PUTTING THE BAN BACK TOGETHER: A CRITICAL LOOK AT *CALIFORNIA RESTAURANT ASSOCIATION V. BERKELEY*

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SUMMARY

Concerned by methane's potent climate-altering emissions, a growing number of states and municipalities have embraced the phaseout of natural gas as a tool to mitigate climate change. But in April 2023, the California Restaurant Association successfully petitioned the U.S. Court of Appeals for the Ninth Circuit to overturn the city of Berkeley's ban on natural gas infrastructure in new buildings. The three-judge panel found the ban preempted by the federal Energy Policy and Conservation Act, and in January 2024, the Ninth Circuit denied Berkeley's petition for rehearing. Armed with a successful legal claim, industry is primed to challenge other state and local gas prohibitions. This Article weighs the panel's reasoning in light of the U.S. Supreme Court's text-based jurisprudence and argues the decision may prove to be a flash in the pan.

Climate change poses the most persistent threat to human survival in our lifetimes.[1] Governments around the world aim to combat this threat with pledges to attain "net-zero" greenhouse gas emissions by 2050,[2] which includes curtailing natural gas combustion—a particularly potent source of emissions.[3] In the United States, the absence of comprehensive greenhouse gas regulation[4] has prompted concerned states to enact their own plans to reduce fossil fuel consumption.[5] The phasing out of natural gas—through prohibitions on new infrastructure—has become one tool states and localities employ in this effort.[6] Leading the way, Massachusetts,[7]

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1. *See generally Climate Change: A Threat to Human Wellbeing and Health of the Planet. Taking Action Now Can Secure Our Future*, Intergovernmental Panel on Climate Change (Feb. 28, 2022), https://www.ipcc.ch/2022/02/28/pr-wgii-ar6/.
2. *See* Press Release, International Energy Agency, Pathway to Critical and Formidable Goal of Net-Zero Emissions by 2050 Is Narrow but Brings Huge Benefits, According to IEA Special Report (May 18, 2021), https://www.iea.org/news/pathway-to-critical-and-formidable-goal-of-net-zero-emissions-by-2050-is-narrow-but-brings-huge-benefits.
3. Natural gas combustion accounts for about 34% of U.S. carbon dioxide emissions. *See* U.S. Energy Information Administration, *Natural Gas Explained*, https://www.eia.gov/energyexplained/natural-gas/natural-gas-and-the-environment.php (last updated Nov. 7, 2022); *see also* Tim Cocks, *Explainer: Why Methane Emissions Are Threatening Climate Stability*, Reuters (Nov. 3, 2022, 4:45 PM), https://www.reuters.com/business/cop/why-methane-emissions-are-threatening-climate-stability-2022-11-03/; Mike Soraghan, *Methane Emissions From Energy Production Are Massively Undercounted*, E&E News (Feb. 23, 2022), https://www.scientificamerican.com/article/methane-emissions-from-energy-production-are-massively-undercounted/.
4. *See generally* Katrina M. Wyman & Danielle Spiegel-Feld, *The Urban Environmental Renaissance*, 108 Calif. L. Rev. 305, 325-46 (2020).
5. *See, e.g.*, Marie J. French, *New York Passes Sweeping Plan to Reduce Emissions and "Lead the Way on Solving Climate Change,"* Politico (Dec. 19, 2022, 4:01 PM), https://www.politico.com/news/2022/12/19/new-york-emissions-climate-change-00074600; Brad Plumer, *California Approves a Wave of Aggressive New Climate Measures*, N.Y. Times (Sept. 29, 2022), https://www.nytimes.com/2022/09/01/climate/california-lawmakers-climate-legislation.html; Miriam Wasser, *What You Need to Know About the New Mass. Climate Law*, WBUR (Mar. 26, 2021), https://www.wbur.org/news/2021/03/26/new-mass-climate-law-faq; *Pritzker Signs Climate Plan to Get Illinois on Path to 100% Clean Energy With Help From Ratepayer Hike*, NPR Ill. (Sept. 15, 2021, 5:00 PM), https://www.nprillinois.org/statehouse/2021-09-15/pritzker-signs-climate-plan-to-get-illinois-on-path-to-100-clean-energy-with-help-from-ratepayer-hike.
6. *See generally* Caitlin McCoy, Harvard Law School Environment and Energy Law Program, The Legal Dynamics of Local Limits on Natural Gas Use in Buildings 3 (2020), http://eelp.law.harvard.edu/wp-content/uploads/The-Legal-Dynamics-of-Local-Limits-on-Natural-Gas-Use-in-Buildings.pdf.
7. *See* Miriam Wasser, *What to Know About the New Mass. Climate Law*, WBUR (Aug. 11, 2022), https://www.wbur.org/news/2022/07/22/massachusetts-climate-bill-baker-desk.

New York,[8] and Washington[9] have passed laws to prohibit new natural gas infrastructure, citing the gas' potent climate change effects along with concerns for indoor air quality and human health.[10] In 2019, Berkeley became one of the first municipalities in California to pass an ordinance to restrict the use of natural gas through a ban on fuel piping in new construction.[11]

Natural gas bans have become politically and culturally divisive as industry lobbyists have sought to portray the laws as liberal encroachment on personal freedoms.[12] Several states have even reacted by imposing a "ban on bans."[13] Certainly a patchwork of state and local climate regulations is not an ideal solution to an environmental crisis of national and global proportion.[14] Yet more immediately, in our system of dual-sovereignty where federal law is supreme,[15] new local initiatives like natural gas prohibitions risk preemption by existing federal law.[16]

In this way, the California Restaurant Association challenged Berkeley's ban in 2019, claiming that the ordinance was unconstitutional because it was expressly preempted by the federal Energy Policy and Conservation Act (EPCA).[17] The district court dismissed the Restaurant Association's claims, citing precedent from a similar EPCA preemption case.[18] The court concluded that Berkeley's ordinance did not conflict with federal law because it did not impose standards of energy use or efficiency on gas appliances in conflict with the Act.[19]

However, in April 2023, a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit reversed the district court, agreeing with the Restaurant Association that EPCA expressly preempted Berkeley's ability to ban natural gas infrastructure in new construction, seemingly disregarding the circuit's precedent.[20] The Ninth Circuit's reasoning differed from the district court in two key respects. First, the circuit court's inquiry into EPCA's purpose did not venture beyond the plain meaning of the text, as it cast aside the "presumption against preemption"—an interpretive doctrine that construes federal law narrowly to avoid preempting areas of law historically controlled by the states.[21] In a fervent concurrence, Ninth Circuit Judge Diarmuid F. O'Scannlain suggested that but for the court's disregarding this doctrine, the ban would have been upheld.[22] Second, the panel concluded that by forbidding new gas fuel lines, Berkeley's ban was actually a building code regulation on the "energy use" and "energy efficiency" of gas appliances, thus entering EPCA's domain.[23]

Did the Ninth Circuit get it right? EPCA was enacted in the 1970s during the Organization of the Petroleum Exporting Countries (OPEC) oil crisis,[24] in part to allow for national uniform appliance efficiency standards.[25] At

8. *See* Anna Philips, *N.Y. Ditches Gas Stoves, Fossil Fuels in New Buildings in First Statewide Ban in U.S.*, Wash. Post (May 3, 2023, 2:27 PM), https://www.washingtonpost.com/climate-environment/2023/05/03/new york-gas-ban-climate-change/.
9. *See* T.J. Martinell, *"Definitely Not Cheap": WA House Passes "First in the Nation" Natural Gas Bill*, Ctr. Square (Mar. 8, 2023), https://www.thecentersquare.com/washington/article_24f7f388-bddd-11ed-b9bc-67ac4eb3e34f.html. *But see* David Iaconangelo, *Washington State Hits the Brakes on Landmark Gas Ban*, E&E News (May 25, 2023, 6:56 AM), https://www.eenews.net/articles/washington-state-hits-the-brakes-on-landmark-gas-ban/.
10. *See* U.S. Energy Information Administration, *Energy and the Environment Explained*, https://www.eia.gov/energyexplained/energy-and-the-environment/where-greenhouse-gases-come-from.php (last updated Aug. 22, 2023); *Gas Stove Emissions Are a Public Health Concern: Exposure to Indoor Nitrogen Dioxide Increases Risk of Illness in Children, Older Adults, and People With Underlying Health Conditions*, Am. Pub. Health Ass'n (Nov. 8, 2022), https://www.apha.org/%20Policies-and-Advocacy/Public-Health-Policy-Statements/Policy-Database/2023/%2001/18/Gas-Stove-Emissions.
11. *See generally* Susie Cagle, *Berkeley Became First US City to Ban Natural Gas. Here's What That May Mean for the Future*, Guardian (July 23, 2019, 11:34 PM), https://www.theguardian.com/environment/2019/jul/23/berkeley-natural-gas-ban-environment; *see* Berkeley, Cal., Mun. Code ch. 12.80 (2023), https://berkeley.municipal.codes/BMC/12.80 ("Prohibition of Natural Gas Infrastructure in New Buildings"). The ordinance provides some public interest exceptions. *See id.* §12.80.050.
12. *See* Brad Plumer & Hiroko Tabuchi, *How Politics Are Determining What Stove You Use*, N.Y. Times (Dec. 16, 2021), https://www.nytimes.com/2021/12/16/climate/gas-stoves-climate-change.html.
13. *See* McCoy, *supra* note 6, at 28-29.
14. The long-term impact of local action on climate change is not emissions reductions—which would be relatively insignificant—but, rather, in local efforts' "triggering action at higher levels of government." Kirsten Engel, *State and Local Climate Change Initiatives: What Is Motivating State and Local Governments to Address a Global Problem and What Does This Say About Federalism and Environmental Law?*, 38 Urb. L. 1015, 1026 (2006).
15. *See* U.S. Const. art. VI, cl. 2:
    > This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, 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.
16. *See* Ann E. Carlson, *Energy Efficiency and Federalism*, 1 San Diego J. Climate & Energy L. 11, 14-15 (2009); National Solid Wastes Mgmt. Ass'n v. Killian, 918 F.2d 671, 673, 21 ELR 20161 (7th Cir. 1990), *aff'd sub nom*. Gade v. National Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 22 ELR 21073 (1992) ("The resulting patchwork of [environmental] legislation and regulation emerging from government at various levels and reflecting different approaches to control has repeatedly generated issues of federal preemption of state and local laws . . . and state and local interference with interstate commerce.").
17. 42 U.S.C. §6201. *See* California Rest. Ass'n v. Berkeley (*Berkeley I*), 547 F. Supp. 3d 878, 883, 51 ELR 20132 (N.D. Cal. 2021), *rev'd*, *Berkeley II*, 65 F.4th 1045, 53 ELR 20064 (9th Cir. 2023), *reh'g denied and amended by Berkeley III*, 89 F.4th 1094 (9th Cir. 2024); *see also* Alexander Stevens & Paige Lambermont, Institute for Energy Research, An Overview of Natural Gas Bans in the U.S. (2021), https://www.instituteforenergyresearch.org/wp-content/uploads/2021/08/Natural-Gas-Ban-Report_Updated.pdf ("This ban will slow down the process of cooking and reduce a chef's control over the amount and intensity of heat which is needed to prepare food appropriately. It's like taking paint away from a painter and asking them to create a masterpiece.").
18. *See generally Berkeley I*, 547 F. Supp. 3d at 889-93 (applying the Ninth Circuit's reasoning from Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Dev. Comm'n, 410 F.3d 492, 35 ELR 20026 (9th Cir. 2005)).
19. *Id.* at 891.
20. *See infra* Section I.B (explaining the lower court's reliance on precedent). The Ninth Circuit reversed the lower court's decision in *Berkeley II*, 65 F.4th 1045, 1056 (9th Cir. 2023). Then, in January 2024, the Ninth Circuit denied Berkeley's petition for rehearing en banc and issued an amended and superseding opinion. *See Berkeley III*, 89 F.4th 1094 (9th Cir. 2024).
21. *See Berkeley III*, 89 F.4th at 1100-01; *see also id.* at 1107-08 (O'Scannlain, J., concurring).
22. *See id.* at 1107.
23. *See id.* at 1105 (majority opinion).
24. *See generally* Albert L. Danielsen, *OPEC*, Britannica (Feb. 3, 2024), https://www.britannica.com/topic/OPEC.
25. U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, *History and Impacts*, https://www.energy.gov/eere/buildings/history-and-impacts (last visited Feb. 8, 2024). *See generally* Rebecca Garcia, *EPCA Reform to Make Dishwashers Great Again*, 31 Loy. Consumer L. Rev. 114, 115-16 (2018) (discussing the history of EPCA's enactment).

