on trucking services, the goal of the Ordinance here is to ban gas appliances by banning gas pipes connected to them.

D. The District Court's Reliance On The Natural Gas Act Is Misplaced Because That Act Has No Bearing On Preemption By The EPCA.

The District Court appears to have concluded that because the Ordinance is not preempted by the Natural Gas Act, Berkeley "is exercising authority expressly deferred to states and localities," which either weighs against or precludes a finding that the Ordinance is preempted by the EPCA. ER-21. The Natural Gas has no bearing on EPCA preemption.

The District Court read the Natural Gas Act to "govern[]" the "scope of federal authority" over any law relating to natural gas pipes and to "expressly carve[] out authority" over intrastate natural gas infrastructure for state and local governments. ER-21. But the statutory language does not go nearly so far; it does *not* exempt from all federal regulation the local

distribution of natural gas. Rather, it simply limits the reach of the Natural Gas Act itself:

> *The provisions of this chapter* shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation, but *shall not* apply to any other transportation or sale of natural gas or *to the local distribution of natural gas* or to the facilities used for such distribution or to the production or gathering of natural gas.

15 U.S.C. § 717(b) (emphasis added). In other words, *this chapter* — the Natural Gas Act — does not govern local distribution of natural gas.

But that does not answer the question whether the EPCA, by expressly preempting regulation concerning the energy use of natural gas appliances, may affect a local government's ability to control local distribution of natural gas. Nothing about Congress's choice in 1938 to regulate interstate, but not intrastate, gas transmission in the Natural Gas Act, ch. 556, § 1(b), 52 Stat. 821, 821, forevermore disclaimed all federal authority over local distribution of gas. Indeed, Congress has since chosen to regulate, for example, the safety of intrastate pipelines. *See, e.g.*, 49 U.S.C. § 60105(a) (discussing federal safety requirements for intrastate pipelines and exemptions therefrom); *see also State Programs Overview*, U.S. Dep't of Transp.: Pipeline & Hazardous Mats. Safety Admin., https://www.phmsa.dot.gov/working-phmsa/state-programs/state-programs-overview (last visited Oct. 18, 2021) ("To participate in

[the Pipeline and Hazardous Materials Safety Administration's pipeline safety . . . programs[,] States must adopt the minimum federal pipeline safety regulations . . . ."). [12]

The District Court's broader reading of the Natural Gas Act as creating an unassailable, exclusive state right to regulate gas pipes without any federal oversight is contrary to the evidence and legal framework. The District Court based its reading not on the statutory text but on a selective quotation from this Court's decision in *South Coast Air Quality Management District v. FERC*, 621 F.3d 1085 (9th Cir. 2010). ER-21. In *South Coast*, this Court interpreted the Natural Gas Act's legislative history, noting that "all aspects related to the direct consumption of gas . . . remain within the exclusive purview of the states." 621 F.3d at 1092. In context, the Court was discussing what remained within the purview of states *under the Natural Gas Act*. It is true that the Act itself does not create federal oversight over local gas pipes. But the *South Coast* Court was not evaluating whether any *other* statutes could theoretically prevent certain local regulations of natural gas pipes, in unknown future factual circumstances. It did not address that issue. Indeed, to read the *South Coast* statement literally would mean that the EPCA cannot preempt a ban of natural gas appliances

[12] Numerous other federal regulations apply to gas utilities' local distribution, such as federal environmental regulations and the Occupational Safety and Health Administration's employee safety standards.

because it relates to the direct consumption of gas — yet neither the District Court nor Berkeley disputes that a local government could not ban natural gas appliances. *See* ER-21 (suggesting that the Ordinance would be preempted if it "facially regulate[d] or mandate[d] [a] particular type of product or appliance"). The EPCA's preemption provision expressly addresses state and local building codes, so to read *South Coast* so broadly as to preclude federal regulation of local building codes or infrastructure fails to give effect to the EPCA's text and structure. In short, there is no basis to conclude that the Natural Gas Act's choice not to regulate local gas pipes precludes application of the EPCA.

II. If The Federal Claim Survives, The District Court's Basis For Declining Jurisdiction Is No Longer Present.

The CRA also asserts that Berkeley violated several provisions of California law limiting when and how local governments can amend statewide building and energy standards. *See* ER-98–102, 104–08 ¶¶ 74–97, 105–37. After it dismissed the sole federal claim, the District Court exercised its discretion under 28 U.S.C. § 1367(c)(3) to decline to exercise supplemental jurisdiction. ER-22. The court did not identify any other basis for declining jurisdiction and, indeed, suggested at oral argument that it would retain jurisdiction over the state law claims if the federal claim survived. *See* ER-132–33 at 39:22–40:2 (District Court explaining that there would be no supplemental jurisdiction without federal claims, but "if I have a federal issue, . . . that would be different"). Because the

District Court erred in dismissing the CRA's federal claim, there is no longer any basis for declining supplemental jurisdiction.

Although Berkeley raised arguments regarding the merits of the state law claims, the District Court did not reach those arguments. This Court should therefore vacate the § 1367(c)(3) dismissal and remand for the District Court to consider Berkeley's merits arguments in the first instance. *See, e.g.*, *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 925 F.3d 1041, 1053 (9th Cir. 2019) (remanding for further district court proceedings where the district court had erroneously dismissed for lack of jurisdiction and had not assessed the merits).

CONCLUSION

This Court should reverse the District Court's dismissal of the CRA's federal claim, vacate the dismissal of the state law claims, and remand for further proceedings on the merits.

Dated: November 3, 2021

Respectfully submitted,

/s/ Courtland L. Reichman

Courtland L. Reichman
Laura Carwile
Ariel C. Green
REICHMAN JORGENSEN
LEHMAN & FELDBERG LLP
100 Marine Parkway, Suite 300
Redwood Shores, CA 94065
(650) 623-1401
creichman@reichmanjorgensen.com

Sarah Jorgensen
REICHMAN JORGENSEN
LEHMAN & FELDBERG LLP
1201 West Peachtree Street, Suite 2300
Atlanta, GA 30309
(404) 609-1040
sjorgensen@reichmanjorgensen.com

Attorneys for Plaintiff-Appellant
California Restaurant Association

Kylie Chiseul Kim
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK, PLLC
1615 M St. NW #400
Washington, DC 20036
(202) 326-7924
kkim@kellogghansen.com

STATEMENT OF RELATED CASES

To the best of our knowledge, there are no related cases pending in this Court.

Dated: November 3, 2021

Respectfully submitted,

/s/ Courtland L. Reichman

Kylie Chiseul Kim
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK, PLLC
1615 M St. NW #400
Washington, DC 20036
(202) 326-7924
kkim@kellogghansen.com

Courtland L. Reichman
Laura Carwile
Ariel C. Green
REICHMAN JORGENSEN
LEHMAN & FELDBERG LLP
100 Marine Parkway, Suite 300
Redwood Shores, CA 94065
(650) 623-1401
creichman@reichmanjorgensen.com

Sarah Jorgensen
REICHMAN JORGENSEN
LEHMAN & FELDBERG LLP
1201 West Peachtree Street, Suite 2300
Atlanta, GA 30309
(404) 609-1040
sjorgensen@reichmanjorgensen.com

Attorneys for Plaintiff-Appellant
California Restaurant Association

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 21-16278

I am the attorney or self-represented party.

This brief contains 12,565 **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).

I certify that this brief *(select only one)*:

- (●) complies with the word limit of Cir. R. 32-1.
- ( ) is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- ( ) is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- ( ) is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- ( ) complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one):*
  - ( ) it is a joint brief submitted by separately represented parties;
  - ( ) a party or parties are filing a single brief in response to multiple briefs; or
  - ( ) a party or parties are filing a single brief in response to a longer joint brief.
- ( ) complies with the length limit designated by court order dated _____.
- ( ) is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/Courtland L. Reichman **Date** Nov 3, 2021

*(use "*s/[typed name]*" to sign electronically-filed documents)*

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

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

PLAINTIFF-APPELLANT'S ADDENDUM OF AUTHORITIES

Kylie Chiseul Kim
KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK, PLLC
1615 M St. NW #400
Washington, DC 20036
(202) 326-7924
kkim@kellogghansen.com

Courtland L. Reichman
Laura Carwile
Ariel C. Green
REICHMAN JORGENSEN
LEHMAN & FELDBERG LLP
100 Marine Parkway, Suite 300
Redwood Shores, CA 94065
(650) 623-1401
creichman@reichmanjorgensen.com

Sarah Jorgensen
REICHMAN JORGENSEN
LEHMAN & FELDBERG LLP
1201 West Peachtree Street, Suite 2300
Atlanta, GA 30309
(404) 609-1040
sjorgensen@reichmanjorgensen.com

Attorneys for Plaintiff-Appellant
California Restaurant Association

TABLE OF CONTENTS

FEDERAL STATUTES

15 U.S.C. § 717

§ 717. Regulation of natural gas companies

(a) Necessity of regulation in public interest

As disclosed in reports of the Federal Trade Commission made pursuant to S.Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) Transactions to which provisions of chapter applicable

The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

[. . . .]

42 U.S.C. § 6291

§ 6291. Definitions

For purposes of this part:

(1) The term "consumer product" means any article (other than an automobile, as defined in section 32901(a)(3) of title 49) of a type—

(A) which in operation consumes, or is designed to consume, energy or, with respect to showerheads, faucets, water closets, and urinals, water; and

(B) which, to any significant extent, is distributed in commerce for personal use or consumption by individuals;

without regard to whether such article of such type is in fact distributed in commerce for personal use or consumption by an individual, except that such term includes fluorescent lamp ballasts, general service fluorescent lamps, incandescent reflector lamps, showerheads, faucets, water closets, and urinals distributed in commerce for personal or commercial use or consumption.

(2) The term "covered product" means a consumer product of a type specified in section 6292 of this title.

(3) The term "energy" means electricity, or fossil fuels. The Secretary may, by rule, include other fuels within the meaning of the term "energy" if he determines that such inclusion is necessary or appropriate to carry out the purposes of this chapter.

