

ORAL ARGUMENT NOT YET SCHEDULED
Case No. 21-16278

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CALIFORNIA RESTAURANT ASSOCIATION,

Plaintiff-Appellant,

v.

CITY OF BERKELEY,

Defendant-Appellee.

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

**BRIEF OF *AMICI CURIAE* ENERGY AND ENVIRONMENTAL LAW
PROFESSORS IN SUPPORT OF DEFENDANT-APPELLEE CITY OF
BERKELEY**

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RULE 29 STATEMENTS

Pursuant to Fed. R. App. P. 29(a)(2), *amici curiae* certify that all parties in this proceeding have consented to the filing of this amicus brief.

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

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INTERESTS AND IDENTITIES OF *AMICI*

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SUMMARY OF THE ARGUMENT

In 2019, Appellee City of Berkeley enacted a municipal ordinance limiting the circumstances under which new natural gas distribution infrastructure could be built out for newly constructed buildings (the Ordinance). *See* Berkeley, Cal., Mun. Code §§ 12.80.010 *et seq.* In so doing, the city exercised its authority to regulate utility distribution, “one of the most important of the functions traditionally associated with the police power of the States.” *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm’n*, 461 U.S. 375, 377 (1983).

Appellant California Restaurant Association (Appellant) challenged the Ordinance on the ground that it is preempted by the Energy Policy and Conservation Act (EPCA). Appellant argues that EPCA’s appliance energy conservation provisions, which are aimed at establishing a set of national conservation standards, preempt local regulations that control where new utility distribution infrastructure will be constructed. Indeed, Appellant claims that EPCA preempts *any* state or local action that would alter the energy available to any building.

This reading of EPCA, if adopted, would fundamentally rework the basic federal scheme that has governed utility regulation for over a hundred years. As Congress has repeatedly affirmed, state and local governments have always had authority to regulate the local distribution of utility services, including,

specifically, the siting of local utility infrastructure. Appellant's arguments would render illegitimate the longstanding regulation of utility infrastructure by states and localities, based on that structure of federalism. Most troublingly, since EPCA supplies no federal authority to replace local infrastructure siting regulations, Appellant's reading would leave a regulatory gap foreclosing any authority to regulate the local siting of distribution infrastructure.

There is no indication that Congress intended EPCA preemption to have any effect at all on the distribution of natural gas, electricity, or water. Rather, both EPCA's text and its legislative history indicate that Congress was concerned only with conserving the energy (or water) used by particular consumer products, and intended EPCA to preempt only those local conservation standards that could be replaced with national standards. *Amici* therefore urge the Court to reject Appellant's proposed reading and affirm the District Court's ruling.

ARGUMENT

I. Appellant’s Reading of EPCA Preemption Conflicts with Congress’s Century-Long Commitment to Local Control of Utility Distribution

Utility regulation has been the shared domain of federal, state, and local regulators for nearly a century. During this time, Congress has retained the same fundamental system: The federal government regulates wholesale transactions and transportation in interstate commerce, while state and local governments regulate local distribution and retail sales (among other things). Congress established these jurisdictional lines in the Federal Power Act of 1935, ch. 687, pt. II, 49 Stat. 847 (codified at 16 U.S.C. §§ 791a *et seq.*) and the Natural Gas Act of 1938, ch. 556, 52 Stat. 821 (codified at 15 U.S.C. §§ 717 *et seq.*), and has never altered their basic structure. The distinctive federalist system preserved by these statutes—and particularly the allocation to the states of control over local distribution—is therefore at the heart of our country’s utility regulation.

Appellant’s reading of EPCA’s preemption clause would eliminate much of this structure and authority. It would strip state and local governments of the ability to make fundamental decisions about utility distribution infrastructure that they have been making for more than a century. And since EPCA does not provide the federal government with authority to regulate utility infrastructure, Appellant’s reading would leave a regulatory gap that no government would be able to fill without congressional intervention.