first glance, what does Berkeley's ban on new gas infrastructure have to do with enforcing an appliance efficiency regulation? Did the U.S. Congress really intend for EPCA to supersede a municipality's exercise of its police powers[26] to protect residents from local harms like asthma and climate change? Berkeley's petition for rehearing en banc was recently denied by the Ninth Circuit,[27] and the natural gas industry wasted no time bringing identical claims in New York.[28] If the Ninth Circuit's reasoning is adopted by other circuits, state and local natural gas bans across the country will likely be struck down.[29]

This Article argues that the court got it very wrong. Regardless of the validity of the "presumption against preemption," the panel's errors are evident in a striking disregard of the text and structure of EPCA that led them to misconstrue key terms in the statute, giving EPCA far-reaching effects that would trample on states' Tenth Amendment powers.[30] By any method of text- or purpose-driven reasoning espoused by the U.S. Supreme Court today, EPCA plainly should not preempt natural gas ban ordinances like Berkeley's.[31] Other circuits faced with similar questions of EPCA preemption should resoundingly reject the Ninth Circuit's reasoning.

Part I summarizes the Ninth Circuit's ruling and relevant background, introducing the three main elements of the panel's decision: (1) abandoning the presumption against preemption; (2) textual reasoning based on ordinary meaning; and (3) analogy to prior case law. Part II examines the court's interpretation of EPCA's text against the arguments advanced by the dissent, Berkeley, and amici. Part III demonstrates how the dissent's interpretation may be properly grounded in precedent and identifies a limiting principle to determine when a state or local ban becomes a de facto regulation subject to preemption by federal law. Ultimately, this Article concludes that Berkeley's ban is closely analogous to many state and local bans previously upheld by the Supreme Court as a proper exercise of the states' historical police powers.[32]

26. *See generally* Berman v. Parker, 348 U.S. 26, 32-33 (1954) (explaining that though public health and safety are more "conspicuous" examples of the states' police powers, "the concept of public welfare is broad and inclusive").
27. *See generally* Defendant-Appellee City of Berkeley's Petition for Rehearing En Banc, *Berkeley II*, 65 F.4th 1045 (9th Cir. 2023) (No. 21-16278) [hereinafter Petition for Rehearing]; *Berkeley III*, 89 F.4th 1094 (9th Cir. 2024).
28. A suit premised on EPCA preemption was filed to challenge New York State's natural gas infrastructure ban in the Climate Leadership and Community Protection Act. *See Lawsuit to Block New York's Ban on Gas Stoves Is Filed by Gas and Construction Groups*, Associated Press (Oct. 13, 2023, 2:16 PM), https://apnews.com/article/gas-stove-ban-new-york-lawsuit-climate-1cdb46211813bd0275b1d4a162817f3e. *See generally* Complaint for Declaratory and Injunctive Relief, Mulhern Gas Co. Inc. v. Rodriguez, No. 1:23-CV-01267 (N.D.N.Y. Oct. 12, 2023) (asserting EPCA preemption of New York's natural gas ban). A separate suit challenging New York City's ban on indoor natural gas combustion was filed in December 2023. *See generally* Complaint for Declaratory and Injunctive Relief, Ass'n of Contracting Plumbers v. City of New York, No. 1:23-CV-11292 (S.D.N.Y. Dec. 29, 2023).
29. *See* David Iaconangelo, *What 9th Circuit Ruling Means for Building Gas Bans*, E&E News (Apr. 18, 2023, 6:57 AM), https://www.eenews.net/articles/what-9th-circuit-ruling-means-for-building-gas-bans/.
30. *See infra* Part II.
31. *See infra* Section III.B.4.
32. *See infra* Part III.

I. Anatomy of the Ninth Circuit's Ruling

A. *Issue: Does EPCA Preempt Berkeley's Natural Gas Ban Ordinance?*

In 1973, the United States experienced a historic energy crisis prompted by the OPEC oil embargo.[33] The crisis prompted the nation to consider its lack of energy policy, including automobile fuel efficiency and energy consumption generally.[34] In 1975, Congress enacted EPCA,[35] which established the Strategic Petroleum Reserve, activated U.S. participation in the International Energy Program, and established a framework from which to promulgate national consumer appliance efficiency standards.[36]

In 2019, the city of Berkeley passed a natural gas ban ordinance, restricting the use of natural gas through a prohibition on fuel piping in new construction.[37] Along with the risks posed by climate change, the ordinance's justification includes natural gas' detriment to indoor air quality, aggravation of asthma, and the heightened danger gas infrastructure poses due to Berkeley's location on a major fault line.[38] The ordinance defines "natural gas infrastructure" 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."[39]

The California Restaurant Association challenged the ordinance, claiming that EPCA preempted Berkeley's ban, and on appeal, the Ninth Circuit agreed.[40] To introduce the issue of federal preemption before the court, Section I.A.1 introduces the relevant text of EPCA, and Section I.A.2 provides background on federal supremacy and the waning doctrine of the *presumption against preemption*.

1. EPCA

Title III, Part B of EPCA—"Energy Conservation Program for Consumer Products Other Than Automobiles"—establishes energy conservation standards for certain consumer products ("covered products").[41] Congress' ability to regulate these products stems from its power under the Com-

33. *See generally* Henry Epp, *How the 1973 Oil Embargo Changed the Way the U.S. Thinks About Energy*, Marketplace (Sept. 21, 2023), https://www.marketplace.org/2023/09/21/how-the-1973-oil-embargo-changed-the-way-the-u-s-thinks-about-energy/.
34. *See id.*
35. 42 U.S.C. §6201.
36. *See* James W. Moeller, *Electric Demand-Side Management Under Federal Law*, 13 Va. Env't L.J. 57, 62-63 (1993). *See generally* Garcia, *supra* note 25, at 115-20.
37. *See generally* Cagle, *supra* note 11. *See* Berkeley, Cal., Mun. Code ch. 12.80 (2023), https://berkeley.municipal.codes/BMC/12.80 ("Prohibition of Natural Gas Infrastructure in New Buildings"). The ordinance provides for some public interest exceptions. *See id.* §12.80.050.
38. *See* Berkeley, Cal., Mun. Code §12.80.010 (2023).
39. *Id.* §12.80.030.
40. *See Berkeley III*, 89 F.4th 1094, 1107 (9th Cir. 2024).
41. EPCA, Pub. L. No. 94-163, 89 Stat. 917 (1975) (codified in 42 U.S.C. §6291).

merce Clause,[42] as highlighted by several key definitions in Part B.[43] For example, a "consumer product" means "any article . . . which, to any significant extent, is distributed in commerce,"[44] whereby "commerce" is "trade . . . between a place in a State and any place outside thereof."[45]

The Ninth Circuit's initial task was to interpret EPCA's preemptive scope and then determine if Berkeley's natural gas ban impermissibly entered that scope.[46] The relevant preemption clause provides that "no State regulation concerning the energy efficiency, energy use, or water use of such covered product shall be effective with respect to such product."[47] Importantly, EPCA distinguishes between energy use and energy efficiency.[48] The statute defines "energy use" as "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."[49] "Energy efficiency" is defined as "the ratio of the useful output of services from a consumer product to the energy use of such product," as also determined by the prescribed testing procedures.[50] Kitchen ranges and ovens are included in the Act's list of "covered products,"[51] which consume electricity or fossil fuels.[52]

2. Federal Supremacy and the Presumption Against Preemption

Woven tightly into the fabric of U.S. democracy is a tension between local control and protection of fundamental rights.[53] Empowered by the U.S. Constitution's Supremacy Clause,[54] a federal act might impose an *express* preemption clause, or the act may *impliedly* preempt a state law by either regulating the entire "field" or *implying* a purpose and effect that conflicts with state law.[55] Even if no federal act preempts, courts may find that a state or local ban infringes on a fundamental liberty.[56] Alternatively, a state law that restricts economic activity may invite challenges under the dormant Commerce Clause, as the ban must not discriminate against other states or exhibit an outsized burden compared to its supposed benefits.[57] A state ban or regulation that does not conflict with federal law rests within the historic police powers of the state to provide for the health and welfare of its citizens, as reserved by the Tenth Amendment.[58]

One of the messier areas of preemption doctrine concerns the Supreme Court's use of the rather lyrically named "presumption against preemption," which the Court has employed when deciding how to interpret the scope of a preemption clause.[59] The presumption against preemption counsels two considerations: (1) "the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress," and (2) the scope of a preemption statute is found through a "fair understanding" of Congress' purpose, including the "structure and purpose of the statute as a whole."[60] Critics maintain that the use of