(4) The term "energy use" means the quantity of energy directly consumed by a consumer product at point of use, determined in accordance with test procedures under section 6293 of this title.

(5) The term "energy efficiency" means 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 under section 6293 of this title.

[. . .]

(8) The term "measure of energy consumption" means energy use, energy efficiency, estimated annual operating cost, or other measure of energy consumption.

(9) The term "class of covered products" means a group of covered products, the functions or intended uses of which are similar (as determined by the Secretary).

[. . . .]

42 U.S.C. § 6292

§ 6292. Coverage

(a) In general

The following consumer products, excluding those consumer products designed solely for use in recreational vehicles and other mobile equipment, are covered products:

(1) Refrigerators, refrigerator-freezers, and freezers which can be operated by alternating current electricity, excluding—

(A) any type designed to be used without doors; and

(B) any type which does not include a compressor and condenser unit as an integral part of the cabinet assembly.

(2) Room air conditioners.

(3) Central air conditioners and central air conditioning heat pumps.

(4) Water heaters.

(5) Furnaces.

(6) Dishwashers.

(7) Clothes washers.

(8) Clothes dryers.

(9) Direct heating equipment.

(10) Kitchen ranges and ovens.

(11) Pool heaters.

(12) Television sets.

(13) Fluorescent lamp ballasts.

(14) General service fluorescent lamps, general service incandescent lamps, and incandescent reflector lamps.

(15) Showerheads, except safety shower showerheads.

(16) Faucets.

(17) Water closets.

(18) Urinals.

(19) Metal halide lamp fixtures.

(20) Any other type of consumer product which the Secretary classifies as a covered product under subsection (b).

(b) Special classification of consumer product

(1) The Secretary may classify a type of consumer product as a covered product if he determines that-

(A) classifying products of such type as covered products is necessary or appropriate to carry out the purposes of this chapter, and

(B) average annual per-household energy use by products of such type is likely to exceed 100 kilowatt-hours (or its Btu equivalent) per year.

(2) For purposes of this subsection:

(A) The term "average annual per-household energy use with respect to a type of product" means the estimated aggregate annual energy use (in kilowatt-hours or the Btu equivalent) of consumer products of such type which are used by

households in the United States, divided by the number of such households which use products of such type.

(B) The Btu equivalent of one kilowatt-hour is 3,412 British thermal units.

(C) The term "household" shall be defined under rules of the Secretary.

42 U.S.C. § 6297

§ 6297. Effect on other law

(a) Preemption of testing and labeling requirements

(1) Effective on March 17, 1987, this part supersedes any State regulation insofar as such State regulation provides at any time for the disclosure of information with respect to any measure of energy consumption or water use of any covered product if—

(A) such State regulation requires testing or the use of any measure of energy consumption, water use, or energy descriptor in any manner other than that provided under section 6293 of this title; or

(B) such State regulation requires disclosure of information with respect to the energy use, energy efficiency, or water use of any covered product other than information required under section 6294 of this title.

(2) For purposes of this section, the following definitions apply:

(A) The term "State regulation" means a law, regulation, or other requirement of a State or its political subdivisions. With respect to showerheads, faucets, water closets, and urinals, such term shall also mean a law, regulation, or other requirement of a river basin commission that has jurisdiction within a State.

(B) The term "river basin commission" means-

(i) a commission established by interstate compact to apportion, store, regulate, or otherwise manage or coordinate the management of the waters of a river basin; and

(ii) a commission established under section 1962b(a) of this title.

(b) General rule of preemption for energy conservation standards before Federal standard becomes effective for product

Effective on March 17, 1987, and ending on the effective date of an energy conservation standard established under section 6295 of this title for any covered product, no State regulation, or revision thereof, concerning the energy efficiency, energy use, or water use of the covered product shall be effective with respect to such covered product, unless the State regulation or revision-

(1)(A) was prescribed or enacted before January 8, 1987, and is applicable to products before January 3, 1988, or in the case of any portion of any regulation which establishes requirements for fluorescent lamp ballasts, was prescribed or enacted before June 28, 1988, or in the case of any portion of any regulation which establishes requirements for fluorescent or incandescent lamps, flow rate requirements for showerheads or faucets, or water use requirements for water closets or urinals, was prescribed or enacted before October 24, 1992; or

(B) in the case of any portion of any regulation that establishes requirements for general service incandescent lamps, intermediate base incandescent lamps, or candelabra base lamps, was enacted or adopted by the State of California or Nevada before December 4, 2007, except that—

(i) the regulation adopted by the California Energy Commission with an effective date of January 1, 2008, shall only be effective until the effective date of the Federal standard for the applicable lamp category under

subparagraphs (A), (B), and (C) of section 6295(i)(1) of this title; and

(ii) the States of California and Nevada may, at any time, modify or adopt a State standard for general service lamps to conform with Federal standards with effective dates no earlier than 12 months prior to the Federal effective dates prescribed under subparagraphs (A), (B), and (C) of section 6295(i)(1) of this title, at which time any prior regulations adopted by the State of California or Nevada shall no longer be effective.

(2) is a State procurement regulation described in subsection (e);

(3) is a regulation described in subsection (f)(1) or is prescribed or enacted in a building code for new construction described in subsection (f)(2);

(4) is a regulation prohibiting the use in pool heaters of a constant burning pilot, or is a regulation (or portion thereof) regulating fluorescent lamp ballasts other than those to which paragraph (5) of section 6295(g) of this title is applicable, or is a regulation (or portion thereof) regulating fluorescent or incandescent lamps other than those to which section 6295(i) of this title is applicable, or is a regulation (or portion thereof) regulating showerheads or faucets other than those to which section 6295(j) of this title is applicable or regulating lavatory faucets (other than metering faucets) for installation in public places, or is a regulation (or portion thereof) regulating water closets or urinals other than those to which section 6295(k) of this title is applicable;

(5) is a regulation described in subsection (d)(5)(B) for which a waiver has been granted under subsection (d);

(6) is a regulation effective on or after January 1, 1992, concerning the energy efficiency or energy use of television sets; or

(7) is a regulation (or portion thereof) concerning the water efficiency or water use of low consumption flushometer valve water closets.

(c) General rule of preemption for energy conservation standards when Federal standard becomes effective for product

Except as provided in section 6295(b)(3)(A)(ii) of this title, subparagraphs (B) and (C) of section 6295(j)(3) of this title, and subparagraphs (B) and (C) of section 6295(k)(3) of this title and effective on the effective date of an energy conservation standard established in or prescribed under section 6295 of this title for any covered product, no State regulation concerning the energy efficiency, energy use, or water use of such covered product shall be effective with respect to such product unless the regulation-

(1) is a regulation described in paragraph (2) or (4) of subsection (b), except that a State regulation (or portion thereof) regulating fluorescent lamp ballasts other than those to which paragraph (5) of section 6295(g) of this title is applicable shall be effective only until the effective date of a standard that is prescribed by the Secretary under paragraph (7) of such section and is applicable to such ballasts, except that a State regulation (or portion thereof) regulating fluorescent or incandescent lamps other than those for which section 6295(i) of this title is applicable shall be effective only until the effective date of a standard that is prescribed by the Secretary and is applicable to such lamps;

(2) is a regulation which has been granted a waiver under subsection (d);

(3) is in a building code for new construction described in subsection (f)(3);

(4) is a regulation concerning the water use of lavatory faucets adopted by the State of New York or the State of Georgia before October 24, 1992;

(5) is a regulation concerning the water use of lavatory or kitchen faucets adopted by the State of Rhode Island prior to October 24, 1992;

(6) is a regulation (or portion thereof) concerning the water efficiency or water use of gravity tank-type low consumption water closets for installation in public places, except that such a regulation shall be effective only until January 1, 1997; or

(7)(A) is a regulation concerning standards for commercial prerinse spray valves adopted by the California Energy Commission before January 1, 2005; or

> (B) is an amendment to a regulation described in subparagraph (A) that was developed to align California regulations with changes in American Society for Testing and Materials Standard F2324;

(8)(A) is a regulation concerning standards for pedestrian modules adopted by the California Energy Commission before January 1, 2005; or

> (B) is an amendment to a regulation described in subparagraph (A) that was developed to align California regulations to changes in the Institute for Transportation Engineers standards, entitled "Performance Specification: Pedestrian Traffic Control Signal Indications"; and

(9) is a regulation concerning metal halide lamp fixtures adopted by the California Energy Commission on or before January 1, 2011, except that-

> (A) if the Secretary fails to issue a final rule within 180 days after the deadlines for rulemakings in section 6295(hh) of this title, notwithstanding any other provision of this section, preemption shall not apply to a regulation concerning metal halide lamp fixtures adopted by the California Energy Commission-

(i) on or before July 1, 2015, if the Secretary fails to meet the deadline specified in section 6295(hh)(2) of this title; or

(ii) on or before July 1, 2022, if the Secretary fails to meet the deadline specified in section 6295(hh)(3) of this title.

(d) Waiver of Federal preemption

(1)(A) Any State or river basin commission with a State regulation which provides for any energy conservation standard or other requirement with respect to energy use, energy efficiency, or water use for any type (or class) of covered product for which there is a Federal energy conservation standard under section 6295 of this title may file a petition with the Secretary requesting a rule that such State regulation become effective with respect to such covered product.

(B) Subject to paragraphs (2) through (5), the Secretary shall, within the period described in paragraph (2) and after consideration of the petition and the comments of interested persons, prescribe such rule if the Secretary finds (and publishes such finding) that the State or river basin commission has established by a preponderance of the evidence that such State regulation is needed to meet unusual and compelling State or local energy or water interests.

(C) For purposes of this subsection, the term "unusual and compelling State or local energy or water interests" means interests which-

(i) are substantially different in nature or magnitude than those prevailing in the United States generally; and

(ii) are such that the costs, benefits, burdens, and reliability of energy or water savings resulting from the State regulation make such regulation preferable or

necessary when measured against the costs, benefits, burdens, and reliability of alternative approaches to energy or water savings or production, including reliance on reasonably predictable market-induced improvements in efficiency of all products subject to the State regulation.