A. Congress Has Firmly and Repeatedly Affirmed State and Local Governments as the Regulators Responsible for Local Distribution Infrastructure

1. State Governments Have Always Controlled Local Distribution, Despite Changes to Other Aspects of Utility Regulation

State and local governments have had authority over local utility regulation for as long as energy infrastructure has existed. In the nineteenth century, this authority was exercised first by state courts, then directly by state legislatures, then by local governments. *See, e.g.,* Robert L. Swartwout, *Current Utility Regulatory Practice from a Historical Perspective*, 32 Nat. Res. J. 289, 297-300 (1992). In the early twentieth century, states began creating public utility commissions (PUCs) to take on the task of setting appropriate rates for retail sales of utilities; every state but Delaware adopted the PUC model by 1930. William Boyd & Ann E. Carlson, *Accidents of Federalism: Ratemaking and Innovation in Public Utility Law*, 63 UCLA L. Rev. 810, 823 (2016). The state PUCs initially regulated all utility activities in the state. The Supreme Court held that the dormant Commerce Clause barred state regulation of some utility activities, including interstate energy transmission and interstate sales of energy in the wholesale market. *See Pennsylvania v. West Virginia*, 262 U.S. 553 (1923), *Missouri v. Kan. Nat. Gas Co.*, 265 U.S. 298 (1924); *Pub. Utils. Comm'n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927); *E. Ohio Gas Co. v. Tax Comm'n of Ohio*, 283 U.S. 465 (1931).

These decisions affirmed state and local control over distribution, that is, the retail sale of energy to consumers and the infrastructure that facilitates it. *See, e.g., E. Ohio Gas*, 283 U.S. at 471 (“[T]he furnishing of gas to consumers...by means of distribution plants...is not interstate commerce, but a business of purely local concern exclusively within the jurisdiction of the state.”). But they eliminated state regulation of wholesale energy sales and interstate transmission, the absence of which was termed the “*Attleboro gap*.” *See, e.g., Jim Rossi, The Brave New Path of Energy Federalism*, 95 Tex. L. R. 399, 409-10 (2016).

Congress closed the *Attleboro gap* by enacting the Federal Power Act of 1935, and the Natural Gas Act of 1938. These statutes created new federal authorities to regulate wholesale sales and transportation of electricity and natural gas in interstate commerce. But both statutes also explicitly excepted the regulation of local distribution, which remained the province of the states. *See* 16 U.S.C. § 824(b) (regulating “the transmission of electric energy in interstate commerce and [] the sale of electric energy at wholesale in interstate commerce,” but generally exempting “any other sale of electric energy” or “facilities used in local distribution”); 15 U.S.C. § 717(b) (regulating “the transportation of natural gas in interstate commerce, [and] the sale in interstate commerce of natural gas for resale,” but not “any other transportation or sale of natural gas or [] the local distribution of natural gas”); *see also, e.g., Boyd & Carlson, Accidents of*

Federalism, 63 UCLA L. Rev. at 822-31 (reviewing the history of congressional action in power regulation and noting Congress’s continued respect for the jurisdictional split between federal and state spheres). In other words, these statutes gave new federal agencies power over wholesale energy sales and energy transportation in interstate commerce, but maintained and affirmed the longstanding control of states and local governments over local distribution.

In the more than eighty years since the passage of the Natural Gas Act and Federal Power Act, Congress has faithfully maintained this federalist system. For example, when a Supreme Court decision placed certain intrastate natural gas pipelines under federal jurisdiction, *Fed. Power Comm’n v. E. Ohio. Gas Co.*, 338 U.S. 464 (1950), Congress responded by amending the Natural Gas Act to ensure that jurisdiction over those lines remained “exclusively in the States, as always has been intended.” S. Rep. No. 83-817 at 2 (1953); *see also* Act of Mar. 27, 1954, ch. 115, 68 Stat. 36 (codified at 15 U.S.C. § 717(c)) (overturning *East Ohio Gas* and declaring the affected pipelines to be “matters primarily of local concern and subject to regulation by the several States.”). Thus, the Supreme Court has noted Congress’s “unbroken recognition” of state and local authority, and that “Congress did nothing to limit the States’ traditional autonomy to authorize and regulate local gas franchises” despite changes to other areas of the utility system. *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 279, 304 (1997).