42. U.S. Const. art. I, §8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").
43. *See generally* 42 U.S.C. §6291 ("Definitions").
44. *Id.* §6291(1)(B).
45. *Id.* §6291(17)(A).
46. *See Berkeley III*, 89 F.4th 1094, 1100-02 (9th Cir. 2024).
47. 42 U.S.C. §6297(c). The court noted that the statute provides several exceptions that are not relevant to Berkeley's ordinance. *See Berkeley III*, 89 F.4th at 1101.
48. *See* 42 U.S.C. §6291(4)-(5).
49. *Id.*
50. *Id.* Testing procedures for gas ranges and ovens are set out in promulgated regulations at 10 C.F.R. pt. 430, subpt. B, app. I1 (2023).
51. 42 U.S.C. §6292(a)(10).
52. *Id.* §6291(3) (defining "energy").
53. *See generally* John C. Yoo, *Sounds of Sovereignty: Defining Federalism in the 1990s*, 32 Ind. L. Rev. 27, 27-32 (1998) ("[D]ividing power between the federal and state governments was thought to produce an additional safety against a potentially tyrannical state."); Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) ("The constitutionally mandated balance of power between the States and the Federal Government was adopted by the Framers to ensure the protection of our fundamental liberties." (citation omitted)); The Federalist No. 45 (James Madison) ("The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.").
54. U.S. Const. art. VI, cl. 2:
> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, 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.
55. *See* Mary J. Davis, *On Preemption, Congressional Intent, and Conflict of Laws*, 66 U. Pitt. L. Rev. 181, 183 (2004).
56. "Under the Due Process Clause of the Fourteenth Amendment, no State shall 'deprive any person of life, liberty, or property, without due process of law.' The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights." Obergefell v. Hodges, 576 U.S. 644, 663 (2015) (quoting U.S. Const. amend. XIV).
57. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970):
> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . [T]he extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

cf. National Pork Producers Council v. Ross, 598 U.S. 356, 382, 53 ELR 20076 (2023) ("In a functioning democracy, policy choices like [the decision to ban the sale of 'cruel' pork] usually belong to the people and their elected representatives. They are entitled to weigh the relevant political and economic costs and benefits for themselves and try novel social and economic experiments if they wish.").
58. While Congress "must rely on enumerated powers to act, states (and local governments through state delegation) possess broad powers to regulate in the interests of the public's health, safety, and general welfare. Known collectively as 'police powers,' this residual authority of sovereign governments [is] reflected in the Tenth Amendment." James G. Hodge Jr. & Megan Scanlon, *The Legal Anatomy of Product Bans to Protect the Public's Health*, 23 Annals Health L. 161, 174 (2014); *see* U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 756 (1985) ("States traditionally have had great latitude under their police powers to legislate as to the protections of the lives, limbs, health, comfort, and quiet of all persons.").
59. *See* Bryan L. Adkins et al., Congressional Research Service, R45825, Federal Preemption: A Legal Primer 4 (2023); Robert N. Weiner, *The Height of Presumption*, 32 Hamline L. Rev. 727, 728-29 (2009); S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. Rev. 685, 762-63 (1991).
60. Medtronic, Inc. v. Lohr, 518 U.S. 470, 485-86 (1996); *see* Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 516 (1992).

the *presumption* puts a "thumb on the scale" against preemption, muddling the Court's inquiry into Congress' true intention.[61] As the balance of power in the Court has shifted over time, its decisions have reflected an "on-again, off-again" use of the *presumption*.[62]

In 2016's *Puerto Rico v. Franklin California Tax-Free Trust*,[63] the Court arrived at a new inflection point in its long, unsettled relationship with the doctrine. *Franklin* examined an express preemption clause in the federal Bankruptcy Code,[64] and established that the Court need not look beyond the ordinary meaning of the preemption clause or "invoke any presumption against preemption" because "the statute's language is plain."[65] Writing for the majority, Justice Clarence Thomas appears to have seized the opportunity to definitively reject the presumption against preemption, in keeping with his long-time advocacy for its demise.[66]

Since *Franklin*, it appears no Supreme Court decision has relied on the presumption.[67] The lower courts are well on their way to universal adoption of *Franklin*'s plain-text rule.[68] Only the U.S. Courts of Appeals for the Third, Sixth, and Federal Circuits have resisted abandoning the presumption against preemption.[69] Other panels on the Ninth Circuit have readily followed *Franklin*'s lead.[70]

61. Justice Antonin Scalia's dissent-in-part in *Cipollone* foreshadowed the Court's emerging conflict, writing: "There is no merit to this newly crafted doctrine of narrow construction. Under the Supremacy Clause . . . our job is to interpret Congress's decrees of pre-emption neither narrowly nor broadly, but in accordance with their apparent meaning." 505 U.S. at 544 (Scalia, J., concurring in part and dissenting in part). *See also* Catherine M. Sharkey, *Against Freewheeling, Extratextual Obstacle Preemption: Is Justice Clarence Thomas the Lone Principled Federalist?*, 5 N.Y.U. J.L. & Liberty 63, 75-76, 78 (2010) (describing Justice Thomas' consistent opposition to the use of the presumption against preemption); *see generally* Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 292-303 (2000).

62. *See, e.g.*, Viet Dinh, *Reassessing the Law of Preemption*, 88 Geo. L.J. 2085, 2101 (2000); Allison H. Eid, *Preemption & the Federalism Five*, 37 Rutgers L.J. 1, 4-5 (2005); Adam Babich, *The Supremacy Clause, Cooperative Federalism, and the Full Federal Regulatory Purpose*, 64 Admin. L. Rev. 1, 10 (2012). For cases following *Medtronic*'s preemption rule, see, for example, *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 426 (2002); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541-42 (2001); *Bates v. Dow Agroscis. LLC*, 544 U.S. 431, 449, 35 ELR 20087 (2005); *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008); *Wyeth v. Levine*, 555 U.S. 555, 565 (2009); *CTS Corp. v. Waldburger*, 573 U.S. 1, 18, 44 ELR 20125 (2014). However, note the many preemption cases that implicitly or explicitly disregard the rule, for example, *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861 (2000); *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 34 ELR 20028 (2004); *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007); *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *PLIVA, Inc. v. Mensing*, 564 U.S. 604 (2011); *Mutual Pharm. Co., Inc. v. Bartlett*, 570 U.S. 472 (2013).

63. 579 U.S. 115 (2016).

64. 11 U.S.C. §101.

65. *Franklin*, 579 U.S. at 125 (citation omitted). *See generally* Timothy R. Powell, Puerto Rico v. Franklin California Tax-Free Trust: *Congressional Intent Interpreted Through a Plain Reading of the Federal Bankruptcy Code*, 13 J. Bus. & Tech. L. 117, 129-32 (2017).

66. *See Franklin*, 579 U.S. at 125. In crafting the Court's plain-text rule, Justice Thomas cited pre-*Cipollone* case law, carefully tracing a path forward through other established precedent, seeming to isolate *Cipollone*'s holding as an aberration in the Court's jurisprudence. *See id.* (supporting a plain-text rule with reference first to *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989); then *Chamber of Com. of U.S.A. v. Whiting*, 563 U.S. 582, 594 (2011); then *Gobeille v. Liberty Mut. Ins. Co.*, 577 U.S. 312, 324 (2016)).

For a summary of Justice Thomas' anti-presumption argument, see generally *Altria Group, Inc.*, 555 U.S. at 91-103 (Thomas, J., dissenting). Justice Thomas' views on the presumption against preemption were shaped, in part, by the scholarship of Caleb Nelson; *see* Sharkey, *supra* note 61, at 77, who argues that "[i]f the Court's normal rules of statutory interpretation are designed to give effect to congressional intent, then the Court's insistence on giving express preemption clauses a narrower-than-usual interpretation will drive preemption decisions away from that intent." Nelson, *supra* note 61, at 292. Nelson explains that the Court's intentional narrowing of statutory text creates an "extrapolitical safeguard—a safeguard that makes it difficult for Congress to preempt state law to the extent it wants." *Id.* at 300-01. For a deeper discussion on Nelson's theories' grounding in his understanding of the Constitution's non obstante clause, see generally *id.* at 237-42, 304; *see also* Daniel J. Meltzer, *Preemption and Textualism*, 112 Mich. L. Rev. 1, 47-48 (2013); U.S. Const. art. VI, cl. 2 ("any Thing in the Constitution or Laws of any State to the Contrary notwithstanding").

67. Justice Ruth Bader Ginsburg tread lightly around the doctrine after 2016. *See* Coventry Health Care of Mo., Inc. v. Nevils, 581 U.S. 87, 97-88 (2017) (rejecting the respondent's argument that the Court should apply a presumption against preemption). Further, in the 2019 preemption case of *Virginia Uranium, Inc. v. Warren*, Justices Neil Gorsuch and Brett Kavanaugh appear to have embraced the underlying scholarship that buttresses Thomas' plain-text views on preemption. *See* 139 S. Ct. 1894, 1901, 49 ELR 20104 (2019) ("We examine these arguments about the [Atomic Energy Act's] preemptive effect much as we would any other about statutory meaning, looking to the text and context of the law in question and guided by the traditional tools of statutory interpretation."). In deciding that Virginia's uranium mining ban was not preempted by the Atomic Energy Act, Gorsuch set aside any extratextual evidence of the purposes of Congress or the Virginia Legislature. *Id.*; *see also infra* Section III.B.3.

68. *See, e.g.*, Medicaid & Medicare Advantage Prods. Ass'n of P.R., Inc. v. Emanuelli Hernandez, 58 F.4th 5, 11 (1st Cir. 2023) (adopting *Franklin*'s direction to not invoke a presumption against preemption); Buono v. Tyco Fire Prods., LP, 78 F.4th 490 (2d Cir. 2023) (same); Air Evac EMS, Inc. v. Cheatham, 910 F.3d 751, 761-62 (4th Cir. 2018) (same); Young Conservatives of Tex. Found. v. Smatresk, 73 F.4th 304, 311 (5th Cir. 2023) (same); Ye v. GlobalTranz Enters., Inc., 74 F.4th 453, 465 (7th Cir. 2023) (same); Watson v. Air Methods Corp., 870 F.3d 812, 817 (8th Cir. 2017) (same); Thornton v. Tyson Foods, Inc., 28 F.4th 1016, 1023 (10th Cir. 2022) (noting the Supreme Court's changed position on the presumption against preemption and declaring, "We have done the same."); Carson v. Monsanto Co., 72 F.4th 1261, 1267, 53 ELR 20104 (11th Cir. 2023) (same).