The factors described in clause (ii) shall be evaluated within the context of the State's energy plan and forecast, and, with respect to a State regulation for which a petition has been submitted to the Secretary which provides for any energy conservation standard or requirement with respect to water use of a covered product, within the context of the water supply and groundwater management plan, water quality program, and comprehensive plan (if any) of the State or river basin commission for improving, developing, or conserving a waterway affected by water supply development.

(2) The Secretary shall give notice of any petition filed under paragraph (1)(A) and afford interested persons a reasonable opportunity to make written comments, including rebuttal comments, thereon. The Secretary shall, within the 6-month period beginning on the date on which any such petition is filed, deny such petition or prescribe the requested rule, except that the Secretary may publish a notice in the Federal Register extending such period to a date certain but no longer than one year after the date on which the petition was filed. Such notice shall include the reasons for delay. In the case of any denial of a petition under this subsection, the Secretary shall publish in the Federal Register notice of, and the reasons for, such denial.

(3) The Secretary may not prescribe a rule under this subsection if the Secretary finds (and publishes such finding) that interested persons have established, by a preponderance of the evidence, that such State regulation will significantly burden manufacturing, marketing, distribution, sale, or servicing of the covered product on

a national basis. In determining whether to make such finding, the Secretary shall evaluate all relevant factors, including-

> (A) the extent to which the State regulation will increase manufacturing or distribution costs of manufacturers, distributors, and others;
>
> (B) the extent to which the State regulation will disadvantage smaller manufacturers, distributors, or dealers or lessen competition in the sale of the covered product in the State;
>
> (C) the extent to which the State regulation would cause a burden to manufacturers to redesign and produce the covered product type (or class), taking into consideration the extent to which the regulation would result in a reduction-
>
> > (i) in the current models, or in the projected availability of models, that could be shipped on the effective date of the regulation to the State and within the United States; or
> >
> > (ii) in the current or projected sales volume of the covered product type (or class) in the State and the United States; and
>
> (D) the extent to which the State regulation is likely to contribute significantly to a proliferation of State appliance efficiency requirements and the cumulative impact such requirements would have.

(4) The Secretary may not prescribe a rule under this subsection if the Secretary finds (and publishes such finding) that interested persons have established, by a preponderance of the evidence, that the State regulation is likely to result in the unavailability in the State of any covered product type (or class) of performance characteristics (including reliability), features, sizes, capacities, and volumes that are substantially the same as those generally available in the State at the time of the Secretary's finding, except that the failure of some classes (or types) to meet this criterion shall

not affect the Secretary's determination of whether to prescribe a rule for other classes (or types).

(5) No final rule prescribed by the Secretary under this subsection may-

> (A) permit any State regulation to become effective with respect to any covered product manufactured within three years after such rule is published in the Federal Register or within five years if the Secretary finds that such additional time is necessary due to the substantial burdens of retooling, redesign, or distribution needed to comply with the State regulation; or
>
> (B) become effective with respect to a covered product manufactured before the earliest possible effective date specified in section 6295 of this title for the initial amendment of the energy conservation standard established in such section for the covered product; except that such rule may become effective before such date if the Secretary finds (and publishes such finding) that, in addition to the other requirements of this subsection the State has established, by a preponderance of the evidence, that-
>
> > (i) there exists within the State an energy emergency condition or, if the State regulation provides for an energy conservation standard or other requirement with respect to the water use of a covered product for which there is a Federal energy conservation standard under subsection (j) or (k) of section 6295 of this title, a water emergency condition, which-
> >
> > > (I) imperils the health, safety, and welfare of its residents because of the inability of the State or utilities within the State to provide adequate quantities of gas or electric energy or, in the case of a water emergency condition, water or wastewater treatment, to its residents at less than prohibitive costs; and

(II) cannot be substantially alleviated by the importation of energy or, in the case of a water emergency condition, by the importation of water, or by the use of interconnection agreements; and

(ii) the State regulation is necessary to alleviate substantially such condition.

(6) In any case in which a State is issued a rule under paragraph (1) with respect to a covered product and subsequently a Federal energy conservation standard concerning such product is amended pursuant to section 6295 of this title, any person subject to such State regulation may file a petition with the Secretary requesting the Secretary to withdraw the rule issued under paragraph (1) with respect to such product in such State. The Secretary shall consider such petition in accordance with the requirements of paragraphs (1), (3), and (4), except that the burden shall be on the petitioner to show by a preponderance of the evidence that the rule received by the State under paragraph (1) should be withdrawn as a result of the amendment to the Federal standard. If the Secretary determines that the petitioner has shown that the rule issued by the State should be so withdrawn, the Secretary shall withdraw it.

(e) Exception for certain State procurement standards

Any State regulation which sets forth procurement standards for a State (or political subdivision thereof) shall not be superseded by the provisions of this part if such standards are more stringent than the corresponding Federal energy conservation standards.

(f) Exception for certain building code requirements

(1) A regulation or other requirement enacted or prescribed before January 8, 1987, that is contained in a State or local building code for new construction concerning the energy efficiency or energy use of a covered product is not superseded by this part until the effective date of the energy conservation standard established in or prescribed under section 6295 of this title for such covered product.

(2) A regulation or other requirement, or revision thereof, enacted or prescribed on or after January 8, 1987, that is contained in a State or local building code for new construction concerning the energy efficiency or energy use of a covered product is not superseded by this part until the effective date of the energy conservation standard established in or prescribed under section 6295 of this title for such covered product if the code does not require that the energy efficiency of such covered product exceed-

> (A) the applicable minimum efficiency requirement in a national voluntary consensus standard; or
>
> (B) the minimum energy efficiency level in a regulation or other requirement of the State meeting the requirements of subsection (b)(1) or (b)(5),

whichever is higher.

(3) Effective on the effective date of an energy conservation standard for a covered product established in or prescribed under section 6295 of this title, a regulation or other requirement contained in a State or local building code for new construction concerning the energy efficiency or energy use of such covered product is not superseded by this part if the code complies with all of the following requirements:

> (A) The code permits a builder to meet an energy consumption or conservation objective for a building by selecting items whose combined energy efficiencies meet the objective.
>
> (B) The code does not require that the covered product have an energy efficiency exceeding the applicable energy conservation standard established in or prescribed under section 6295 of this title, except that the required efficiency may exceed such standard up to the level required by a regulation of that State for which the Secretary has issued a rule granting a waiver under subsection (d).

(C) The credit to the energy consumption or conservation objective allowed by the code for installing covered products having energy efficiencies exceeding such energy conservation standard established in or prescribed under section 6295 of this title or the efficiency level required in a State regulation referred to in subparagraph (B) is on a one-for-one equivalent energy use or equivalent cost basis.

(D) If the code uses one or more baseline building designs against which all submitted building designs are to be evaluated and such baseline building designs contain a covered product subject to an energy conservation standard established in or prescribed under section 6295 of this title, the baseline building designs are based on the efficiency level for such covered product which meets but does not exceed such standard or the efficiency level required by a regulation of that State for which the Secretary has issued a rule granting a waiver under subsection (d).

(E) If the code sets forth one or more optional combinations of items which meet the energy consumption or conservation objective, for every combination which includes a covered product the efficiency of which exceeds either standard or level referred to in subparagraph (D), there also shall be at least one combination which includes such covered product the efficiency of which does not exceed such standard or level by more than 5 percent, except that at least one combination shall include such covered product the efficiency of which meets but does not exceed such standard.

(F) The energy consumption or conservation objective is specified in terms of an estimated total consumption of energy (which may be calculated from energy loss- or gain-based codes) utilizing an equivalent amount of energy (which may be specified in units of energy or its equivalent cost).

(G) The estimated energy use of any covered product permitted or required in the code, or used in calculating the objective, is determined using the applicable test procedures

prescribed under section 6293 of this title, except that the State may permit the estimated energy use calculation to be adjusted to reflect the conditions of the areas where the code is being applied if such adjustment is based on the use of the applicable test procedures prescribed under section 6293 of this title or other technically accurate documented procedure.

(4)(A) Subject to subparagraph (B), a State or local government is not required to submit a petition to the Secretary in order to enforce or apply its building code or to establish that the code meets the conditions set forth in this subsection.

(B) If a building code requires the installation of covered products with efficiencies exceeding both the applicable Federal standard established in or prescribed under section 6295 of this title and the applicable standard of such State, if any, that has been granted a waiver under subsection (d), such requirement of the building code shall not be applicable unless the Secretary has granted a waiver for such requirement under subsection (d).

(g) No warranty

Any disclosure with respect to energy use, energy efficiency, or estimated annual operating cost which is required to be made under the provisions of this part shall not create an express or implied warranty under State or Federal law that such energy efficiency will be achieved or that such energy use or estimated annual operating cost will not be exceeded under conditions of actual use.

(Pub. L. 94–163, title III, §327, Dec. 22, 1975, 89 Stat. 926; Pub. L. 95–619, title IV, §424, Nov. 9, 1978, 92 Stat. 3263; Pub. L. 100–12, §7, Mar. 17, 1987, 101 Stat. 117; Pub. L. 100–357, §2(f), June 28, 1988, 102 Stat. 674; Pub. L. 102–486, title I, §123(h), Oct. 24, 1992, 106 Stat. 2829; Pub. L. 109–58, title I, §135(d), Aug. 8, 2005, 119 Stat. 634; Pub. L. 110–140, title III, §§321(d), 324(f), Dec. 19, 2007, 121 Stat. 1585, 1594; Pub. L. 112–210, §10(a)(9), Dec. 18, 2012, 126 Stat. 1524.)

42 U.S.C. § 6311

§ 6311. Definitions

For purposes of this part—

(1) The term "covered equipment" means one of the following types of industrial equipment:

(A) Electric motors and pumps.

(B) Small commercial package air conditioning and heating equipment.

(C) Large commercial package air conditioning and heating equipment.

(D) Very large commercial package air conditioning and heating equipment.

(E) Commercial refrigerators, freezers, and refrigerator-freezers.

(F) Automatic commercial ice makers.

(G) Walk-in coolers and walk-in freezers.

(H) Commercial clothes washers.