Likewise, the federal judiciary has consistently recognized that the Federal Power Act and Natural Gas Act leave utility distribution in the hands of state and local governments. *See, e.g., Fed. Energy Regul. Comm'n v. Elec. Power Supply Ass'n*, 577 U.S. 260, 266-67 (2016) (“[T]he [Federal Power] Act...maintains a zone of exclusive state jurisdiction...[for] retail sales of electricity (*i.e.*, sales directly to users.)”); *ONEOK, Inc. v. Learjet, Inc.*, 575 U.S. 373, 384-85 (2015) (“As we have repeatedly stressed, the Natural Gas Act ‘was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way.’” (quoting *Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n of Ind.*, 332 U.S. 507, 517-18 (1947))); *Gen. Motors Corp.*, 519 U.S. at 292 (“Congress’s purpose in enacting the [Natural Gas Act] was to fill the regulatory void created by the Court’s earlier decisions..., while at the same time leaving undisturbed the recognized power of the States to regulate all in-state gas sales directly to consumers.”); *Panhandle E. Pipe Line Co. v. Mich. Pub. Serv. Comm'n*, 341 U.S. 329, 334 (1951) (“Direct sales for consumptive use were designedly left to state regulation [by the Natural Gas Act].”); *S. Coast Air Quality Mgmt. Dist. v. Fed. Energy Reg’y Comm’n*, 621 F.3d 1085, 1091 (9th Cir. 2010) (“[T]he Natural Gas Act specifically exempted from federal regulation the ‘local distribution of natural gas’....” (quoting 15 U.S.C. § 717(b) and citing *Fed. Power Comm’n v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 27 (1961))).

2. *Local Control Over the Siting of Utility Infrastructure is a Crucial Element of This Federalist Scheme*

While regulation of utility rates has been passed to state PUCs, in many states local governments retain responsibility for regulating the siting of distribution infrastructure. For example, California allows municipalities to either provide for distribution themselves through municipally owned utilities, Cal. Pub. Util. Code § 10101 (West 2013), or issue franchises to privately owned utilities to allow them to distribute gas, Cal. Gov't Code § 39732(b) (West 2008); *see also* Cal. Const. art. XII, § 8. Municipalities that own their own utility providers generally control the scope of their distribution with specificity, even down to the particular appliances that may be connected. *See, e.g.*, Long Beach, Cal., Mun. Code § 15.40.240 (disallowing connections of appliances that might impact the system's integrity and safety).

Even where a municipality chooses to award a franchise, however, it has authority to “impose...additional terms and conditions...as in the judgment of the [municipality] are to the public interest.” Cal. Pub. Util. Code §§ 6002, 6203 (West 2010). This keeps the scope of the franchise under the control of the municipality. For example, San Diego's recently proposed franchise agreement is subject to “the absolute reservation” that the city retains the authority to “require the removal or

relocation” of any infrastructure, even where the removal would result in a denial of preexisting service. City of San Diego, Invitation to Bid exh. A, § 8(b) (2021).¹

State and local governments can exercise these powers to refuse to deliver energy (or water) for other public purposes. For example, a municipally owned utility may shut down its electricity distribution in order to reduce wildfire risk. *See, e.g., Sacramento Municipal Utility District, 2021 SMUD Wildfire Mitigation Plan 30-31* (2021) (utility has “authority to de-energize select distribution circuits”—that is, shut off power to local customers—if “a wildfire threat is imminent” or “when requested by local...officials”).² Similarly, state and local governments may cut off lower-priority users from water supplies during a drought. *See, e.g., Cal. Code Regs. tit. 23, §§ 876.1(b), 877.1(a), 878.1(b)(1)* (2022) (authorizing state agency to issue “curtailment orders,” defined as an order requiring specific water users “to cease diversions” of water, except as needed for “minimum human health and safety needs”).

B. Appellant’s Reading of EPCA Would Upend Congress’s Federalist System of Utility Regulation

Appellant’s reading of EPCA’s preemption provisions would eliminate much of the traditional role of state and local governments in regulating local

¹ Available at https://www.sandiego.gov/sites/default/files/gas_packet.pdf.

² Available at https://www.smud.org/-/media/Documents/In-Our-Community/Safety/0864-20_2021SMUDWildfireMitigationPlan.ashx.

utility distribution, in direct opposition to the “unbroken recognition of [] state regulatory authority” over local distribution that has existed since before the Natural Gas Act of 1938 and that was expressly preserved in that statute. *Gen. Motors Corp.*, 519 U.S. at 304-05.