69. *See* Shuker v. Smith & Nephew, PLC, 885 F.3d 760, 770-71 n.9 (3d Cir. 2018) ("We disagree . . . that any presumption against express preemption no longer exists." (citation omitted)); Lupian v. Joseph Cory Holdings LLC, 905 F.3d 127, 131 n.5 (3d Cir. 2018) (continuing to use the presumption in areas historically regulated by the states); In re Ford Motor Co. F-150 & Ranger Truck Fuel Econ. Mktg. & Sales Pracs. Litig., 65 F.4th 851, 860 (6th Cir. 2023), *cert. denied sub nom.* Lloyd v. Ford Motor Co., No. 23-289, 2023 WL 6797753 (Oct. 16, 2023) (noting *Franklin*'s rule, but stating "[w]e normally apply a strong presumption against implied preemption in fields that States traditionally regulate" (citation omitted)); Conway v. United States, 997 F.3d 1198, 1207-08 (Fed. Cir. 2021) (applying presumption against preemption to an insurance insolvency case); *cf.* Amgen Inc. v. Sandoz Inc., 877 F.3d 1315, 1326 (Fed. Cir. 2017) (embracing the presumption against preemption but not applying it to a field that the state has not traditionally occupied). *But see* Rolon v. Metropolitan Life Ins. Co., No. 21-CV-01856-JMG, 2022 WL 35609 (E.D. Pa. Jan. 4, 2022) (citing *Franklin*'s plain-text rule).

70. *See, e.g.*, International Bhd. of Teamsters, Loc. 2785 v. Federal Motor Carrier Safety Admin., 986 F.3d 841, 853 (9th Cir. 2021), *cert. denied sub nom.* Trescott v. Federal Motor Carrier Safety Admin., 142 S. Ct. 93 (2021); Jones v. Google LLC, 73 F.4th 636, 641-42 (9th Cir. 2023); Hollins v. Walmart Inc., 67 F.4th 1011, 1016 (9th Cir. 2023); National R.R. Passenger Corp. v. Su, 41 F.4th 1147, 1153 n.1 (9th Cir. 2022); R.J. Reynolds Tobacco Co. v. County of Los Angeles, 29 F.4th 542, 553 n.6 (9th Cir. 2022), *cert. denied sub nom.* R.J. Reynolds Tobacco Co. v. County of Los Angeles, Cal., 143 S. Ct. 979 (2023); Webb v. Trader Joe's Co., 999 F.3d 1196, 1201 (9th Cir. 2021); Connell v. Lima Corp., 988 F.3d 1089, 1097 (9th Cir. 2021). *But see* Miller v. C.H. Robinson Worldwide, Inc., 976 F.3d 1016, 1021 (9th Cir. 2020) (failing to address *Franklin* and continuing to apply the presumption against preemption); California Ins. Guarantee Ass'n v. Azar, 940 F.3d 1061, 1067 (9th Cir. 2019) (same).

B. Procedural History: Reversing the District Court

In spite of growing adoption of *Franklin*'s plain-text rule, the district court in *Berkeley* purported to rely on the presumption against preemption, construing EPCA's preemption language narrowly according to circuit precedent.[71] In upholding Berkeley's ban, the court examined the legislative history and purpose of EPCA to affirm that Congress did not intend to supplant state and local control over natural gas infrastructure.[72] The court found that the Act was intended to prevent a patchwork of state appliance efficiency standards, and nothing in EPCA required local municipalities to allow the extension of natural gas lines.[73]

The court held that the regulation of "energy efficiency" and "energy use" of a covered appliance narrowly concerned design and manufacturing standards under EPCA—regulations that posed no conflict with Berkeley's gas ban ordinance.[74] Its decision followed the Ninth Circuit's 2005 ruling in *Air Conditioning & Refrigeration Institute v. Energy Resources Conservation & Development Commission*,[75] where the court decided a similar question of EPCA's express preemption of state law.[76] The Ninth Circuit, citing reliance on *Franklin*, however, reversed.[77]

C. Reasoning: Three Key Elements

When adjudicating the Restaurant Association's appeal, the Ninth Circuit chose not to rely on any presumption against preemption, casting the doctrine aside.[78] The court then embarked on a plain-text analysis of EPCA,[79] drawing support from prior cases where federal law expressly preempted state-level bans.[80] To initially explain the panel's reversal of the district court, this section presents three key elements of the panel's reasoning: (1) disregarding the presumption against preemption, (2) a text-based analysis, and (3) analogy to prior case law.

1. Disregarding the Presumption Against Preemption

In *Berkeley*, the Ninth Circuit relied on the plain-text rule set by the Supreme Court in 2016 in *Franklin*.[81] Employing *Franklin*'s rule, the *Berkeley* panel unceremoniously cast aside its prior adherence to the doctrine, choosing to read EPCA's preemption clause without any "thumb on the scale" against federal preemption, focusing only on the ordinary meaning of the text.[82] In his concurrence, Judge O'Scannlain proposed that but for the panel's unhesitating adoption of *Franklin*, Berkeley's gas ban ordinance would have survived under the precedent of *Air Conditioning & Refrigeration Institute*.[83]

2. Textual Analysis According to Ordinary Meaning

The Ninth Circuit's resulting analysis is grounded in two primary conclusions.[84] First, EPCA preempts regulations that interfere with the end-user's ability to operate a covered appliance because the concept of "energy use" includes *actual use* of the appliance by the consumer.[85] While Berkeley's ordinance is not a direct ban on gas appliances, the court framed the ban as "moving up one step in the energy chain" to effectively prohibit their use in new buildings—just the kind of indirect regulation that EPCA preempts.[86] Second, a ban on natural gas use is effectively a requirement that a gas appliance use "zero" energy—a quantity within the meaning of the Act.[87]

3. Express Preemption Case Law

For support, the court analogized to two other preemption cases that originated in the Ninth Circuit: *Engine Manufacturers Ass'n v. South Coast Air Quality Management District*[88] and *National Meat Ass'n v. Harris*.[89] In both cases, the

71. *See generally Berkeley I*, 547 F. Supp. 3d 878, 889, 891 (N.D. Cal. 2021), *rev'd*, *Berkeley II*, 65 F.4th 1045 (9th Cir. 2023), *reh'g denied and amended by Berkeley III*, 89 F.4th 1094 (9th Cir. 2024).
72. *Id.* at 891-93.
73. *Id.* at 892.
74. *See id.*
75. 410 F.3d 492, 35 ELR 20026 (9th Cir. 2005).
76. *Id.* at 494-95. The *Air Conditioning & Refrigeration Institute* court found the phrase "disclosure of information" to be ambiguous, triggering the use of the *presumption*. *See id.* at 500-03. The court then studied the Act's structure and extratextual legislative history to ultimately determine that "EPCA's express preemption provisions dealt primarily with the possibility that states would adopt different test procedures or consumer labeling requirements." *Id.* at 499.
77. *See Berkeley III*, 89 F.4th 1094, 1107 (9th Cir. 2024).
78. *See id.* at 1107 (O'Scannlain, J., concurring).
79. *See id.* at 1101-02 (majority opinion).
80. *See id.* at 1106-07 (first citing *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252, 34 ELR 20028 (2004); then citing *National Meat Ass'n v. Harris*, 565 U.S. 452, 458 (2012)).
81. 579 U.S. 115 (2016); *see Berkeley III*, 89 F.4th at 1101.
82. *Berkeley III*, 89 F.4th at 1101 (quoting R.J. Reynolds Tobacco Co. v. County of Los Angeles, 29 F.4th 542, 553 n.6 (9th Cir. 2022), *cert. denied sub nom.* R.J. Reynolds Tobacco Co. v. County of Los Angeles, Cal., 143 S. Ct. 979 (2023)); *see supra* Section I.A (introducing *Franklin*'s plain-text rule).
83. Judge O'Scannlain writes in his *Berkeley III* concurrence, "I agree that EPCA preempts the Ordinance. But I only reach that conclusion because, under Ninth Circuit precedent, I believe I am bound to hold that the presumption against preemption does not apply to the express-preemption provision before us today. That conclusion is not obvious or easy." 89 F.4th at 1107. *See generally* Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Dev. Comm'n, 410 F.3d 492, 496-501, 35 ELR 20026 (9th Cir. 2005).
84. This Article only examines the court's textual analysis of EPCA, leaving several other issues aside—namely the Restaurant Association's standing and the role of the Natural Gas Act of 1938, 15 U.S.C. §717, in providing evidence of the scope of EPCA. *See Berkeley III*, 89 F.4th at 1099-100, 1105-06.
85. *See id.* at 1101-02; *infra* Section II.A.1.
86. *See Berkeley III*, 89 F.4th at 1107.
87. *See id.* at 1102; *see infra* Section II.A.2.
88. 541 U.S. 246, 34 ELR 20028 (2004).
89. 565 U.S. 452 (2012); *see Berkeley III*, 89 F.4th at 1106-07.

Supreme Court found the state's law expressly preempted, even though the law seemed carefully crafted to avoid the scope of federal activity.[90] *Engine Manufacturers Ass'n* struck down California's purchase-ban for certain private and public automobile fleets, finding the law's heightened emissions requirement acted as a "standard" that conflicted with the Clean Air Act (CAA).[91]

Similarly, in *National Meat Ass'n*, the Court found California's blanket ban on the sale of pork from non-ambulatory pigs actually conflicted with federal rules for the treatment of animals inside the slaughterhouse.[92] The *Berkeley* panel explained the common thread between these two cases, writing: "States and localities can't skirt the text of broad preemption provisions by doing *indirectly* what Congress says they can't do *directly*."[93]

II. Interpreting EPCA's Text

Because the Ninth Circuit relied on *Franklin*'s plain-text rule, its *Berkeley* decision was ostensibly rooted in a textual analysis of EPCA, unaffected by an artificial narrowing of meaning or external evidence of legislative purpose.[94] Yet, was the court's abandoning the presumption against preemption truly the dispositive issue in this case, as Judge O'Scannlain suggests?[95] In other words, does Berkeley's ordinance fail if the court simply construes EPCA's preemption clause in an ordinary manner, with no "thumb on the scale" against preemption?[96] Assuming the *presumption* is no longer good law, how do the court's text-based arguments fare on their own, unburdened by the doctrine?