(I) Packaged terminal air-conditioners and packaged terminal heat pumps.

(J) Warm air furnaces and packaged boilers.

(K) Storage water heaters, instantaneous water heaters, and unfired hot water storage tanks.

(L) Any other type of industrial equipment which the Secretary classifies as covered equipment under section 6312(b) of this title.

(2)(A) The term "industrial equipment" means any article of equipment referred to in subparagraph (B) of a type-

(i) which in operation consumes, or is designed to consume, energy;

(ii) which, to any significant extent, is distributed in commerce for industrial or commercial use; and

(iii) which is not a "covered product" as defined in section 6291(a)(2) of this title, other than a component of a covered product with respect to which there is in effect a determination under section 6312(c) of this title;

without regard to whether such article is in fact distributed in commerce for industrial or commercial use.

(B) The types of equipment referred to in this subparagraph (in addition to electric motors and pumps, commercial package air conditioning and heating equipment, commercial refrigerators, freezers, and refrigerator-freezers, automatic commercial ice makers, commercial clothes washers, packaged terminal air-conditioners, packaged terminal heat pumps, warm air furnaces, packaged boilers, storage water heaters, instantaneous water heaters, and unfired hot water storage tanks) are as follows:

(i) compressors;

(ii) fans;

(iii) blowers;

(iv) refrigeration equipment;

(v) electric lights and lighting power supply circuits;

(vi) electrolytic equipment;

(vii) electric arc equipment;

(viii) steam boilers;

(ix) ovens;

(x) kilns;

(xi) evaporators;

(xii) dryers; and

(xiii) other motors.

(3) The term "energy efficiency" means the ratio of the useful output of services from an article of industrial equipment to the energy use by such article, determined in accordance with test procedures under section 6314 of this title.

(4) The term "energy use" means the quantity of energy directly consumed by an article of industrial equipment at the point of use, determined in accordance with test procedures established under section 6314 of this title.

[. . .]

(7) The terms "energy", "manufacture", "import", "importation", "consumer product", "distribute in commerce", "distribution in commerce", and "commerce" have the same meaning as is given such terms in section 6291 of this title.

(8)(A) The term "commercial package air conditioning and heating equipment" means air-cooled, water-cooled, evaporatively-cooled, or water source (not including ground water source) electrically operated, unitary central air conditioners and central air conditioning heat pumps for commercial application.

(B) The term "small commercial package air conditioning and heating equipment" means commercial package air conditioning and heating equipment that is rated below 135,000 Btu per hour (cooling capacity).

(C) The term "large commercial package air conditioning and heating equipment" means commercial package air conditioning and heating equipment that is rated-

(i) at or above 135,000 Btu per hour; and

(ii) below 240,000 Btu per hour (cooling capacity).

(D) The term "very large commercial package air conditioning and heating equipment" means commercial package air conditioning and heating equipment that is rated-

(i) at or above 240,000 Btu per hour; and

(ii) below 760,000 Btu per hour (cooling capacity).

(9)(A) The term "commercial refrigerator, freezer, and refrigerator-freezer" means refrigeration equipment that-

(i) is not a consumer product (as defined in section 6291 of this title);

(ii) is not designed and marketed exclusively for medical, scientific, or research purposes;

(iii) operates at a chilled, frozen, combination chilled and frozen, or variable temperature;

(iv) displays or stores merchandise and other perishable materials horizontally, semivertically, or vertically;

(v) has transparent or solid doors, sliding or hinged doors, a combination of hinged, sliding, transparent, or solid doors, or no doors;

(vi) is designed for pull-down temperature applications or holding temperature applications; and

(vii) is connected to a self-contained condensing unit or to a remote condensing unit.

(B) The term "holding temperature application" means a use of commercial refrigeration equipment other than a pull-down temperature application, except a blast chiller or freezer.

(C) The term "integrated average temperature" means the average temperature of all test package measurements taken during the test.

(D) The term "pull-down temperature application" means a commercial refrigerator with doors that, when fully loaded with 12 ounce beverage cans at 90 degrees F, can cool those beverages to an average stable temperature of 38 degrees F in 12 hours or less.

(E) The term "remote condensing unit" means a factory-made assembly of refrigerating components designed to compress and liquefy a specific refrigerant that is remotely located from the refrigerated equipment and consists of one or more refrigerant compressors, refrigerant condensers, condenser fans and motors, and factory supplied accessories.

(F) The term "self-contained condensing unit" means a factory-made assembly of refrigerating components designed to compress and liquefy a specific refrigerant that is an integral part of the refrigerated equipment and consists of one or more refrigerant compressors, refrigerant condensers, condenser fans and motors, and factory supplied accessories.

(10)(A) The term "packaged terminal air conditioner" means a wall sleeve and a separate unencased combination of heating and cooling assemblies specified by the builder and intended for mounting through the wall. It includes a prime source of refrigeration, separable outdoor louvers, forced ventilation, and heating availability by builder's choice of hot water, steam, or electricity.

(B) The term "packaged terminal heat pump" means a packaged terminal air conditioner that utilizes reverse cycle refrigeration as its prime heat source and should have supplementary heat source available to builders with the choice of hot water, steam, or electric resistant heat.

(11)(A) The term "warm air furnace" means a self-contained oil- or gas-fired furnace designed to supply heated air through ducts to spaces that

require it and includes combination warm air furnace/electric air conditioning units but does not include unit heaters and duct furnaces.

(B) The term "packaged boiler" means a boiler that is shipped complete with heating equipment, mechanical draft equipment, and automatic controls; usually shipped in one or more sections.

(12)(A) The term "storage water heater" means a water heater that heats and stores water within the appliance at a thermostatically controlled temperature for delivery on demand. Such term does not include units with an input rating of 4000 Btu per hour or more per gallon of stored water.

(B) The term "instantaneous water heater" means a water heater that has an input rating of at least 4000 Btu per hour per gallon of stored water.

(C) The term "unfired hot water storage tank" means a tank used to store water that is heated externally.

(13) Electric motor.—

(A) General purpose electric motor (subtype I).—The term "general purpose electric motor (subtype I)" means any motor that meets the definition of "General Purpose" as established in the final rule issued by the Department of Energy entitled "Energy Efficiency Program for Certain Commercial and Industrial Equipment: Test Procedures, Labeling, and Certification Requirements for Electric Motors" (10 CFR 431), as in effect on December 19, 2007.

(B) General purpose electric motor (subtype II).—The term "general purpose electric motor (subtype II)" means motors incorporating the design elements of a general purpose electric motor (subtype I) that are configured as 1 of the following:

(i) A U-Frame Motor.

(ii) A Design C Motor.

(iii) A close-coupled pump motor.

(iv) A Footless motor.

(v) A vertical solid shaft normal thrust motor (as tested in a horizontal configuration).

(vi) An 8-pole motor (900 rpm).

(vii) A poly-phase motor with voltage of not more than 600 volts (other than 230 or 460 volts [1].

(C) The term "definite purpose motor" means any motor designed in standard ratings with standard operating characteristics or standard mechanical construction for use under service conditions other than usual or for use on a particular type of application and which cannot be used in most general purpose applications.

(D) The term "special purpose motor" means any motor, other than a general purpose motor or definite purpose motor, which has special operating characteristics or special mechanical construction, or both, designed for a particular application.

(E) The term "open motor" means a motor having ventilating openings which permit passage of external cooling air over and around the windings of the machine.

(F) The term "enclosed motor" means a motor so enclosed as to prevent the free exchange of air between the inside and outside of the case but not sufficiently enclosed to be termed airtight.

(G) The term "small electric motor" means a NEMA general purpose alternating current single-speed induction motor, built in a two-digit frame number series in accordance with NEMA Standards Publication MG1–1987.

(H) The term "efficiency" when used with respect to an electric motor means the ratio of an electric motor's useful power output to its total power input, expressed in percentage.

[1] So in original. A closing parenthesis should probably follow "volts".

(I) The term "nominal full load efficiency" means the average efficiency of a population of motors of duplicate design as determined in accordance with NEMA Standards Publication MG1–1987.

(14) The term "ASHRAE" means the American Society of Heating, Refrigerating, and Air Conditioning Engineers.

(15) The term "IES" means the Illuminating Engineering Society of North America.

(16) The term "NEMA" means the National Electrical Manufacturers Association.

(17) The term "IEEE" means the Institute of Electrical and Electronics Engineers.

(18) The term "energy conservation standard" means-

(A) a performance standard that prescribes a minimum level of energy efficiency or a maximum quantity of energy use for a product; or

(B) a design requirement for a product.

(19) The term "automatic commercial ice maker" means a factory-made assembly (not necessarily shipped in one package) that-

(A) consists of a condensing unit and ice-making section operating as an integrated unit, with means for making and harvesting ice; and

(B) may include means for storing ice, dispensing ice, or storing and dispensing ice.

(20) Walk-in cooler; walk-in freezer.—

(A) In general.—The terms "walk-in cooler" and "walk-in freezer" mean an enclosed storage space refrigerated to temperatures, respectively, above, and at or below 32 degrees Fahrenheit that can

be walked into, and has a total chilled storage area of less than 3,000 square feet.

(B) Exclusion.—The terms "walk-in cooler" and "walk-in freezer" do not include products designed and marketed exclusively for medical, scientific, or research purposes.

(21) The term "commercial clothes washer" means a soft-mount front-loading or soft-mount top-loading clothes washer that—

(A) has a clothes container compartment that—

(i) for horizontal-axis clothes washers, is not more than 3.5 cubic feet; and

(ii) for vertical-axis clothes washers, is not more than 4.0 cubic feet; and

(B) is designed for use in—

(i) applications in which the occupants of more than one household will be using the clothes washer, such as multi-family housing common areas and coin laundries; or

(ii) other commercial applications.

(22) [2] The term "harvest rate" means the amount of ice (at 32 degrees F) in pounds produced per 24 hours.

(22) [2] Single package vertical air conditioner.—The term "single package vertical air conditioner" means air-cooled commercial package air conditioning and heating equipment that—

(A) is factory-assembled as a single package that—

(i) has major components that are arranged vertically;

[2] So in original. Two pars. (22) were enacted.