Appellant’s proposed reading prohibits any state or local action that would affect the type of energy available to a building. Appellant relies on the provision that “no State regulation concerning the energy efficiency, energy use, or water use of [a] covered product shall be effective with respect to that product.” Pl.-Appellant’s Opening Br. 21, ECF No. 13-1 (hereinafter “Appellant’s Br.”) (quoting 42 U.S.C. § 6297(c)). Appellant argues that, since a new building would typically contain EPCA-regulated appliances, this clause preempts the regulation of new energy infrastructure just as it would the direct regulation of covered products. *Id.* at 22-23. Appellant also claims that “energy use” encompasses both the quantity of energy used and the type of energy: i.e., *whether* a building is supplied with electricity, natural gas, or, presumably, some other type of fossil fuel, as well as *how much* energy is consumed by the appliances inside the building. *Id.* at 21-22. Thus, under Appellant’s reading, any local government

action that would affect the type of energy available in a given area where appliances might be installed is preempted.³

It is important to note that, although this case addresses only natural gas infrastructure, Appellant’s reading appears to apply with equal force to electric power and water. The definition of “energy” in EPCA on which Appellant relies includes “electricity” alongside “fossil fuels.” 42 U.S.C. § 6291(3) (“The term ‘energy’ means electricity, or fossil fuels.”). Similarly, “water use” is used equivalently to “energy use” in EPCA’s preemption provisions, *see id.* § 6297(b), (c), and the definition uses “quantity of water” in the same manner that the definition of “energy use” uses “quantity of energy,” *see id.* § 6291(31)(A). Therefore, if EPCA’s preemption clause affects state and local governments’ authority to regulate natural gas distribution, it may also implicate their regulation of electricity and water distribution.

³ For similar reasons, it appears that Appellant’s logic would also preempt any decision *creating* natural gas infrastructure: EPCA’s preemption provisions do not distinguish between regulations that promote energy use and those that restrict it; they apply to all regulations “concerning...energy use...of [a] covered product.” 42 U.S.C. § 6297(b), (c). If a decision to deny new infrastructure construction “concern[s]...energy use,” there seems to be no reason that a decision to *allow* such construction would not also “concern[]...energy use.” Appellant’s reasoning therefore leads to the absurd result that EPCA froze natural gas infrastructure in those locations where it existed when the statute was passed.

This reading would turn Congress’s longstanding scheme of utility federalism on its head. State and local governments would have no authority to decide where to locate new distribution pipes or lines, since doing so would change the type of energy available to buildings in the service area. They could not cut off gas to a malfunctioning appliance or shut off local electricity distribution to reduce wildfire risk. They may not even be able to protect water resources in response to drought by cutting off lower-priority users, since this would “concern[.]...[the] water use” of appliances under Appellant’s reading. State and local governments would therefore be displaced from their traditional responsibilities over energy and water distribution, in contradiction of Congress’s established federalist system.

C. Appellant’s Argument Has No Limiting Principle

Appellant’s attempt to limit the implications of its reading draws lines that are meaningless in the real-world context of natural gas distribution, and that have no grounding in EPCA’s statutory text. Appellant first argues that its reading is limited to preempting infrastructure bans, and does not affirmatively require local governments “to extend natural gas infrastructure.” Appellant’s Br. 35 (quoting ER-22). This argument misunderstands how natural gas is distributed: Even if natural gas service is available in an area, a new service connection requires, at the very least, a new line to be laid from the service main to the individual building or site. *See, e.g., Pacific Gas & Electric, Electric & Gas Service Requirements* §§ 2.2-

3 (2021).⁴ In other words, connecting a new building *does* require extending the local distribution infrastructure. It also requires local governments to take a number of steps to facilitate the work: allowing use of public land, approving any required permits, and, in the case of municipally owned utilities, approving the connection request itself. Thus, a requirement to allow new service connections within a service area would create a number of new affirmative obligations for local governments.

Likewise, the distinction Appellant draws between “controlling natural gas distribution systems at the city level” and “building-level regulation,” Appellant’s Br. 36-37, is spurious. Any new connection affects the whole system, creating additional strain on distribution infrastructure and requiring the utility to procure additional gas, electricity, or water. *See, e.g.*, Jim Rossi & Christopher Serkin, *Energy Exactions*, 104 Cornell L. Rev. 643, 659-63 (2019) (describing some of the costs inherent in expanding utility distribution networks to new development). Thus, the Ordinance *is* a means of “controlling [a] natural gas distribution system[] at the city level”; namely, by preventing Berkeley’s distribution system from growing unchecked.