A. A Rebuttal of the Court's Primary Textual Findings

In response to the panel's ruling, Berkeley filed a petition for rehearing en banc,[97] accompanied shortly thereafter by eight amicus briefs representing the views of several states, environmental advocates, and the federal government.[98] In January 2024, the court denied Berkeley's petition, prompting a dissent from eight of the circuit judges.[99] Together, the viewpoints of the dissent, Berkeley, and the amici present an argument protesting the court's ruling by vigorously rebutting two of the panel's primary conclusions: (1) EPCA protects end-users' ability to "use" covered appliances,[100] and (2) because "zero" is a measure of energy use, EPCA supersedes local laws that effectively reduce the appliance's energy consumption to "zero."[101]

This section examines the reasoning behind these conclusions and presents an alternative reading of EPCA advanced by the dissent, along with Berkeley and the amici ("petitioners").[102] The dissenting arguments do not purport to rely on a "narrow" reading of EPCA necessitated by a presumption against preemption, but simply on plain meaning informed by the whole structure of the Act.

1. Does EPCA Protect the End-User's Ability to "Use" Covered Appliances?

EPCA's preemption clause provides that "no State regulation concerning the energy efficiency, energy use, or water use of such covered product shall be effective with respect to [covered products]."[103] The Ninth Circuit panel interpreted this clause to preempt local building codes that interfere with the end-user's ability to operate a covered appliance in their home.[104] The court supported this conclusion with three text-based arguments: (1) "point of use" is the end-user's location; (2) "energy use" is broader than "energy conservation"; and (3) a ban on natural gas is a preempted

90. *See Berkeley III*, 89 F.4th at 1106-07.
91. 42 U.S.C. §7401, ELR Stat. CAA §101; *see Engine Mfrs. Ass'n*, 541 U.S. at 253-55; *see also infra* Section III.B.1 (*Engine Manufacturers Ass'n*).
92. *See National Meat Ass'n*, 565 U.S. at 455; *see also infra* Section III.B.2 (*National Meat Ass'n*).
93. *Berkeley III*, 89 F.4th at 1107.
94. See *supra* background in Sections I.C.1-.2.
95. *See supra* note 83 and accompanying text.
96. *See Berkeley III*, 89 F.4th at 1101 (citation omitted); Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 544 (1992) (Scalia, J., concurring in part and dissenting in part) ("[O]ur job is to interpret Congress's decrees of pre-emption neither narrowly nor broadly, but in accordance with their apparent meaning.").
97. *See generally* Petition for Rehearing, *supra* note 27.
98. *See generally* Climate Case Chart, *California Restaurant Association v. City of Berkeley*, https://climatecasechart.com/case/california-restaurant-association-v-city-of-berkeley/ (last visited Feb. 8, 2024) (collecting and publishing amicus briefs from the case docket). This Article only cites four of the eight amicus briefs. *See generally* Brief of Amici Curiae Energy and Environmental Law Professors in Support of Petition for Rehearing En Banc, *Berkeley II*, 65 F.4th 1045 (No. 21-16278) [hereinafter Law Professors' Amicus]; Brief of the Guarini Center on Environmental, Energy, and Land Use Law at New York University School of Law as Amicus Curiae in Support of Defendant-Appellee's Petition for Rehearing En Banc, *Berkeley II*, 65 F.4th 1045 (No. 21-16278) [hereinafter Guarini Center Amicus]; Brief of Amici Curiae States of California, Arizona, Hawaii, Maryland, New Jersey, New Mexico, New York, Oregon, and Washington, the Commonwealth of Massachusetts, the District of Columbia, and the City of New York in Support of Rehearing En Banc, *Berkeley II*, 65 F.4th 1045 (No. 21-16278) [hereinafter States' Amicus]; Brief for the United States as Amicus Curiae in Support of Petition for Rehearing, *Berkeley II*, 65 F.4th 1045 (No. 21-16278) [hereinafter Government's Amicus].
99. *See generally Berkeley III*, 89 F.4th at 1119 (Friedland, J., dissenting). Pointedly, Ninth Circuit Judge Michelle Friedland framed her dissent by noting, "In nearly a decade on the bench, I have never previously written or joined a dissent from a denial of rehearing en banc. I feel compelled to do so now to urge any future court . . . not to repeat the panel opinion's mistakes." *Id.* Three senior judges separately registered their agreement with Judge Friedland's dissent. *Id.* at 1126 ("respecting the denial of rehearing en banc").
100. *See infra* Section II.A.1.
101. *See infra* Section II.A.2.
102. This Article draws from Berkeley's petition for rehearing and amici filed in response to the April 2023 initial decision by the panel. *See supra* notes 97, 98. The select arguments drawn from amici and petition for rehearing respond to analysis unchanged from the court's 2023 opinion to its 2024 amended opinion. The court's amended opinion remains almost entirely unaltered, save for the court's purported narrowing of its holding to clarify that it only applies to "building codes." *Compare generally Berkeley II*, 65 F.4th at 1048-56, *with Berkeley III*, 89 F.4th at 1098-1107 ("amended opinion"). The court expressed that its holding does not implicate the state's general ability to control the placement of new natural gas piping, but only blocks the municipality from preventing a user from installing natural gas piping from a preexisting point of delivery at the meter. *See Berkeley III*, 89 F.4th at 1106.
103. 42 U.S.C. §6297(c).
104. *See Berkeley III*, 89 F.4th at 1103.

building code under EPCA.[105] The following subsections examine each of these arguments and their rebuttals.

☐ *How to define "point of use"?* The court first examined the meaning of "energy use,"[106] which the statute partially defines as "the quantity of energy directly consumed by a consumer product at *point of use*."[107] Critically, the panel relied on a dictionary definition of "point of use," explaining that "[t]his means that we measure energy use not only from where the products roll off the factory floor, but also from where consumers *use* the products."[108] This plain reading of "point of use" was the cornerstone of the court's first conclusion—that EPCA preempts state and local laws that interfere with the consumer's "ability to *use* installed covered products at their intended final destinations."[109]

The petitioners offered a different approach to EPCA's definition of "energy use," arguing that the Ninth Circuit failed to consider the provision as a whole.[110] They noted that the court "ignored all of the words following the comma," leaving out a key clause that imbues "point of use" with proper context.[111]

In its entirety, the statute provides that "[t]he 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*."[112] The dissent argued that, regardless of how the phrase is understood in every-day language, "point of use" is constrained by this test procedures clause.[113] As a result, point of use is not a physical location like "homes, kitchens, and businesses"[114]; rather, it is a technical manner of testing, prescribed by regulation designed to mimic real-world conditions and to approximate energy consumption.[115]

The promulgated testing regulations provide some context, prescribing detailed procedures and mathematical formulas the testing organization must use to derive the gas consumption and efficiency of a kitchen range and oven.[116] This testing occurs directly at the appliance or "consumer product" prior to any sale, and "energy use" test results are not affected by how an eventual end-user might actually operate the product.[117] The Guarini Center, in amicus, noted that EPCA defines "consumer product" as "any article . . . distributed in commerce . . . without regard to whether such article of such type is *in fact* distributed in commerce for personal use or consumption by an individual"—further structural evidence that "point of use" is not a physical location per se, but an operational state from which to measure anticipated performance.[118]

With the full context provided by EPCA's definitions, the preemption clause provides: "[N]o State regulation concerning . . . *energy use* . . . of such covered product shall be effective with respect to such product"[119] where "energy use" is 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."[120] Drawing from the statute's internal definitions, the dissent argued that EPCA does not seek to regulate a product's "actual use," but rather its design, production, and marketing as it relates to the product's estimated performance.[121]

☐ *Is "energy use" broader than "energy conservation"?* The court supported its broad, plain-meaning definition of "energy use" through a second textual proposition: the

105. *See generally id*. at 1100-07.
106. *Id*. at 1101.
107. *See* 42 U.S.C. §6291(4) (emphasis added).
108. *Berkeley III*, 89 F.4th at 1101-03 (defining "point of use" as "the 'place where something is used'" (quoting Oxford English Dictionary Online (2022))). Prior to this case, U.S. courts do not appear to have given the phrase any special definition even in the few cases where "point of use" was especially relevant. *See, e.g.*, Tanner Elec. Coop. v. Puget Sound Power & Light Co., 128 Wash. 2d 656 (Wash. 1996) (employing a "point of use test" for utility providers); Electro Med. Sys., S.A. v. Cooper Life Scis., Inc., 34 F.3d 1048 (Fed. Cir. 1994) (same); Northern Va. Elec. Coop. v. Virginia Elec. & Power Co., 265 Va. 363 (Va. 2003) (same).

Most aptly, a "point of use" water heater or filtration system operates precisely where water exits the tap to be consumed by the user. *See* U.S. Environmental Protection Agency, A Consumer Tool for Identifying Point of Use (POU) Drinking Water Filters Certified to Reduce Lead (2018), https://www.epa.gov/sites/default/files/2018-12/documents/consumer_tool_for_identifying_drinking_water_filters_certified_to_reduce_lead.pdf; Energy Star, *Point of Use (POU) Water Heaters*, https://www.energystar.gov/products/water_heaters/point_use_pou_water_heaters (last visited Feb. 8, 2024). The dissent presents a list of additional industry and regulatory sources where the term "point of use" is employed. *See Berkeley III*, 89 F.4th at 1123-24 (Friedland, J., dissenting).
109. *Berkeley III*, 89 F.4th at 1101-02 (majority opinion) ("So, by its plain language, EPCA preempts Berkeley's regulation here because it prohibits the installation of necessary natural gas infrastructure on premises where covered natural gas appliances are used.").
110. *See* Guarini Center Amicus, *supra* note 98, at 18; *see also* Petition for Rehearing, *supra* note 27, at 13-14; States' Amicus, *supra* note 98, at 15 ("Specifically, the key phrase 'determined in accordance with federal test procedures' is missing from the panel's opinion.").
111. *See* Guarini Center Amicus, *supra* note 98, at 18.
112. 42 U.S.C. §6291 (emphasis added).
113. *Berkeley III*, 89 F.4th at 1123-25; *see also* States' Amicus, *supra* note 98, at 15.
114. Petition for Rehearing, *supra* note 27, at 7 (quoting *Berkeley II*, 65 F.4th 1045, 1052 (9th Cir. 2023)).
115. The dissent criticized the court for applying a "colloquial meaning" to a technical term and engaging in "uncritical literalism." *See Berkeley III*, 89 F.4th at 1125-26 (Friedland, J., dissenting); *see also* Petition for Rehearing, *supra* note 27, at 13-14.
116. Testing procedures in 42 U.S.C. §6293 authorize the Secretary to promulgate testing regulations, which in this case are codified in Appendix I1 to Subpart B of Part 430—Uniform Test Method for Measuring the Energy Consumption of Conventional Cooking Products. These regulations incorporate by reference specific testing standards created by the International Electrotechnical Commission. *See* 10 C.F.R. pt. 430, subpt. B, app. I1, §0 (2023) (incorporating the "test standard for IEC 60350-2; IEC 62301 (First Edition); and IEC 62301 (Second Edition)").
117. *See Berkeley III*, 89 F.4th at 1122 (Friedland, J., dissenting); *see also* States' Amicus, *supra* note 98, at 17 ("Indeed, EPCA's provisions for testing, standard-setting, labeling, and enforcement, are all premised on 'energy use' being a fixed quantity determined prior to sale, regardless of how or whether any particular end-user in fact operates the product."). *See generally* 42 U.S.C. §§6293(e), 6295, 6302(a)(5), 6303, 6307(b).
118. *See* Guarini Center Amicus, *supra* note 98, at 16 (quoting 42 U.S.C. §6291(1) (emphasis added)).
119. 42 U.S.C. §6297(c) (emphasis added).
120. *Id.* §6291.
121. *See Berkeley III*, 89 F.4th at 1121-23 (Friedland, J., dissenting); *see also* Guarini Center Amicus, *supra* note 98, at 15-17; States' Amicus, *supra* note 98, at 17; Petition for Rehearing, *supra* note 27, at 13-14. This interpretation is congruent with Berkeley's understanding of the purpose of EPCA's preemption clause—namely, to prevent a patchwork of state efficiency standards and allow manufacturers to adhere to one set of national regulations. *See* Petition for Rehearing, *supra* note 27, at 9; States' Amicus, *supra* note 98, at 2.