(ii) is an encased combination of cooling and optional heating components; and

(iii) is intended for exterior mounting on, adjacent interior to, or through an outside wall;

(B) is powered by a single- or 3-phase current;

(C) may contain 1 or more separate indoor grilles, outdoor louvers, various ventilation options, indoor free air discharges, ductwork, well plenum, or sleeves; and

(D) has heating components that may include electrical resistance, steam, hot water, or gas, but may not include reverse cycle refrigeration as a heating means.

(23) Single package vertical heat pump.—The term "single package vertical heat pump" means a single package vertical air conditioner that—

(A) uses reverse cycle refrigeration as its primary heat source; and

(B) may include secondary supplemental heating by means of electrical resistance, steam, hot water, or gas.

42 U.S.C. § 6316

§ 6316. Administration, penalties, enforcement, and preemption

(a) The provisions of section 6296(a), (b), and (d) of this title, the provisions of subsections (l) through (s) of section 6295 of this title, and section [1] 6297 through 6306 of this title shall apply with respect to this part (other than the equipment specified in subparagraphs (B), (C), (D), (I), (J), and (K) of section 6311(1) of this title) to the same extent and in

[1] So in original. Probably should be "sections".

the same manner as they apply in part A. In applying such provisions for the purposes of this part—

(1) references to sections 6293, 6294, and 6295 of this title shall be considered as references to sections 6314, 6315, and 6313 of this title, respectively;

(2) references to "this part" shall be treated as referring to part A-1;

(3) the term "equipment" shall be substituted for the term "product";

(4) the term "Secretary" shall be substituted for "Commission" each place it appears (other than in section 6303(c) of title);

(5) section 6297(a) of this title shall be applied, in the case of electric motors, as if the National Appliance Energy Conservation Act of 1987 was the Energy Policy Act of 1992;

(6) section 6297(b)(1) of this title shall be applied as if electric motors were fluorescent lamp ballasts and as if the National Appliance Energy Conservation Amendments of 1988 were the Energy Policy Act of 1992;

(7) section 6297(b)(4) of this title shall be applied as if electric motors were fluorescent lamp ballasts and as if paragraph (5) of section 6295(g) of this title were section 6313 of this title;

(8) notwithstanding any other provision of law, a regulation or other requirement adopted by a State or subdivision of a State contained in a State or local building code for new construction concerning the energy efficiency or energy use of an electric motor covered under this part is not superseded by the standards for such electric motor established or prescribed under section 6313(b) of this title if such regulation or requirement is identical to the standards established or prescribed under such section;

(9) in the case of commercial clothes washers, section 6297(b)(1) of this title shall be applied as if the National Appliance Energy Conservation Act of 1987 was the Energy Policy Act of 2005; and

(10) section 6297 of this title shall apply with respect to the equipment described in section 6311(1)(L) of this title beginning on the date on which a final rule establishing an energy conservation standard is issued by the Secretary, except that any State or local standard prescribed or enacted for the equipment before the date on which the final rule is issued shall not be preempted until the energy conservation standard established by the Secretary for the equipment takes effect.

(b)(1) The provisions of section 6295(p)(4) of this title, section 6296(a), (b), and (d) of this title, section 6297(a) of this title, and sections 6298 through 6306 of this title shall apply with respect to the equipment specified in subparagraphs (B), (C), (D), (I), (J), and (K) of section 6311(1) of this title to the same extent and in the same manner as they apply in part A. In applying such provisions for the purposes of such equipment, paragraphs (1), (2), (3), and (4) of subsection (a) shall apply.

(2)(A) A standard prescribed or established under section 6313(a) of this title shall, beginning on the effective date of such standard, supersede any State or local regulation concerning the energy efficiency or energy use of a product for which a standard is prescribed or established pursuant to such section.

(B) Notwithstanding subparagraph (A), a standard prescribed or established under section 6313(a) of this title shall not supersede a standard for such a product contained in a State or local building code for new construction if—

(i) the standard in the building code does not require that the energy efficiency of such product exceed the applicable minimum energy efficiency requirement in amended ASHRAE/IES Standard 90.1; and

(ii) the standard in the building code does not take effect prior to the effective date of the applicable minimum energy efficiency requirement in amended ASHRAE/IES Standard 90.1.

(C) Notwithstanding subparagraph (A), a standard prescribed or established under section 6313(a) of this title shall not supersede the standards established by the State of California set forth in Table C-6, California Code of Regulations, Title 24, Part 2, Chapter 2-53, for water-source heat pumps below 135,000 Btu per hour (cooling capacity) that become effective on January 1, 1993.

(D) Notwithstanding subparagraph (A), a standard prescribed or established under section 6313(a) of this title shall not supersede a State regulation which has been granted a waiver by the Secretary. The Secretary may grant a waiver pursuant to the terms, conditions, criteria, procedures, and other requirements specified in section 6297(d) of this title.

(c) With respect to any electric motor to which standards are applicable under section 6313(b) of this title, the Secretary shall require manufacturers to certify, through an independent testing or certification program nationally recognized in the United States, that such motor meets the applicable standard.

(d)(1) Except as provided in paragraphs (2) and (3), section 6297 of this title shall apply with respect to very large commercial package air conditioning and heating equipment to the same extent and in the same manner as section 6297 of this title applies under part A on August 8, 2005.

(2) Any State or local standard issued before August 8, 2005, shall not be preempted until the standards established under section 6313(a)(9) of this title take effect on January 1, 2010.

(e)(1)(A) Subsections (a), (b), and (d) of section 6296 of this title, subsections (m) through (s) of section 6295 of this title, and sections 6298 through 6306 of this title shall apply with respect to commercial refrigerators, freezers, and refrigerator-freezers to the same extent and in the same manner as those provisions apply under part A.

(B) In applying those provisions to commercial refrigerators, freezers, and refrigerator-freezers, paragraphs (1), (2), (3), and (4) of subsection (a) shall apply.

(2)(A) Section 6297 of this title shall apply to commercial refrigerators, freezers, and refrigerator-freezers for which standards are established under paragraphs (2) and (3) of section 6313(c) of this title to the same extent and in the same manner as those provisions apply under part A on August 8, 2005, except that any State or local standard issued before August 8, 2005, shall not be preempted until the standards established under paragraphs (2) and (3) of section 6313(c) of this title take effect.

(B) In applying section 6297 of this title in accordance with subparagraph (A), paragraphs (1), (2), and (3) of subsection (a) shall apply.

(3)(A) Section 6297 of this title shall apply to commercial refrigerators, freezers, and refrigerator-freezers for which standards are established under section 6313(c)(4) of this title to the same extent and in the same manner as the provisions apply under part A on the date of publication of the final rule by the Secretary, except that any State or local standard issued before the date of publication of the final rule by the Secretary shall not be preempted until the standards take effect.

(B) In applying section 6297 of this title in accordance with subparagraph (A), paragraphs (1), (2), and (3) of subsection (a) shall apply.

(4)(A) If the Secretary does not issue a final rule for a specific type of commercial refrigerator, freezer, or refrigerator-freezer within the time frame specified in section 6313(c)(5) of this title, subsections (b) and (c) of section 6297 of this title shall not apply to that specific type of refrigerator, freezer, or refrigerator-freezer for the period beginning on the date that is 2 years after the scheduled date for a final rule and ending on the date on which the Secretary publishes a final rule covering the specific type of refrigerator, freezer, or refrigerator-freezer.

(B) Any State or local standard issued before the date of publication of the final rule shall not be preempted until the final rule takes effect.

(5)(A) In the case of any commercial refrigerator, freezer, or refrigerator-freezer to which standards are applicable under paragraphs (2) and (3) of section 6313(c) of this title, the Secretary shall require manufacturers to certify, through an independent, nationally recognized testing or certification program, that the commercial refrigerator, freezer, or refrigerator-freezer meets the applicable standard.

(B) The Secretary shall, to the maximum extent practicable, encourage the establishment of at least 2 independent testing and certification programs.

(C) As part of certification, information on equipment energy use and interior volume shall be made available to the Secretary.

(f)(1)(A)(i) Except as provided in clause (ii), section 6297 of this title shall apply to automatic commercial ice makers for which standards have been established under section 6313(d)(1) of this title to the same extent and in the same manner as the section applies under part A on August 8, 2005.

(ii) Any State standard issued before August 8, 2005, shall not be preempted until the standards established under section 6313(d)(1) of this title take effect.

(B) In applying section 6297 of this title to the equipment under subparagraph (A), paragraphs (1), (2), and (3) of subsection (a) shall apply.

(2)(A)(i) Except as provided in clause (ii), section 6297 of this title shall apply to automatic commercial ice makers for which standards have been established under section 6313(d)(2) of this title to the same extent and in the same manner as the section

applies under part A on the date of publication of the final rule by the Secretary.

(ii) Any State standard issued before the date of publication of the final rule by the Secretary shall not be preempted until the standards established under section 6313(d)(2) of this title take effect.

(B) In applying section 6297 of this title in accordance with subparagraph (A), paragraphs (1), (2), and (3) of subsection (a) shall apply.

(3)(A) If the Secretary does not issue a final rule for a specific type of automatic commercial ice maker within the time frame specified in section 6313(d) of this title, subsections (b) and (c) of section 6297 of this title shall no longer apply to the specific type of automatic commercial ice maker for the period beginning on the day after the scheduled date for a final rule and ending on the date on which the Secretary publishes a final rule covering the specific type of automatic commercial ice maker.

(B) Any State standard issued before the publication of the final rule shall not be preempted until the standards established in the final rule take effect.

(4)(A) The Secretary shall monitor whether manufacturers are reducing harvest rates below tested values for the purpose of bringing non-complying equipment into compliance.

(B) If the Secretary finds that there has been a substantial amount of manipulation with respect to harvest rates under subparagraph (A), the Secretary shall take steps to minimize the manipulation, such as requiring harvest rates to be within 5 percent of tested values.