⁴ Available at https://www.pge.com/pge_global/common/pdfs/services/building-and-renovation/greenbook-manual-online/greenbook_manual_full.pdf.

In any case, Appellant provides no reason to think that EPCA preemption should depend on whether a regulation operates at the “city level” or the “building[]level,” applying only to the latter. Appellant does note that regulations with “no significant impact” on the objectives of a statute are not preempted, Appellant’s Br. 34 (quoting *Cal. Trucking Ass’n v. Su*, 903 F.3d 953, 961 (9th Cir. 2018)), but does not explain why regulation of distribution at a broader level would have *less* of an impact than regulation at a narrower level. Ultimately, there is no logically consistent way to apply EPCA preemption to the Ordinance without sweeping aside a broad swathe of traditional local authority.

D. Because EPCA Contains No Federal Authority to Replace the Local Authority Appellant Claims is Preempted, Appellant’s Reading Would Create a Regulatory Vacuum Where Congress Intended a “Comprehensive Regulatory System”

Alarminglly, Appellant’s argument implies that Congress not only eliminated longstanding and long-recognized local government powers in passing EPCA, but also that it provided no federal replacement for that authority.

There is no provision in EPCA that would allow federal standards to determine where to site natural gas infrastructure, or any other utility infrastructure. The regulatory authority created by the relevant section of the statute is limited to appliance-specific conservation standards. *See* 42 U.S.C. § 6295 (creating “[f]ederal energy conservation standards applicable to covered products” and authorizing “amended or new energy conservation standards” only);

id. § 6313 (creating some appliance standards and authorizing new standards for those products, but authorizing no additional regulatory action). In other words, if Appellant is correct, Congress not only eliminated the ability of local governments to determine where new distribution infrastructure should be sited, but eliminated *all* regulation of such infrastructure.

This is the world that Appellant’s reading would leave us with: No government could refuse to build out new natural gas infrastructure to a building. No government could control the type of energy that a home or business can use. No government could restrict the use of water in a building.⁵ And the only way to restore any of those controls would be for Congress to create a new set of federal authorities that would decide whether each new development, on each street of each city in the country, should be connected to utilities—an outcome no one calls for.

This regulatory gap would directly contradict Congress’s intent to “impose a comprehensive regulatory system on the transportation, production, and sale” of

⁵ It would technically be possible to resurrect a preempted infrastructure regulation by petitioning the Department of Energy for a waiver of regulation. However, by definition such a waiver must be for “unusual and compelling State or local energy or water interests,” which “are substantially different in nature or magnitude than those prevailing in the United States generally,” and therefore could not be the typical means by which distribution could be managed. 42 U.S.C. § 6297(d)(1)(B), (C)(i).

natural gas, *Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 28 (1961), which would prevent the existence of any regulatory “no-man’s land,” *Id.* at 19. Any shortfall in federal power should be made up by state jurisdiction. *See, e.g., Elec. Power Supply Ass’n*, 577 U.S. at 289 (“Some entity must have jurisdiction to regulate each and every practice that takes place in the electricity markets....”); *Mich. Pub. Serv. Comm’n*, 341 U.S. at 333 (“In the absence of federal regulation [of the sale and distribution of natural gas], state regulation is required in the public interest.”). Thus, the void created by Appellant’s reading, in which the state is preempted from regulating and no federal agency has authority to regulate, fundamentally contradicts Congress’s intended regulatory structure.

II. Nothing in EPCA’s Text or History Suggests that Congress Intended to Make Such Fundamental Changes to Local Siting Authority for Utility Infrastructure

Appellant’s reading of EPCA is simply wrong. EPCA is intended to, and does, create specific conservation standards for specific products. Its preemption provisions exist to ensure that, when a product is regulated by EPCA, the national conservation standard is the only such standard that applies to that particular product. EPCA does not regulate beyond the scope of individual products; it certainly does not overturn a decades-old system of utility federalism. A detailed look at the statute’s structure and history supports that conclusion: Congress did

not intend EPCA's preemption provision to remove state or local authority over utility distribution.