language and structure of the statute does not restrict the meaning of "energy use" within the concept of "energy conservation."[122] Initially, the court examined the phrase "no State regulation concerning the . . . energy use . . . shall be effective" and construed the word "concerning" "expansively," noting that, "as a matter of ordinary meaning, a regulation may 'concern' something without directly regulating that thing."[123]

In its first amicus brief submitted prior to the panel's initial ruling, the government counseled that EPCA's preemption provision only supersedes "state [energy use] regulations that function as 'energy conservation standards.'"[124] The government justified this narrower understanding by pointing to the title of the preemption provision—"General rule of preemption for energy conservation standards . . . ."[125]

The court coolly dismissed this argument, noting that the statute's text is not limited by its title.[126] The panel then countered that Congress did not intend to cabin the meanings of "energy use" and "energy efficiency" within the concept of "energy conservation," because Congress gave these three terms related but different meanings.[127] To demonstrate, the court pointed to EPCA's adjacent waiver clause, which allows states to request a preemption waiver for a regulation that "provides for any *energy conservation standard* or other requirement with respect to *energy use*, *energy efficiency*, or water use."[128] These terms are not interchangeable, the court explained, because Congress would not craft such redundancy, and thus "energy use" must mean something wholly distinct from "energy conservation."[129] Here, the court untethered "energy use" from the confines of "conservation" and then construed "energy use" to concern the appliance's end-user, as explained above.[130]

Berkeley decried this construction as "incoherent" and "radically inconsistent with the design and structure of the statute as a whole."[131] As the dissent highlighted, the statute's own internal definition of "energy conservation standard" seems to contradict the court's interpretation: "(A) a performance standard which prescribes a minimum level of *energy efficiency* or a maximum quantity of *energy use* . . . for a covered product, determined in accordance with test procedures prescribed under section 6293 of this title."[132] Here, "energy efficiency" and "energy use" are apparently cabined within EPCA's definition of "energy conservation standard," countering the court's notion that these three terms are distinct.[133] The government's most recent amicus doubled down on its initial argument, rebutting the court's analysis of the waiver clause word by word and suggesting the use of a different interpretative canon, *noscitur a sociis*[134]:

> The waiver provision allows the [U.S. Department of Energy] to waive the preemption of a State or local regulation that "provides for any energy conservation standard or *other* requirement *with respect* to energy use, energy efficiency, or water use for any . . . covered product." 42 U.S.C. §6297(d)(1)(A) (emphases added). Under familiar interpretive principles, "general words"—such as, here, "other requirement with respect to energy use, energy efficiency, or water use"—"are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words."[135]

The government argued that the waiver provision captures overt "energy conservation standards" as well as any requirements that de facto regulate energy use or efficiency—elements that are contained within EPCA's overall concept of "energy conservation."[136]

Petitioners maintained that Congress has marked the outer bounds of "energy use" as constituting a measure of the product's estimated average energy consumption (i.e., an energy conservation standard), countering the panel's finding that "use" may be construed broadly according to an ordinary meaning.[137] Accordingly, a local regulation would not be preempted just because it prevents an individual from "using" an appliance; rather, EPCA's "energy use" provisions only govern conservation standards concerning the product's design and anticipated performance.[138]

122. *See Berkeley III*, 89 F.4th at 1105 (majority opinion).
123. *Id.* at 1103 (citation omitted) ("So EPCA preemption extends to regulations that address the products themselves *and* building codes that concern their *use* of natural gas."). *But see id.* at 1116-17 (Baker, J., concurring) (noting that Justice Scalia once lamented "everything is related to everything else" and suggesting that "the breadth of EPCA's preemption provision . . . 'does not meant the sky is the limit'" (citations omitted)).
124. *Id.* at 1105 (majority opinion) (citation omitted); *see* Brief for the United States in Support of Appellee at 9, *Berkeley II*, 65 F.4th 1045 (9th Cir. 2023) (No. 21-16278).
125. Brief for the United States in Support of Appellee, *supra* note 124, at 9 (citing 42 U.S.C. §6297(c)).
126. *See Berkeley III*, 89 F.4th at 1105.
127. *See id.*
128. *Id.* (quoting 42 U.S.C. §6297(d)(1)(A) (emphasis added)).
129. *Id.*
130. *See supra* Section II.A.1 (How to define "point of use"?).
131. Petition for Rehearing, *supra* note 27, at 10 (quoting University of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 353 (2013)); *see also Berkeley III*, 89 F.4th at 1122-23 (Friedland, J., dissenting).
132. *See Berkeley III*, 89 F.4th at 1122 (Friedland, J., dissenting) (quoting 42 U.S.C. §6291(6)(A) (emphasis added)).
133. *See* Government's Amicus, *supra* note 98, at 14-15.
134. The Supreme Court explained the principle of *noscitur a sociis*: "[A] word is known by the company it keeps—to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress." Yates v. United States, 574 U.S. 528, 543 (2015) (citation omitted) ("The words immediately surrounding . . . cabin the contextual meaning of that term.").
135. Government's Amicus, *supra* note 98, at 14-15 (first quoting 42 U.S.C. §6297(d)(1)(A)); then quoting *Washington State Dep't of Soc. & Health Servs. v. Guardianship Est. of Keffeler*, 537 U.S. 371, 384 (2003) (citations omitted).
136. *See id.* at 15-16.
137. *See Berkeley III*, 89 F.4th at 1103 ("[B]y enacting EPCA, Congress ensured that States and localities could not prevent consumers from using covered products in their homes, kitchens, and businesses."); Petition for Rehearing, *supra* note 27, at 8-10, 16 (arguing that the panel's decision creates a regulatory regime that is both "inexplicable and incoherent," by "conferring rights to use appliances free of *all* local regulation").
138. *See* Guarini Center Amicus, *supra* note 98, at 17, 21-22 (arguing energy use "cannot be read as extending without limit"); Government's Amicus, *supra* note 98, at 12-13 ("The statute thus defines a covered product's 'energy use' under standardized testing conditions. It does not guarantee that consumers will be able to actually use a covered product in any circumstance they may wish.").

☐ *Is a natural gas ban a preempted building code under EPCA?* Another supporting pillar in the Ninth Circuit's reasoning was its interpretation of EPCA's local building code provision.[139] The court found that §6297(f) ("Exception for certain building code requirements") demonstrates that the scope of EPCA's preemption "extends beyond direct or facial regulations of consumer products"—thus protecting the end-user's ability to operate the covered appliance.[140] The court reasoned that EPCA supersedes local building codes that indirectly operate as a regulation on the appliance's "energy use."[141]

Judge M. Miller Baker's[142] concurrence explained that "the Berkeley Ordinance cuts to the heart of what Congress sought to prevent—state and local manipulation of building codes for new construction to regulate the natural gas consumption of covered products when gas service is otherwise available to premises where such products are used."[143] Judge Baker posited that because EPCA would preempt a hypothetical building code forbidding an owner from attaching a certain appliance to a preexisting gas hookup, EPCA preempts a building code that bans fuel piping further upstream.[144]

The amici panned this prong of the court's interpretation, arguing the court largely misunderstood EPCA's preemption of building codes.[145] Rather than preempt *any* building code that affects the use of a covered appliance in *any way*, the amici suggested EPCA only preempts building codes that mandate the installation of appliances whose energy use and efficiency standards conflict with federal regulations.[146] The amici argue that if EPCA's preemption clause were construed so broadly that no municipal regulation could prevent any EPCA-covered product from being installed anywhere, this would greatly upset the historical role of the states to provide for the health and safety of their citizens.[147] For instance, the government hypothesizes a local regulation prohibiting the installation of oversized furnaces in an inappropriately small residential space—a regulation that superficially affects the user's operation of an EPCA-covered product but remains squarely within the states' power.[148]

By the dissent's reading, EPCA only supersedes codes that, through appliance installation mandates or prohibitions, oblige manufacturers to produce appliances according to a conflicting standard of energy use or efficiency.[149] Building codes that regulate health and safety conditions, only superficially affecting the "use" of a covered product, are not subject to the preemptive power of EPCA.[150]

2. Is "Zero" a Measure of "Energy Use"?

After the panel established that EPCA preempts a regulation that interferes with the end-users' ability to use a covered appliance, the panel found that Berkeley's ordinance interfered with that ability by effectively requiring the appliance to consume "zero" energy.[151]

In its original appellate argument, Berkeley contended that its ordinance did not regulate "energy use" because the ordinance "bans natural gas rather than prescribes an affirmative 'quantity of energy.'"[152] The court dismissed this argument, pointing to the ordinary definition of "quantity" along with the widely accepted mathematical notion that "zero is a quantity"—a cognizable amount of energy under EPCA's definitions of "energy use" and "efficiency."[153] Berkeley had argued that "zero" was incompatible with EPCA's definition of "efficiency"—a mathematical ratio of useful output over input[154]—because "zero" was an "impermissible denominator."[155] The panel pounced on the city's rather abstract argument, explaining, "[b]ut in that case, both the denominator ('energy use') *and* the numerator ('output') would be zero—which simply yields an indeterminate result. And we doubt that Congress meant to hide an exemption to the plain text of EPCA's preemption clause in a mathematical equation."[156]