(g)(1)(A) If the Secretary does not issue a final rule for commercial clothes washers within the timeframe specified in section 6313(e)(2) of this title, subsections (b) and (c) of section 6297 of this title shall not apply to commercial clothes washers for the period beginning on the day after the

scheduled date for a final rule and ending on the date on which the Secretary publishes a final rule covering commercial clothes washers.

(B) Any State or local standard issued before the date on which the Secretary publishes a final rule shall not be preempted until the standards established under section 6313(e)(2) of this title take effect.

(2) The Secretary shall undertake an educational program to inform owners of laundromats, multifamily housing, and other sites where commercial clothes washers are located about the new standard, including impacts on washer purchase costs and options for recovering those costs through coin collection.

(h) Walk-in coolers and walk-in freezers.—

(1) Covered types.—

(A) Relationship to other law.—

(i) In general.—Except as otherwise provided in this subsection, section 6297 of this title shall apply to walk-in coolers and walk-in freezers for which standards have been established under paragraphs (1), (2), and (3) of section 6313(f) of this title to the same extent and in the same manner as the section applies under part A on December 19, 2007.

(ii) State standards.—Any State standard prescribed before December 19, 2007, shall not be preempted until the standards established under paragraphs (1) and (2) of section 6313(f) of this title take effect.

(B) Administration.—In applying section 6297 of this title to equipment under subparagraph (A), paragraphs (1), (2), and (3) of subsection (a) shall apply.

(2) Final rule not timely.—

(A) In general.—If the Secretary does not issue a final rule for a specific type of walk-in cooler or walk-in freezer within the timeframe established under paragraph (4) or (5) of section 6313(f) of this title, subsections (b) and (c) of section 6297 of this title shall no longer apply to the specific type of walk-in cooler or walk-in freezer during the period-

(i) beginning on the day after the scheduled date for a final rule; and

(ii) ending on the date on which the Secretary publishes a final rule covering the specific type of walk-in cooler or walk-in freezer.

(B) State standards.—Any State standard issued before the publication of the final rule shall not be preempted until the standards established in the final rule take effect.

(3) California.—Any standard issued in the State of California before January 1, 2011, under title 20 of the California Code of Regulations, that refers to walk-in coolers and walk-in freezers, for which standards have been established under paragraphs (1), (2), and (3) of section 6313(f) of this title, shall not be preempted until the standards established under section 6313(f)(4) of this title take effect.

49 U.S.C. § 60105

§ 60105. State pipeline safety program certifications

(a) General Requirements and Submission.—Except as provided in this section and sections 60114 and 60121 of this title, the Secretary of Transportation may not prescribe or enforce safety standards and practices for an intrastate pipeline facility or intrastate pipeline transportation to the extent that the safety standards and practices are regulated by a State authority (including a municipality if the standards and practices apply to intrastate gas pipeline transportation) that submits to the Secretary annually a certification for the facilities and transportation that complies with subsections (b) and (c) of this section.

(b) Contents.—Each certification submitted under subsection (a) of this section shall state that the State authority-

(1) has regulatory jurisdiction over the standards and practices to which the certification applies;

(2) has adopted, by the date of certification, each applicable standard prescribed under this chapter or, if a standard under this chapter was prescribed not later than 120 days before certification, is taking steps to adopt that standard;

(3) is enforcing each adopted standard through ways that include inspections conducted by State employees meeting the qualifications the Secretary prescribes under section 60107(d)(1)(C) of this title;

(4) is encouraging and promoting the establishment of a program designed to prevent damage by demolition, excavation, tunneling, or construction activity to the pipeline facilities to which the certification applies that subjects persons who violate the applicable requirements of that program to civil penalties and other enforcement actions that are substantially the same as are provided under this chapter, and addresses the elements in section 60134(b);

(5) may require record maintenance, reporting, and inspection substantially the same as provided under section 60117 of this title;

(6) may require that plans for inspection and maintenance under section 60108 (a) and (b) of this title be filed for approval;

(7) may enforce safety standards of the authority under a law of the State by injunctive relief and civil penalties substantially the same as provided under sections 60120 and 60122(a)(1) and (b)-(f) of this title;

(8) has the capability to sufficiently review and evaluate the adequacy of the plans and manuals described in section 60109(e)(7)(C)(i); and

(9) has a sufficient number of employees described in paragraph (3) to ensure safe operations of pipeline facilities, updating the State Inspection Calculation Tool to take into account factors including-

(A) the number of miles of natural gas and hazardous liquid pipelines in the State, including the number of miles of cast iron and bare steel pipelines;

(B) the number of services in the State;

(C) the age of the gas distribution system in the State; and

(D) environmental factors that could impact the integrity of the pipeline, including relevant geological issues.

(c) Reports.—(1) Each certification submitted under subsection (a) of this section shall include a report that contains-

(A) the name and address of each person to whom the certification applies that is subject to the safety jurisdiction of the State authority;

(B) each accident or incident reported during the prior 12 months by that person involving a fatality, personal injury requiring hospitalization, or property damage or loss of more than an amount the Secretary establishes (even if the person sustaining the fatality, personal injury, or property damage or loss is not subject to the safety jurisdiction of the authority), any other accident the authority considers significant, and a summary of the investigation by the authority of the cause and circumstances surrounding the accident or incident;

(C) the record maintenance, reporting, and inspection practices conducted by the authority to enforce compliance with safety standards prescribed under this chapter to which the certification applies, including the number of inspections of pipeline facilities the authority made during the prior 12 months; and

(D) any other information the Secretary requires.

(2) The report included in the first certification submitted under subsection (a) of this section is only required to state information available at the time of certification.

[. . . .]

LOCAL ORDINANCES

Berkeley Municipal Code §§ 12.80.010 *et seq.*

12.80.010 Findings and Purpose.

In addition to the findings set forth in Resolution No. 67,736-N.S., the Council finds and expressly declares as follows:

A. Scientific evidence has established that natural gas combustion, procurement and transportation produce significant greenhouse gas emissions that contribute to global warming and climate change.

B. The following addition to the Berkeley Municipal Code is reasonably necessary because of local climatic, geologic and topographical conditions as listed below:

(1) As a coastal city located on the San Francisco Bay, Berkeley is vulnerable to sea level rise, and human activities releasing greenhouse gases into the atmosphere cause increases in worldwide average temperature, which contribute to melting of glaciers and thermal expansion of ocean water--resulting in rising sea levels.

(2) Berkeley is already experiencing the repercussions of excessive greenhouse gas emissions as rising sea levels threaten the City's shoreline and infrastructure, 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.

(3) Berkeley is situated along a wildland-urban interface and is extremely vulnerable to wildfires and firestorms, and human activities releasing greenhouse gases into the atmosphere cause increases in worldwide average temperature, drought conditions, vegetative fuel, and length of fire seasons.

(4) Structures in Berkeley are located along or near the Hayward fault, which is likely to produce a large earthquake in the Bay Area.

C. The following addition to the Berkeley Municipal Code is also 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.

D. The people of Berkeley, as codified through Measure G (Resolution No. 63,518-N.S.), the City of Berkeley Climate Action Plan (Resolution No. 64,480-N.S.), and Berkeley Climate Emergency Declaration (Resolution No. 68,486-N.S.) all recognize that rapid, far-reaching and unprecedented changes in all aspects of society are required to limit global warming and the resulting environmental threat posed by climate change, including the prompt phasing out of natural gas as a fuel for heating and cooling infrastructure in new buildings.

E. Substitute electric heating and cooling infrastructure in new buildings fueled by less greenhouse gas intensive electricity is linked to significantly lower greenhouse gas emissions and is cost competitive because of the cost savings associated with all-electric designs that avoid new gas infrastructure.

F. All-electric building design benefits the health, welfare, and resiliency of Berkeley and its residents.

G. The most cost-effective time to integrate electrical infrastructure is in the design phase of a building project because building systems and spaces can be designed to optimize the performance of electrical systems and the project can take full advantage of avoided costs and space requirements from the elimination of natural gas piping and venting for combustion air safety.

H. It is the intent of the council to eliminate obsolete natural gas infrastructure and associated greenhouse gas emissions in new buildings where all-electric infrastructure can be most practicably integrated, thereby reducing the environmental and health hazards produced by the consumption and transportation of natural gas.

12.80.020 Applicability.

A. The requirements of this Chapter shall apply to Use Permit or Zoning Certificate applications submitted on or after the effective date of this Chapter for all Newly Constructed Buildings proposed to be located in whole or in part within the City.

B. The requirements of this Chapter shall not apply to the use of portable propane appliances for outdoor cooking and heating.

C. This chapter shall in no way be construed as amending California Energy Code requirements under California Code of Regulations, Title 24, Part 6, nor as requiring the use or installation of any specific appliance or system as a condition of approval.

D. The requirements of this Chapter shall be incorporated into conditions of approval for Use Permits or Zoning Certificates under BMC Chapter 23B.

12.80.030 Definitions.

A. "Applicant" shall mean an applicant for a Use Permit or Zoning Certification under Chapter 23B,

B. "Energy Code" shall mean the California Energy Code as amended and adopted in BMC Chapter 19.36.

C. "Greenhouse Gas Emissions" mean gases that trap heat in the atmosphere.

D. "Natural Gas" shall have the same meaning as "Fuel Gas" as defined in California Plumbing Code and Mechanical Code.

E. "Natural Gas Infrastructure" shall be defined as fuel gas piping, other than service pipe, in or in connection with a building, structure or within the property lines of premises, extending from the point of delivery at the gas meter as specified in the California Mechanical Code and Plumbing Code.

F. "Newly Constructed Building" shall be defined as a building that has never before been used or occupied for any purpose.

G. "Use Permit" shall have the same meaning as specified in Chapter 23B.32.

H. "Zoning Certificate" shall have the same meaning as specified in Chapter 23B.20.

12.80.040 Prohibited Natural Gas Infrastructure in Newly Constructed Buildings.

A. Natural Gas Infrastructure shall be prohibited in Newly Constructed Buildings.

1. Exception: Natural Gas Infrastructure may be permitted in a Newly Constructed Building if the Applicant establishes that it is not physically feasible to construct the building without Natural Gas Infrastructure. For purposes of this exception, "physically feasible" to construct the building means either an all-electric prescriptive compliance approach is available for the building under the Energy Code or the building is able to achieve the performance compliance standards under the Energy Code using commercially available technology and an approved calculation method.