A. The Statutory Context Demonstrates that EPCA Regulates Products, Not Infrastructure

The sweeping changes that Appellant argues were made by EPCA are nowhere visible in the statute's text or history. EPCA does not, on its face, address any aspect of utility governance. It is instead a collection of requirements to reduce the amount of energy and water resources used by particular products in the U.S. marketplace. *See generally* 42 U.S.C. § 6201.

The parts of the statute at issue in this litigation create a remarkably detailed program of national energy and water efficiency standards. *See generally* 42 U.S.C. §§ 6291-6317. These standards apply to specific consumer appliances and industrial equipment, and even specify minimum levels of efficiency for many of the products that the statute covers. *E.g., id.* § 6295(c)(1) (setting separate efficiency standards for each of twelve different types of air conditioner). EPCA's preemption provisions are similarly detailed: Whether a standard is preempted can depend on the specific product it regulates, the state that issued it, the date it was issued, and whether a federal regulation applies to that product. *See, e.g., id.* § 6297(b)(1)(B) (efficiency standards for certain lamps adopted by California or Nevada before December 4, 2007, are not preempted, although a specific California standard will be preempted once a federal standard comes into effect).

Even the clause on which Appellant relies demonstrates a focus on specific appliances: It provides that “no State regulation...concerning the energy efficiency, energy use, or water use of [a] covered product shall be effective with respect to such product.” 42 U.S.C. § 6297(b), (c) (emphasis added).

The level of detail with which EPCA identifies the appliances that would be subject to federal or state regulation, and the absence of any reference to the infrastructure that serves them, indicate Congress’s intent not to expand preemption to cover such infrastructure. In “an area where precisely targeted prohibitions are commonplace, and where more general prohibitions have been qualified by numerous exceptions..., a statute...that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter.” *U.S. v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 412 (1999) (discussing bribery law). Careful interpretation is all the more important when an expansive reading of the statute threatens areas of traditional state and local control. *See, e.g., Bond v. U.S.*, 572 U.S. 844, 857-58 (2014). Here, there is no reason to adopt Appellant’s “meat axe” approach when the “scalpel” reading—that Congress preempted only state conservation standards that could be directly replaced by federal standards—better fits the text, structure, and general approach of Congress to regulating in this field.

B. The Evolution of EPCA Demonstrates an Intent to Preempt Only Appliance Conservation Standards

A similar focus on appliance-specific standards is found throughout EPCA's legislative history. The evolution of the language of the statute shows an intent to preempt local appliance energy efficiency standards in order to create uniform standards at the national level, but not to expand preemption to regulations that the federal government could not replace. Likewise, the legislative record shows a consistent treatment of the preemption clauses as applicable only to local standards that would control the quantity of energy used by particular products, including (but not ranging beyond) local energy efficiency standards and their equivalents.

1. EPCA Originated as an Energy-Conservation Statute

The impetus for EPCA's enactment was the energy crisis of the 1970s, when several oil-producing countries embargoed oil supplies to the United States, creating substantial fuel shortages. *See* S. Rep. No. 94-516, at 202-03 (1975) (Conf. Rep.). The immediate reaction of Congress was to pass the Emergency Petroleum Allocation Act of 1973, which created substantial federal authority to control the flow of oil in the country. *Id.* EPCA was, in part, meant to ramp down this tight centralization of control over fuel supplies, while at the same time preparing for future shortages. *See id.* at 116-17, 204. The energy-conservation aspects of EPCA were, therefore, intended to “reduce domestic energy consumption” with the ultimate purpose of “reduc[ing] the vulnerability of the

domestic economy to increases in import prices,...decreas[ing] dependence upon foreign imports,...[and] achiev[ing] the efficient utilization of scarce resources,” among other goals. *Id.* at 117.

Congress translated this goal of energy conservation into statutory policy. “The purposes of [EPCA] are...to conserve energy supplies through energy conservation programs, and, where necessary, the regulation of certain energy uses” and “to provide for improved energy efficiency of motor vehicles, major appliances and certain other consumer products...” Pub. L. 94-163, § 2, 89 Stat. 871, 874 (1975) (current version at 42 U.S.C. § 6201). This vision was to be effected first through appliance labeling and voluntary targets for appliance efficiency, with a backstop of mandatory appliance standards if those targets were not met. *See id.* § 325(a)(4)(B). Consistent with this approach, the 1975 EPCA preempted local energy use regulations for a given product whenever federal standards were created for that product. *Id.* § 327(a).