The petition for rehearing rebutted the court's reasoning, arguing it "strains ordinary meaning."[157] Yet, rather than continue to engage in the question of the proper application of the philosophy of zero,[158] Berkeley offered several analogies, suggesting the illogic of labeling a fuel ban as a regulation on the "energy use" of the forbidden activity.[159] They suggested a local ban on any number of energy-con-

139. *See Berkeley III*, 89 F.4th at 1101.
140. *Id.*
141. *Id.* at 1101-02.
142. Judge for the U.S. Court of International Trade, sitting on the Ninth Circuit panel by designation.
143. *Berkeley III*, 89 F.4th at 1119 (Baker, J., concurring).
144. *See id.*
145. *See* Government's Amicus, *supra* note 98, at 16; Law Professors' Amicus, *supra* note 98, at 10-11; States' Amicus, *supra* note 98, at 7-9:
> Cities and water districts throughout the West have also long imposed temporary bans on water connections in new construction—because of shortages, drinking water safety concerns, or inability to safely handle effluent—often structured similarly to Berkeley's ban on gas connections. . . . None of these laws can plausibly be mistaken for energy conservation standards.

see also Berkeley III, 89 F.4th at 1125 (Friedland, J., dissenting).
146. *See* Guarini Center Amicus, *supra* note 98, at 9 (first referencing 42 U.S.C. §6297(c)(1), (3); then citing *Building Indus. Ass'n of Wash. v. Washington State Bldg. Code Council*, 683 F.3d 1144, 1151-52 (9th Cir. 2012) (explaining why a building code that effectively made it cheaper to install appliances more efficient than the federal standard was not preempted by EPCA)); *see also Berkeley III*, 89 F.4th at 1125.
147. *See* Law Professors' Amicus, *supra* note 98, at 12.
148. *See* Government's Amicus, *supra* note 98, at 18-19.
149. *See Berkeley III*, 89 F.4th at 1126 (Friedland, J., dissenting); Petition for Rehearing, *supra* note 27, at 15 (citing promulgated regulations to show that "some EPCA-compliant electric appliances may actually be *less* energy-efficient than gas-powered ones").
150. *See* Government's Amicus, *supra* note 98, at 18-19.
151. *See Berkeley III*, 89 F.4th at 1102 (majority opinion).
152. *Id.* (summarizing Berkeley's argument). *See generally* Brief for Appellee at 20-27, *Berkeley II*, 65 F.4th 1045 (9th Cir. 2023) (No. 21-16278) (discussing the absurdity of "zero" as a quantity for an energy efficiency or use standard).
153. *Berkeley III*, 89 F.4th at 1102.
154. *See* 42 U.S.C. §6291(5).
155. *Id.*; *see* Brief for Appellee, *supra* note 152, at 26.
156. *Berkeley III*, 89 F.4th at 1102.
157. Petition for Rehearing, *supra* note 27, at 14.
158. *See Berkeley III*, 89 F.4th at 1102 n.4 (collecting cases and scientific sources that suggest "zero" is a quantity).
159. *See* Petition for Rehearing, *supra* note 27, at 14-15.

suming activities (such as indoor barbecues, loudspeakers at night, or commercial refrigerators in residential spaces) could not be accurately described as regulations concerning those products' quantity of energy consumption.[160] The petitioners explained that these kinds of municipal bans address *when* or *where* a product is used rather than how much energy the product actually consumes.[161]

Congruent with its interpretation that EPCA's energy conservation standards are manufacturing standards,[162] the amici answered the court by pointing out that the ordinance does not affect the quantity of energy the appliance is *designed* to use,[163] explaining that when the appliance is disconnected or switched off, the measurement of its energy use calculated pursuant to EPCA's regulations is "unchanged, not reduced to zero."[164] Petitioners and the dissent argued that because "zero" is not a measure of energy use or efficiency, Berkeley's ban does not conflict with EPCA's standards.[165]

B. The Court Missed the Point . . . of Use

Even setting aside evidence of EPCA's legislative history[166] and the presumption against preemption,[167] the Ninth Circuit's resulting textual analysis strains credulity. In contrast, the dissent and petitioners interpret the preemption clause in relation to EPCA's whole structure, resisting the court's desire to give terms like "concerning" or "point of use" limitless effect.[168] Circuit Judge O'Scannlain's concurrence—fervently advocating for the Supreme Court's help on the *presumption against preemption*—perhaps serves a venerable purpose for the federal bench at large.[169] But the concurrence ultimately appears as a red herring in the panel's ruling, drawing our focus from a majority opinion whose thin veneer of plausibility shrouds a tortured semantic construction—one that collapses upon closer look.

The Ninth Circuit panel made two particularly grievous errors in its textual analysis. First, it substituted its own definition of "point of use" for the one provided in the statute.[170] Even the broadest reading of "concerning"—parallel to the Supreme Court's prior broad readings of "relating to"—cannot save the panel's reading.[171] The testing procedures clause that buttresses "point of use" constrains "energy use" to a measure of average, anticipated consumption according to testing—not protecting a right to actual *use* of an appliance located on the consumer's premises.[172]

The panel's second major error was misconstruing the relationship between conservation, use, and efficiency.[173] The panel ignored the statute's structure and definitions that plainly cabin the meanings of "energy use" and "energy efficiency" inside of the concept of "energy conservation"—revealing the scope of Congress' purpose for EPCA.[174] EPCA presents a clear hierarchical relationship between these terms, and so the court cannot elect to define "use" as broadly as it likes.[175] In this way, EPCA only preempts state and local laws that function like conflicting energy conservation standards on the design, manufacturing, and marketing of covered appliances.[176]

Accordingly, while the Ninth Circuit correctly noted EPCA's preemption of building codes, it misunderstood the scope of that preemption. EPCA only supersedes codes that, through appliance installation mandates or prohibitions, compel manufacturers to produce appliances according to a higher standard of energy use or efficiency.[177] Congress did not intend for building codes that regulate health and safety conditions, only indirectly affecting the "use" of a covered product, to be subject to the preemptive power of EPCA.[178]

The panel's other key conclusion—that Berkeley's ban ordinance effectively mandates an energy efficiency ratio subject to EPCA's domain—defies sensible, plain reading of the text.[179] Even accepting the court's logic, it fails to follow its reasoning to its ultimate conclusion: if Berkeley's ordinance mandates an "indeterminate" efficiency ratio of

160. *See id*.
161. *Id*. at 15.
162. *See* States' Amicus, *supra* note 98, at 13-14, 14 n.8 (noting that EPCA requirements for manufacturers could also affect an appliance's "marketing, distribution, sales, and servicing").
163. *See* Guarini Center Amicus, *supra* note 98, at 14.
164. *See* States' Amicus, *supra* note 98, at 15. Similarly, amici argued the construing of the ordinance as a mandate that an appliance use "zero energy" is as nonsensical as the suggestion that a hypothetical zoning law that prohibited the construction of a gas station effectively acts as a fuel economy standard for automobiles. *See* Law Professors' Amicus, *supra* note 98, at 21-22. For additional support, the dissent points to EPCA's labeling requirements, arguing that consumer-facing information about "energy use" cannot plausibly consider "zero" as a measure of energy use. *See Berkeley III*, 89 F.4th 1094, 1122 (9th Cir. 2024) (Friedland, J., dissenting).
165. *See* Petition for Rehearing, *supra* note 27, at 14-15; *Berkeley III*, 89 F.4th at 1122-23 (Friedland, J., dissenting).
166. *See generally Berkeley I*, 547 F. Supp. 3d 878, 889, 891-93 (N.D. Cal. 2021) (examining the legislative history of EPCA), *rev'd*, *Berkeley II*, 65 F.4th 1045 (9th Cir. 2023), *reh'g denied and amended by Berkeley III*, 89 F.4th 1094 (9th Cir. 2024). *See also Berkeley III*, 89 F.4th at 1120-21 (Friedland, J., concurring) (explaining how the history of EPCA supports a finding that terms like "point of use" were "technical provisions with a narrow scope of preemption").
167. *See supra* Section I.A.2.
168. *See supra* Section II.A.
169. *See Berkeley III*, 89 F.4th at 1107 (O'Scannlain, J., concurring).
170. *See supra* Section II.A.1 (How to define "point of use"?).
171. Judge Baker's concurrence recalled Justice Scalia's famous observation, "applying the 'relate to' provision according to its terms was a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else." *Berkeley III*, 89 F.4th at 1117 (noting that the term "concerning" "does not mean the sky is the limit" (quoting Dan's City Used Cars, Inc. v. Pelkey, 569 U.S. 251, 260 (2013))).
172. *See supra* Section II.A.1. The amici show how this interpretation is supported by EPCA's definitions that indicate these regulations on energy use apply regardless of whether the appliance is actually sold and used by consumers. *See* 42 U.S.C. §6291(1) (defining "consumer product" as one that is intended for distribution in commerce regardless of whether such product is *actually* distributed).
173. *See supra* Section II.A.1 (Is "energy use" broader than "energy conservation"?).
174. *See id*.
175. *See id*.
176. *See* Guarini Center Amicus, *supra* note 98, at 17 ("Congress's focus was on products' proper design, production, and marketing.").
177. *See supra* Section II.A.1 (Is a natural gas ban a preempted building code under EPCA?); *see also Berkeley III*, 89 F.4th 1094, 1126 (9th Cir. 2024) (Friedland, J., dissenting); Petition for Rehearing, *supra* note 27, at 15 (citing promulgated regulations to show that "some EPCA-compliant electric appliances may actually be *less* energy-efficient than gas-powered ones").
178. *See* Government's Amicus, *supra* note 98, at 18-19.
179. *See supra* Section II.A.2.

"zero" energy input over "zero" service output, then *there is no appliance*, thus no conflicting regulation on the appliance's energy efficiency.[180] Certainly, a reviewing court could consider EPCA's legislative history and purpose, but this would likely only reinforce Berkeley's showing that Congress did not intend EPCA to supersede a state's historical powers governing local infrastructure and land use.[181] The scope of EPCA's preemption is evident by its plain language and structure.

III. Grounding in Precedent

Once we accurately interpret the scope of EPCA preemption, we may then situate Berkeley's ban comfortably within a family of lawful state and local bans. This part contrasts the Ninth Circuit panel's use of precedent against counterexamples of permissible bans that would seem to support a finding that Berkeley's ordinance rests within its historic police powers. Section III.A first proposes a limiting principle to guide our inquiry into recent case law concerning local bans. Section III.B tests the principle against examples of local bans both upheld and struck down, drawing additional lessons along the way.