B. To the extent that Natural Gas Infrastructure is permitted, it shall be permitted to extend to any system, device, or appliance within a building for which an equivalent all-electric system or design is not available.

C. Newly Constructed Buildings shall nonetheless be required at a minimum to have sufficient electric capacity, wiring and conduit to facilitate future full building electrification.

D. The requirements of this section shall be deemed objective planning standards under Government Code section 65913.4 and objective development standards under Government Code section 65589.5.

12.80.050 Public Interest Exemption.

A. Notwithstanding the requirements of this Chapter and the Greenhouse Gas Emissions and other public health and safety hazards associated with Natural Gas Infrastructure, minimally necessary and specifically tailored Natural Gas Infrastructure may be allowed in a Newly Constructed Building provided that the entitling body establishes that the use serves the public interest. In determining whether the construction of Natural Gas Infrastructure is in the public interest, the City may consider:

1. The availability of alternative technologies or systems that do not use natural gas;

2. Any other impacts that the decision to allow Natural Gas Infrastructure may have on the health, safety, or welfare of the public.

B. If the installation of Natural Gas Infrastructure is granted under a public interest exemption, the Newly Constructed Buildings shall nonetheless be required at the minimum to have sufficient electric capacity, wiring and conduit to facilitate future full building electrification.

12.80.060 Periodic Review of Ordinance.

The City shall review the requirements of this ordinance every 18 months for consistency with the California Energy Code and the Energy Commission's mid-cycle amendments and triennial code adoption cycle as applicable.

12.80.070 Severability.

If any word, phrase, sentence, part, section, subsection, or other portion of this Chapter, or any application thereof to any person or circumstance is declared void, unconstitutional, or invalid for any reason, then such word, phrase, sentence, part, section, subsection, or other portion, or the prescribed application thereof, shall be severable, and the remaining provisions of this Chapter, and all applications thereof, not having been declared void, unconstitutional or invalid, shall remain in full force and effect. The City Council hereby declares that it would have passed this

title, and each section, subsection, sentence, clause and phrase of this Chapter, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases is declared invalid or unconstitutional.

12.80.080 Effective Date.

The provisions of this chapter shall become effective on January 1, 2020.

FEDERAL LEGISLATIVE HISTORY

H.R. Rep. No. 94-340 (1975)

[. . .]

[Page 20]

V. EXPLANATION OF BILL'S MAJOR PROVISIONS

[. . .]

[Page 94]

J. ENERGY LABELING AND EFFICIENCY STANDARDS FOR CONSUMER OTHER THAN AUTOMOBILES (TITLE V, PART B)

BACKGROUND

In 1970, net energy consumption in the residential sector represented 17 percent of total net energy consumption in the United States. Ninety-five percent of residential energy use is accounted for by space heating (68%), water heating (15%), cooking (5%), refrigeration (3%), clothes drying (2%), and air conditioning (2%). Improving the energy efficiency of major appliances can result in major reductions in net energy consumption, and because of extensive residential use of electricity, also in primary energy consumption.

[Page 95]

The President proposed, in his January 15, 1975, message to Congress, to achieve by 1980 a 20% reduction in the energy usage of new appliances relative to their output. This, in the Administration's view, could be achieved through a combination of an appliance labeling program, plus voluntary efforts of manufacturers. Other information available to the Committee indicates that the 20 percent goal is lower than the level which is attainable by 1980. A Federal Energy Administration working paper (which appears as appendix VII to this report) indicates that a 29% target is attainable for major appliances (excluding furnaces and central air conditioning). As noted below, the Committee settled on a 25% goal for 1980 as a reasonable level of improvement for major energy consuming consumer products.

Part B of title V of the bill establishes a program under which test procedures, and energy labeling procedures will be established for consumer products other than automobiles, and under which energy efficiency standards may (and in certain cases, must) be prescribed for major energy consuming household products.

The primary focus of the Committee bill, at least in the first few years of the program, will be energy labeling. As noted below, it is the Committee's hope that voluntary efforts by manufacturers and better consumer information will make energy efficiency standards unnecessary; however, should the labeling program not suffice, energy efficiency standards should be utilized to achieve the goals of the legislation.

Under Section 554, the Secretary is directed to establish separate energy efficiency improvement targets for each type of major energy consuming product. These targets would be designed to achieve an overall 25 percent improvement goal for all of these products. If any type of product does not achieve its goal, the Secretary is required to commence a proceeding to establish an energy efficiency standard for that type of product.

[. . . .]

(footnote omitted)

H.R. Rep. No. 100-11 (1987)

[. . .]

[Page 19]

DISCUSSION OF KEY PROVISIONS

[. . .]

[Page 23]

Section 7. Effect on Other Law

Overview.—Section 7 provides for preemption of certain State and local regulations that address the energy consumption of covered products. In overall form, the section follows substantially the preemption requirements in current EPCA. Thus, the section continues the current rules for preemption with respect to certain State testing and labeling requirements applicable to covered prod-***[Page 24]***ucts that are inconsistent with Federal law. It also continues the basic concept of preempting State energy efficiency standards allowing and waivers of preemption under certain circumstances.

Preemption applies to an entire product type as listed in the coverage section of the Act. For example, State standards for electric and gas kitchen ranges and ovens are preempted.

H.R. 87 significantly changes the criteria to be applied by the Secretary in determining whether to grant State petitions for waivers of preemption. The waiver provisions in Section 7 are intended to give DOE clearer direction and to give the States and other interested persons clearer notice of what the provisions entail. The combination of the new preemption provisions and the Federal standards mandated by Section 5 provide an appropriate solution to the problems caused by the absence of Federal standards and the adoption of numerous and inconsistent State standards. Section 7 makes appropriate allowance for the interests of the States through such features as "grandfathering" rules for existing [sic] State requirements, special rules for energy requirements relating to

covered products in building codes and State procurement standards, and waivers from preemption.

Under the new waiver provisions, a State may petition for a waiver of preemption where a State regulation is necessary to meet "unusual and compelling State or local energy interests." As a general rule, a State may not receive a waiver for a standard that takes effect prior to the effective date of a Federal standard, except in the case of "unusual and compelling State or local energy interests" (discussed below) that also qualify as an energy emergency. In addition, a "grandfather" provision applies with respect to this period.

Special rules also permit State and local building codes to continue to regulate the energy consumption of covered products both before and after the effective date of Federal standards so long as the codes meet certain requirements. Provisions relating to State and local building codes recognize the increasingly important role of these codes in a State's management of energy resources. H.R. 87 does not affect a State's authority to adopt provisions in building codes that do not affect the energy efficiency or energy use of covered products, such as insulation, structure, fire, heating or safety standards.

Section 7 is designed to protect the appliance industry from having to comply with a patchwork of numerous conflicting State requirements. It is also designed to ensure that States are able to respond with their own appliance regulations to substantial and unusual energy problems, such as high electricity, gas, or heating oil prices, high dependence on oil (or fuels whose price is tied to oil) for electricity generation or on out-of-State energy sources, unusual climatic conditions, or adverse environmental or health and safety conditions that can be alleviated by energy conservation in appliances. Congress anticipates that States that have such energy problems, and that have met the burden of proof set forth in Section 327, will be granted waivers.

[. . .]

S. Rep. No. 100-6 (1987)

[. . .]

[Page 2]

PURPOSE

The purpose of S. 83 is to reduce the Nation's consumption of energy and to reduce the regulatory and economic burdens on the appliance manufacturing industry through the establishment of national energy conservation standards for major residential appliances.

SUMMARY OF MAJOR PROVISIONS

There are two basic provisions to the measure: The establishment of Federal standards and the preemption of State standards.

Standards: Federal standards are established to take effect in 1988, 1990, 1992, or 1993, depending on the product, and are to remain in effect from 3 to 10 years, also depending on the product. After the 3 to 10 year 'lock-in' period, DOE may promulgate new standards for each product which may not be less than those established by the legislation. The 12 covered products are: refrigerators and freezers; room air conditioners; central air conditioners and heat pumps; water heaters; furnaces; washers; clothes washers; clothes dryers; direct heating equipment; kitchen ranges and ovens; pool heaters; and television sets. The standards in most cases are as strong as, or stronger than, any State standards currently in effect.

Preemption: In general, these national standards would preempt all State standards. However, States may petition DOE for a waiver from the Federal standards. Moreover, State standards enacted before January 8, 1987, and which become effective before January 3, 1988, are 'grandfathered' by the bill and will remain effective until the appropriate Federal standard begins.

States may petition DOE to be waived from Federal preemption, but achieving the waiver is difficult. In order to receive a waiver a State must show that its regulation is needed to meet 'unusual and compelling State and local interests.' These interests are defined as being substantially different in nature or magnitude from those of the Nation generally. Furthermore, DOE may not grant a waiver if interested

persons show that the State regulation will significantly burden marketing, manufacturing, distribution, sale or servicing of appliance products nationally. Nor may DOE grant a waiver if interested persons show that the State regulation is likely to result in the unavailability in the State of a product type or of products of a particular performance class, such as frost-free refrigerators. A waiver would become effective 3 years after it is granted by DOE, or after 5 years if the Secretary finds that the time is needed for redesign or retooling, etc.

In general, a State may not receive a waiver either prior to effective date of the Federal Standard or during the 3 to 10 year 'lock-in' period for the Federal standards except if the State can show that an 'energy emergency condition' exists within the State which imperils the health, safety and welfare of its residents.

The law would also restrict related State enacted performance-based building codes. They may be adopted by States only if they do not require the installation of covered products which have efficiencies exceeding the applicable Federal standard.

[Page 3]

Because the State of California has already enacted standards and has been very active on this issue, special provisions are included in the bill relating to these State standards. In the case of the refrigerator/freezer standard, if DOE does not promulgate a final rule establishing a new Federal standard following the initial 'lock-in' period ending January 1, 1993, then California's second tier standards (now to be effective on January 1, 1992) would go into effect on January 1, 1993, but only in California, without California receiving a waiver from Federal exemption.