2. *In Amending EPCA, Congress Did Not Intend to Expand Preemption Beyond Regulations of the Efficiency of Specific Appliances*

The language at the center of this litigation comes from two amendments to EPCA. The first is the National Energy Conservation Policy Act of 1978 (NECPA), Pub. L. 95-619, 92 Stat. 3206. NECPA temporarily barred any new state or local efficiency standards for products that *could* be regulated at the

national level, not just those that were already federally regulated, a status that the enacting Congress termed “automatic preemption.” H.R. Rep. No. 95-1751, at 117 (1978) (Conf. Rep.). NECPA preempted any regulation “respecting energy use or energy efficiency of a...covered product[],” NECPA § 424(a), where “covered product” referred to an appliance that could be regulated under EPCA, *see* Pub. L. 94-163, § 322(a) (current version at 42 U.S.C. § 6292(a)).

In other words, the NECPA amendments included within EPCA’s preemptive scope state conservation standards that could be replaced by national standards, even if such national standards had not yet been promulgated. With this change, Congress intended to protect manufacturers from needing to tailor their products to many disparate appliance standards. *See, e.g.*, S. Rep. No. 95-409, at 39 (1977) (“[C]ompliance with all state standards would be very costly and would force certain product lines out of the marketplace. National standards would help maintain the diversity in the product line and, at the same time, would promote energy efficiency.”). But that logic does not apply to the question of whether a particular fuel will be available at all in a building, because declining to provide natural gas to a building does not require manufacturers to make a different kind of gas appliance.

When the federal government did not, in fact, promulgate new national efficiency standards after NECPA, and instead began a process of regularly

waiving federal preemption of local standards, Congress acted again. *See generally* S. Rep. No. 100-6, at 4 (1987); H.R. Rep. No. 100-11, at 27-28 (1987). To accelerate the federalization of energy efficiency regulation, Congress passed the National Appliance Energy Conservation Act of 1987 (NAECA), Pub. L. 100-12, 101 Stat. 103. NAECA had “two basic principles”: to “establish [federal] efficiency standards” and to “preempt State efficiency standards.” 133 Cong. Rec. 3,070 (1987) (statement of Sen. Johnston). This was accomplished by, on the one hand, tightening the standards for federal preemption waivers, *see* NAECA § 7, and, on the other hand, statutorily enacting a number of national efficiency standards, *see id.* § 5.

While the difficulty of obtaining a preemption waiver increased under NAECA, the scope of preemption stayed essentially the same as under prior enactments. NECPA had preempted any “requirement respecting energy use or energy efficiency of a...covered product[],” NECPA § 424(a), and NAECA updated the statute to preempt any “regulation concerning the energy efficiency or energy use of [a] covered product,” NAECA § 7. As Appellant notes, “concerning” and “respecting” are synonyms. Appellant’s Br. 29 (citing *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1759-60 (2018)). Further, the congressional record specifically notes that the intent of the new provision was to “follow[] substantially the preemption requirements in [then-]current EPCA.” H.R.

Rep. 100-11, at 23-24 (Mar. 3, 1987). Thus, NAECA preserved the scope of preemption under NECPA.

Finally, Congress again amended EPCA as part of the Energy Policy Act of 1992 (EPAAct), Pub. L. 102-486, 106 Stat. 2776. This act created additional conservation standards for industrial appliances and added new preemption language to accompany them; its language closely tracks NECPA's formulation. *See id.* § 122(e)(2) (current version at 42 U.S.C. § 6316(b)(2)(A)) (federal standards to supersede “any State or local regulation concerning the energy efficiency or energy use of a product for which [the] standard is prescribed”). There is no indication that Congress intended this language to operate differently from the preemption language already in EPCA; the committee reports do not address it at all, but simply note that the new provisions were meant to “expand the coverage of [EPCA's] appliance energy efficiency standards program.” H.R. Rep. No. 102-1018, at 384 (1992) (Conf. Rep.); see also H.R. Rep. No. 102-474, at 175 (1992) (discussing new provisions without mentioning any changes in preemption).

