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## Berkeley, California Ban on Natural Gas Infrastructure Struck Down

*Legal Alert*

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Earlier this week, the Ninth Circuit Court of Appeals handed down a very important ruling concerning the regulation of the use of both natural gas and appliances that use natural gas.

In [California Restaurant Association v. City of Berkeley \(April 17, 2023\)](#), the Ninth Circuit struck down an attempt by the city of Berkeley, California to regulate the use of natural gas. The Ninth Circuit ruled that such a ban is preempted by the federal Energy Policy and Conservation Act (EPCA).

According to the Court, "EPCA's preemption clause establishes that, once a federal 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 project'" unless the regulations meets one of certain categories, none of which was applicable in this case.

At issue was an attempt by the City of Berkeley in 2019 to regulate the use of natural gas appliances in new construction. Realizing the legal difficulties in doing so directly, Berkeley adopted an ordinance that banned natural gas infrastructure in new buildings. No matter. The Ninth Circuit ruled that both direct and indirect attempts to regulate energy infrastructure were preempted by federal statute.

The federal government filed an *amicus curiae* (friend of the Court) brief in support of Berkeley, arguing that there is no EPCA preemption at issue as the ordinance does not attempt to develop conservation standards specific to appliances covered by the EPCA. In a very blunt opinion, the Ninth rejected both Berkeley's and the federal government's position. It stated:

"[B]y enacting EPCA, Congress ensured that States and localities could not prevent consumers from using covered products in their homes, kitchens, and businesses. So EPCA preemption extends to regulations that address the products themselves and the on-site infrastructure for their use of natural gas."

The Ninth Circuit ruling likely will have an impact on nearly 100 other cities, which have passed bans on either natural gas appliances or hookups in new construction. Some, like Eugene, OR, have ordinances that mirror Berkeley's. Others seek to ban natural gas appliances in new construction outright. It remains to be seen how it affects New York City, which sets indoor air quality standards for fuels burned in new buildings, clearly for the intended purpose of discouraging, if not banning, natural gas usage. If the logic and the language of the [Berkeley](#) decision are followed, however, New York will face a difficult task. As the Ninth Circuit noted:

"States and localities can't skirt the text of broad preemption provisions by doing indirectly what Congress says they can't do directly."

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It is possible that other Circuits will decide differently, of course. Should that happen, however, and should the case eventually find its way to the United States Supreme Court, then given the current Supreme Court makeup it appears likely that the Ninth Circuit decision ultimately will prevail.

**ATTORNEYS MENTIONED**

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