

Landmark Court Decision Affirms Consumer Energy Choice: Legal Summary

On Monday April 17, 2023, a [unanimous Ninth Circuit panel](#) reversed the district court’s opinion upholding a City of Berkeley ordinance banning gas piping into new buildings. The panel found the ban was preempted by federal law because Berkeley’s ordinance banning gas piping into new buildings effectively prevented those appliances from using gas, but the federal government already governs the use of gas under the Energy Policy and Conservation Act (EPCA) which contains an express preemption clause. The court noted that “states and localities can’t skirt the text of broad preemption provisions by doing indirectly what Congress says they can’t do directly.”

The unanimous majority opinion by Judge Bumatay featured two concurrences by Judge O’Scannlain and Judge Baker.

Background

The City of Berkeley enacted a regulation that starting in 2020 would have prohibited the installation of natural gas piping within newly constructed buildings. The California Restaurant Association sued, arguing in their original complaint filed November 21, 2019 that its members rely on gas for cooking particular types of food as well as for heating space and water, for backup power, and for affordable power. The Association argued that Berkeley’s ordinance would harm its members, which would not be able to move into or build new buildings without a reliable and affordable energy source. The drastic step of requiring “all-electric” new buildings stands at odds with the need for a reliable, resilient, and affordable energy supply. Further, the Association argued that the ordinance conflicts with both federal and state law, is contrary to the public interest, and harms the Association and its members.

The district court found CRA had standing and the dispute was ripe, but disagreed on the statutory interpretation of federal energy law.

Ninth Circuit Majority Opinion

The Ninth Circuit reversed the district court, finding that EPCA preempts a City of Berkeley regulation that prohibits the installation of natural gas piping within newly constructed buildings.

The panel wrote that, in this express preemption case, it addressed the plain meaning of the Act without any presumptive thumb on the scale for or against preemption. The Act expressly preempts State and local regulations concerning the energy use of many natural gas appliances, including those used in household and restaurant kitchens. Instead of directly banning those appliances in new buildings, Berkeley took a more circuitous route to the same result and enacted a code that prohibits natural gas piping into those buildings, rendering the gas appliances useless. The panel held that, by its plain text and structure, the Act’s preemption provision encompasses codes that regulate natural gas use by covered products. By preventing such appliances from using natural gas, the Berkeley code did exactly that.

EPCA’s preemption clause establishes that, once a federal energy conservation standard becomes effective for a 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 meets one of several categories not relevant here. The panel determined that since the EPCA preempts regulations that relate to “the quantity of [natural gas] directly consumed by” certain consumer appliances at the place where those products are used – a regulation like Berkeley’s that imposes a total ban on natural gas is not exempt from EPCA just because it lowers the “quantity of energy” consumed to “zero.” In other words, a regulation on “energy use” fairly encompasses an ordinance that effectively eliminates the “use” of an energy source.

Concurrences

Judge O’Scannlain wrote separately to note that he agreed that the EPCA preempts the Berkeley ordinance, but he only reached that conclusion only because under Ninth Circuit precedent he was bound to hold that the presumption against preemption does not apply to the express-preemption provision at issue. Judge O’Scannlain wrote, however, that the law regarding the presumption against preemption in express-preemption cases is troubling and confused—beset by tensions in Supreme Court precedents, disagreement among the circuits, and important practical questions still unanswered. He pointed out significant circuit splits in issues of preemption law in this context and pushed for Supreme Court review.

Judge Baker stated that he wrote separately to express his reservations about the Association’s standing and to explain his understanding of why the City of Berkeley’s ordinance invades the core area preempted by EPCA. Judge Baker wrote that, at the pleading stage, an organization need not identify any specific injured member in order to establish associational standing, but it must do so at summary judgment or trial. As to preemption, Judge Baker wrote that the Berkeley ordinance cut to the heart of what Congress sought to prevent—state and local manipulation of codes for new construction to regulate the natural gas consumption of covered products when gas service is otherwise available to the premises where such products are used. Judge Baker therefore joined the panel opinion in full.

Analysis

While the majority opinion is technical and relies on statutory interpretation, it concludes with powerful language that should dissuade localities nationwide (and prevent those within the Ninth Circuit) from enacting direct or indirect bans in the future.

States and localities can’t skirt the text of broad preemption provisions by doing indirectly what Congress says they can’t do directly. EPCA would no doubt preempt an ordinance that directly prohibits the use of covered natural gas appliances in new buildings. So Berkeley can’t evade preemption by merely moving up one step in the energy chain and banning natural gas piping within those buildings. Otherwise, the ability to use covered products is “meaningless” if consumers can’t access the natural gas available to them within the City of Berkeley.

NPGA will continue to oppose gas bans wherever they are enacted and advocate for consumer energy choice. For more, please also see NPGA President and CEO Stephen Kaminski’s [Op-ed](#).