3. *Congress Intended “Concerning” and “Respecting” in NECPA and NAECA to Refer to Regulation of the Efficiency of Specific Appliances*

In enacting NECPA and NAECA, Congress intended to preempt state appliance efficiency standards that would eventually be replaced by national

standards, but not to expand the scope of preemption. This is clear in the legislative record; the conference report with the final language for NECPA, for example, described the change thus: “EPCA provides for the preemption of State energy efficiency standards once a Federal standard is prescribed....Both the House and Senate [versions of NECPA] modified EPCA to establish a period of automatic preemption of State standards prior to the establishment of a Federal standard.” H.R. Rep. No. 95-1751, at 117. In other words, NECPA flipped the default for state efficiency standards—instead of being preempted only when a federal standard was promulgated, they would be preempted by default—but did not change the scope of preemption under EPCA.

Indeed, the use of “respecting,” and later “concerning,” in the preemption clause was intended to ensure that all regulations that specifically addressed the energy efficiency or energy use of a covered appliance would be preempted. As the NECPA conference summary explains, the more expansive language was meant to include even regulations that were not “performance standard[s]”—that is, did not provide for a minimum efficiency level on their face—but were instead “design regulations relating to the energy efficiency of [a covered] product.” 124 Cong. Rec. 34,563 (1978). The report uses the example of “pilot-light prohibitions” for gas ovens: A local rule preventing manufacturers from using pilot lights (which waste gas) in their ovens does not require a minimum efficiency level or maximum

amount of energy consumption on its face, and is therefore not a performance standard, but will still be preempted because it is a product design regulation that “relate[s] to...energy efficiency.” *Id.*

Crucially, the preempted “design regulation[]” in the conference’s example is specifically targeted at a covered product: It prohibits gas pilot lights, which are components of covered appliances, and it therefore creates manufacturing requirements for such products, and specifically the amount of energy they are designed to use. *Id.*; *see also* 123 Cong. Rec. 28,510 (1977) (earlier Senate committee summary noting that preemption language was intended to ensure that any “State standard that requires or bans specific energy-related components in appliances is treated as a performance standard for that category of appliance”). It also directly alters the appliance’s “energy efficiency” (by reducing the quantity of energy used by that specific appliance), not simply the type of energy supplied to a geographic area. This preemptive scope makes sense, given EPCA’s structure: A pilot-light ban could well be implemented as part of a federal standard, and in fact was added statutorily in NAECA, *See* NAECA § 5 (current version at 42 U.S.C. § 6295(h)(1)). The example says nothing to indicate that regulations governing distribution infrastructure, which do not address the quantity of energy any product is designed to use, and which *cannot* be replaced by national regulations, should be preempted.

This history explains why Congress did not use the phrase “regulation of” instead of “regulation...concerning” in laying out EPCA preemption. *See* Appellant’s Br. 26 (arguing that Congress would have used “regulation of” if it meant to exclude regulations like the Ordinance). Had Congress preempted only direct “regulations of energy efficiency or energy use,” it would not have been clear that product design standards that directly limit the quantity of energy use, but do not specify efficiency or use standards, cannot be enacted locally. Thus, Congress used the broadening words “respecting” and, later, “concerning...the energy efficiency or energy use of a [covered] product”—but never expanded the scope of preemption to the infrastructure that serves those products.

Congress gave no indication that its amendments to NECPA and NAECA were intended to expand the scope of EPCA preemption beyond energy efficiency standards. There is certainly no sign that it expected the amendments to remove a large swathe of state and local authority. On the contrary, through each of these amendments, Congress has consistently connected preemption of local efficiency standards with the possibility of new, national standards that could take their place. The change in the language of the preemption clause—leading to the use of the word “concerning” on which Appellant bases its reading—was not an attempt by Congress to *sub silentio* remake the federalist order, but merely a way to capture the full scope of efficiency standards that could be replaced at the national level.

CONCLUSION

Appellant's proposed reading of EPCA preemption is contrary to the manifest intent of Congress, and *amici* therefore urge the Court to reject Appellant's interpretation and uphold the District Court's decision.

Respectfully submitted,

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February 8, 2022

CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the Court's CM/ECF system, which will send notice of such filing to all counsel who are CM/ECF registered users.

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February 8, 2022

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FOR THE NINTH CIRCUIT

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