Test procedures, enforcement, and reporting: S. 83 has three other general provisions relating to test procedures, enforcement, and reporting. First, test procedures would not change from existing law unless DOE recommends their revision. In this case, S. 83 requires that standards shall be adjusted so that revisions of the test procedures do not affect the actual stringency of the standards. Second, the bill would provide expeditious judicial relief should DOE fail to comply with

statutory deadlines by stating that there is a Federal cause of action in such cases and that the courts are required to advance and expedite such cases. Section 336 of EPCA relating to administrative procedures and judicial review remains essentially intact except for technical changes and the addition of a new subsection to allow persons to seek declaratory judgments that State building codes do not comply with the Act. S. 83 does not require a State to petition DOE to show that their building codes are consistent with the Act. Finally, as for reporting, DOE may require submission of reports by manufacturers but DOE would be required to use existing information when possible and to minimize industry's reporting burden.

BACKGROUND AND NEED

In 1975, Congress passed the Energy Policy and Conservation Act (EPCA) (Public Law 94–163) which required the Department of Energy (DOE) to mandate energy efficiency labeling of major residential appliances and to prescribe voluntary industry appliance efficiency improvements. In addition, EPCA authorized, but did not require, DOE to establish mandatory efficiency standards if necessary. In 1978, Congress enacted the National Energy Conservation Policy Act (NECPA) (Public Law 95–619) which amended EPCA to require that energy efficiency standards be established for each of 13 classes of appliances that are major consumers of energy. The standards, which would preempt State laws on appliance efficiency, were to 'be designed to achieve the maximum improvement in energy efficiency which the Secretary determines is technologically feasible and economically justified.'

The Department proceeded with rulemaking and in 1980 issued proposed standards for 8 of the 13 classes of covered appliances. In January of 1981, however, the Department suspended this process and announced in April 1982 a finding that no standards were economically justified. The DOE adoption of this 'no-standard' standard precluded individual States from adopting their own efficiency standards due to the preemption provisions of EPCA.

The 'no-standard' standard was immediately challenged in court by the Natural Resources Defense Council (NRDC) which sued to ***[Page 4]***

overturn the standards as thwarting the congressional intent that Federal standards be established. On July 16, 1985, the D.C. Circuit Court of Appeals issued a unanimous decision striking down the 'no-standard' standards as '. . . contrary to law' and directing DOE to initiate a new rulemaking in accordance with the statutory intent of NECPA (*NRDC* v. *Herrington*, 768 F.2d 1355 (D.C. Cir. 1985)). That new rulemaking is still in progress.

It is currently estimated that approximately 18 percent of the Nation's energy is consumed by major home appliances such as furnaces, hot water heaters, clothes washers and dryers, air conditioners, refrigerators, stoves, etc. Since the energy price increases of the early 1970's, appliance efficiency has been the subject of national interest.

During the 1970's some States began enacting appliance efficiency standards on their own. NECPA provides that the Federal standards preempt State standards, except that States may petition DOE to grant a waiver from preemption if a State is able to show justification for its standards over those of DOE. While DOE adopted its policy of the 'no-standard' standards, it also initiated a general policy of granting petitions from States requesting waivers from preemption. As a result, a system of separate State appliance standards has begun to emerge and the trend is growing.

Because of this trend, appliance manufacturers were confronted with the problem of a growing patchwork of differing State regulations which would increasingly complicate their design, production and marketing plans. Regulations in a few populous States could as a practical matter determine the product lines sold nationwide, even in States where no regulations existed. In an effort to resolve this problem the major appliance manufacturer associations began negotiations with the Natural Resources Defense Council in early 1986. At the end of July an agreement was reached and it was embodied in legislation which was introduced on August 15, 1986, in the House (H.R. 5465) and in the Senate (S. 2781). H.R. 5465 was passed without objection by both Houses of Congress on October 15, 1986 and with only four substantive changes:

1. Television sets were added as a covered product for which the Secretary of Energy may prescribe an energy conservation standard (section 322(a)(12) and section 325(i)(3)).

2. An energy conservation standard was established for the heating cycle of heat pumps (section 325(d)(2) and section 325(d)(3)(A)).

3. The energy conservation standards for furnaces were modified to provide different treatment for furnaces having an input of less than 45,000 Btu's per hour (section 325(f)(B)).

4. Two new sections were added which did not relate to appliance standards, but instead dealt with issues pending before the Federal Energy Regulatory Commission.

On November 1, 1986, H.R. 5465 was pocket-vetoed by the President. The President's Memorandum of Disapproval stated that: 'The bill intrudes unduly on the free market, limits the freedom of choice available to consumers who would be denied the opportunity to purchase lower-cost applicances, and constitutes a substantial intrusion into traditional state responsibilities and prerogatives.'

[Page 5]

As introduced, S. 83 is the same legislation which was unanimously approved by Congress last October, except that sections 12 and 13 of last year's bill, regarding issues unrelated to appliance efficiency, have been deleted.

[. . .]

[Page 6]

SECTION-BY-SECTION ANALYSIS

[. . .]

[Page 9]

Section 7 (Effect on Other Laws): Section 327 of EPCA is amended to create new preemption provisions, including criteria under which States can receive waivers from preemption.

Section 327(a), which essentially restates existing law, and provides that the Act supersedes State and local regulations regarding testing and labeling in certain cases.

New section 327(b) describes how preemption would apply during the period between the date of enactment of the Act and the effective dates of each Federal energy conservation standard. As a general principle, no State appliance efficiency regulations or requirements shall be applicable unless such regulations or requirement are prescribed or enacted before January 8, 1987, and are applicable to products before January 3, 1988. The section also lists other exceptions to preemption.

New section 327(c) states that on the effective date for each Federal energy conservation standard, that standard preempts State regulation, as provided under current law. This preemption is subject to the certain exceptions for building codes in new section 327(f), a state procurement regulation described in subsection (e), a regulation prohibiting constant burning pilot light for pool heaters, and any waiver from preemption granted by DOE upon State petition.

New section 327(d) allows States to file petitions seeking waiver of Federal preemption. This subsection provides new and more stringent criteria that a State must establish by a preponderance of the evidence in order to receive an exemption. The State is required to show that its regulation is needed to meet 'Unusual and compelling' State or local interests.

New subsection (d) also provides that even if the State has made a showing of an unusual and compelling interest, the Secretary may not grant the requested waiver if he finds that interested persons ***[Page 10]*** have established by a preponderance of the evidence that such State regulation will significantly burden marketing, manufacturing, distribution, sale or servicing of the covered products or is likely to result in the unavailability in the State of any covered product type (or class) of

performance characteristics that are substantially the same as those generally available in the State at the time of the Secretary's finding.

New subsection 327(d) further provides that any State regulation for which a waiver is granted shall apply to products manufactured three years after the rule granting such exemption is published in the Federal Register; however, the Secretary may lengthen the time to 5 years if he finds that additional time is necessary for retooling, redesign, etc.

In general, no State regulation, except as specified in subsection (b), may go into effect prior to the earliest possible effective date established by the Act for a revision of the energy conservation standard. However, a State may implement its regulation before that date if it can show by a preponderance of the evidence that an 'energy emergency condition' exists within the State.

This subsection further provides that any interested person may file a petition requesting the Secretary to withdraw the rule issued with respect to a waiver petition.

Section 327(e) provides that State or local procurement standards more stringent than the Federal energy conservation standards are not superseded by the part. This provision is substantially the same as section 327(c) of current law.

New section 327(f) describes Federal preemption with regard to energy efficiency or energy use requirements regarding covered products contained in State and local building codes for construction. State and local building codes governing new construction typically regulate the energy efficiency of central heating and cooling equipment and water heaters. This section states that energy efficiency or use requirements contained in State or local building codes enacted or prescribed before January 8, 1987 are not preempted until the effective date of the Federal energy conservation standard. Such requirements adopted on or after January 8, 1987, are not preempted if they do not require the energy efficiency of a covered product to exceed the standard set forth in a 'national voluntary consensus standard'; or in a grandfathered State standard or standard for which a State waiver has been obtained, whichever is higher. National voluntary consensus standards include

those adopted by the Association of Air Conditioning, Heating and Refrigerating Engineers (ASHRAE), which sets energy efficiency standards using procedures sanctioned by the American National Standards Institute. ASHRAE standards are adopted by most States and local building codes.

Section 327(f)(3) describes the preemption of States or local building codes that exists after the effective date of the initial Federal standard for a covered product.

This paragraph describes the requirements that must be met in order for State or local building codes not to be preempted after such effective date. The paragraph, therefore, allows a State flexibility to implement performance-based codes. These codes authorize ***[Page 11]*** builders to adjust or trade off the efficiencies of the various building components so long as an energy objective is met.

In order to avoid preemption of its building code provisions concerning covered products, this paragraph also requires States building codes which establish 'credits' for various conservation measures, to provide, to the greatest degree possible, one-for-one equivalency between the energy efficiency of these differing measures and the credits provided for such energy efficiency. The Committee recognizes that in some cases, exact equivalency is not possible. For example, some conservation measures may only be available to the builder in discreet levels of energy efficiency, such as insulation which is available only in certain thicknesses. It is the Committee's intent, however, that State building codes follow a one-for-one equivalency as closely as possible, to assure that the credits for exceeding Federal standards are even-handed and are not unfairly weighted resulting in undue pressure on builders to install covered products exceeding Federal standards.

The limited requirements of this paragraph are designed to ensure the performance-based building codes cannot circumvent the federal standard for a given covered product by effectively requiring the installation of such product with an efficiency exceeding the applicable Federal standards or State standards for which a waiver from preemption has been obtained. Finally, paragraph (4) states that a State

or local government is not required to submit a petition to the Secretary in order to enforce or apply its building code, unless the building code requires the installation of covered products with efficiencies exceeding both the applicable Federal standard and any applicable State standard that has been granted a waiver from preemption.

Subsection (g) states that no disclosure under this part creates an expressed or implied warranty under State or federal law regarding energy efficiency.

[. . . .]