A. A Limiting Principle Within Reach

The Ninth Circuit's ruling makes clear the panel believed that, under EPCA, Berkeley lacks the ability to ban the use of natural gas appliances outright.[182] The court suggested a total ban on gas appliances would undoubtedly be preempted, so why not a ban on upstream gas infrastructure?[183] In a colloquy with Berkeley's counsel at oral argument, the Ninth Circuit panel challenged Berkeley to identify a limiting principle to demonstrate why this was not so.[184]

But what should stop Berkeley from banning natural gas use—or even gas appliances—altogether? A federal preemption clause is only as powerful as its underlying constitutional authority.[185] There is no fundamental, constitutional right to natural gas.[186] The reach of EPCA's consumer product regulation resides in Congress' authority to regulate interstate commerce.[187] Under the Tenth Amendment, states retain considerable discretion to decide if and when to allow an activity, such as the use of natural gas.[188] Initially, if a gas ban does not violate the Commerce Clause by discriminating against other states or assuming an outsized burden compared to its benefit, the ban should be permissible.[189]

Of course, some so-called bans conceal de facto regulations, meddling within an area of federal law.[190] This is the crux of *Berkeley*. Yet a clarifying limiting principle was within the Ninth Circuit's reach: does the ban compel a regulated party's adherence to a standard that conflicts with federal law?[191] If the answer is "no"—assuming other supremacy claims have been resolved—the ban is permissible.

B. The Lessons of Local Bans

This section illustrates the application of this limiting principle. First, we contrast two bans on automobiles—one narrow and one broad—noting the outer poles of what it means to "compel" the regulated party. Then, we examine recent cases concerning "cruel pork" and "cruel poultry" bans to distinguish between the federal government's role in regulating an activity and the state's role in initially

180. *See id*.

181. *See generally* Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Dev. Comm'n, 410 F.3d 492, 498-500, 35 ELR 20026 (9th Cir. 2005).

182. *See Berkeley III*, 89 F.4th at 1098 ("Instead of directly banning [gas] appliances in new buildings, Berkeley took a more circuitous route to the same result.").

183. *See id*.

184. Ninth Circuit Judge Patrick Bumatay pressed Berkeley's counsel for a limiting principle, suggesting there is no difference between a preempted ban on appliance hookups as an efficiency regulation and a ban on fuel piping or even gas appliances generally. *See* Oral Argument at 21:20, *Berkeley II*, 65 F.4th 1045 (9th Cir. 2022) (No. 21-16278), https://www.ca9.uscourts.gov/media/video/?20220512/21-16278/. Berkeley responded with a rule seemingly rooted in the local law's purpose: the local regulation "has to prevent the use of an appliance *because* the appliance isn't more efficient than the federal standard." *Id*. Judge Bumatay replied, "Well, how is that textually based?" *Id*. Berkeley suggested that a blanket ban on appliances would be permissible, but the court's exchange was left unresolved. *See id*.

185. *See* Haaland v. Brackeen, 599 U.S. 255, 287 (2023) ("Thus, when Congress enacts a valid statute pursuant to its Article I powers, 'state law is naturally preempted to the extent of any conflict with a federal statute.'" (quoting Crosby v. National Foreign Trade Council, 530 U.S. 363, 372 (2000))).

186. For instance, if there is no fundamental right to man's best friend, likely little hope remains for methane products. *See, e.g.*, Perfect Puppy, Inc. v. City of E. Providence, 98 F. Supp. 3d 408, 418-20 (D.R.I. 2015) (upholding a local ban on the retail sale of dogs and cats), *aff'd in part, appeal dismissed in part sub nom*. Perfect Puppy, Inc. v. City of E. Providence, R.I., 807 F.3d 415 (1st Cir. 2015).

187. *See supra* Section I.A.1 (noting how EPCA's definitions anchor the Act's authority in the Commerce Clause).

188. *See supra* note 58 and accompanying text. The Natural Gas Act of 1938 explicitly reserves the traditional authority of local gas distribution to the states. *See* 15 U.S.C. §717(b)-(c); *see also* New York v. United States, 505 U.S. 144, 180, 22 ELR 21082 (1992) ("The Constitution established Congress as 'a superintending authority over the reciprocal trade' among the States, by empowering Congress to regulate that trade directly, not by authorizing Congress to issue trade-related orders to state governments.").

189. *See supra* note 57 and accompanying text; *see also Berkeley III*, 89 F.4th 1094, 1126 (9th Cir. 2024) (Friedland, J., dissenting) ("Even [ ] a direct prohibition [on gas appliances] would not affect the 'energy use' of any appliance.").

190. *See Berkeley III*, 89 F.4th at 1102 (majority opinion) ("A regulation may 'assume the form of a prohibition.'" (quoting Champion v. Ames, 188 U.S. 321, 328 (1903))).

191. *See* Gade v. National Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 106, 22 ELR 21073 (1992) ("[P]re-emption analysis turns not on whether federal and state laws 'are aimed at distinct and different evils' but whether they 'operate upon the same object.'" (quoting Napier v. Atlantic Coast Line R.R. Co., 272 U.S. 605, 612 (1926))); U.S. Smokeless Tobacco Mfg. Co. LLC v. City of New York, 708 F.3d 428, 434 (2d Cir. 2013):

> [A]ny purported sales ban that in fact "functions as a command" to tobacco manufacturers to "structure their operations" in accordance with locally prescribed standards would not escape preemption simply because the City framed it as a ban on the sale of tobacco produced in whatever way [it] disapproved. . . . But it does not follow that every sales ban—many of which would likely have some effect on manufacturers' production decisions—should be regarded as a backdoor "requirement . . . relating to [federal regulations]."

(citations omitted)). The *Berkeley* dissent actually nodded to a similar framing of this principle: "The ordinance [ ] gives manufacturers no reason to change the design of their natural gas products to meet standards higher than those prescribed by [the U.S. Department of Energy]." *See Berkeley III*, 89 F.4th at 1126 (Friedland, J., dissenting).

deciding whether the activity occurs. Lastly, the uranium mining ban upheld in *Virginia Uranium, Inc. v. Warren*[192] offers an important instruction about the role of *purpose* in a preemption inquiry, and illustrates why Berkeley should prevail under the Supreme Court's current jurisprudence.

1. Cars: A Higher Calling

When is a ban so narrowly crafted that it actually functions as a regulation in conflict with federal law? The examples of California's purchase-ban on certain cars and Mackinac Island's general ban on automobiles suggest the outer poles between which we might place Berkeley's ordinance.

☐ Engine Manufacturers Ass'n. In support of its reasoning in *Berkeley*, the Ninth Circuit compares the city's natural gas ban ordinance to a narrowly styled California ban: the state's attempt to prohibit various public and private fleet operators from purchasing vehicles that did not meet certain emissions requirements.[193] In *Engine Manufacturers Ass'n*,[194] the Supreme Court found that California's purchase requirements functioned as a "standard" relating to the control of emissions, which was expressly preempted by the CAA.[195] The Court examined the CAA's preemption clause regarding vehicle emissions standards, which states: "No State or any political subdivision thereof shall adopt or attempt to enforce any standard relating to the control of emissions . . . as condition precedent to the initial retail sale [of a motor vehicle]."[196]

Key to the Court's analysis was defining the word "standard."[197] The Court rejected the lower court's interpretation that California's rules were not "standards" because they only related to restrictions on the purchase of vehicles, not sales.[198] The Court found this distinction senseless, as a ban on purchase is a de facto ban on sales.[199] Justice Antonin Scalia noted: "[I]f one State or political subdivision may enact such rules, then so may any other; and the end result would undo Congress's carefully calibrated regulatory scheme."[200]

The Ninth Circuit viewed Berkeley's ban on new gas infrastructure as a requirement concerning the "energy use" of an appliance covered by EPCA,[201] ruling that Berkeley's building code was expressly preempted by federal law, much like California's fleet purchasing rules.[202] The *Engine Manufacturers Ass'n* Court had emphasized, "[t]he manufacturer's right to sell federally approved vehicles is meaningless in the absence of a purchaser's right to buy them."[203] The *Berkeley* panel found this reasoning analogous to its own, viewing a ban on fuel piping as indistinguishable from one on appliance hookups.[204]

☐ *Mackinac Island, Michigan*. Contrast California's narrow ban on public and private fleet purchases of certain automobiles with a much broader, historical municipal ordinance: Mackinac Island, Michigan's, ban on *all* automobiles.[205] Since 1898, the island has banned all automobiles with an exception for emergency vehicles.[206] The municipal code finds that motorized vehicles have a "detrimental effect on the health, safety and welfare of the general public" and are economically adverse to the town's tourism industry.[207]

Does Mackinac Island's code act as a de facto regulation of emissions under the CAA? Certainly not. Yet—to superimpose the reasoning of Justice Scalia—if every political subdivision may enact Mackinac Island's rules, would not the end result "undo Congress's carefully calibrated regulatory scheme?"[208]

☐ *Conflicting standards*. Where should the court situate Berkeley's ban on new natural gas infrastructure—closer to California's purchasing requirements or more like Mackinac Island's blanket ban? Applying our limiting principle, a ban is preempted when it compels the regulated party to adhere to a standard conflicting with federal law.[209] Under California's overturned product ban, car companies could plausibly satisfy the state's purchase requirements by manufacturing and marketing vehicles to meet the state's higher emissions standards—standards in conflict with the CAA.[210] Yet, it is self-evident that no manufacturer could build a vehicle that complies with Mackinac Island's ban on automobiles[211]—even a zero emission vehicle.

In 1992, Chicago banned the sale of spray paint.[212] Yet, among its challenges, the ban did not prompt federal preemption claims under lead-based paint regulations of the Toxic Substances Control Act (TSCA),[213] for example, because the ban did not effect a higher manufacturing standard in conflict with existing regulation.[214] For contrast, in 2015, Albany enacted a rigorous "toxic toys" ban that it

192. 139 S. Ct. 1894, 49 ELR 20104 (2019).
193. *See Berkeley III*, 89 F.4th at 1106 (majority opinion).
194. Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist., 541 U.S. 246, 34 ELR 20028 (2004).
195. 42 U.S.C. §7401. *See Engine Mfrs. Ass'n*, 541 U.S. at 253-55.
196. 42 U.S.C. §7543(a).
197. *See Engine Mfrs. Ass'n*, 541 U.S. at 253-55.
198. *See id.*
199. *See id.* at 255.
200. *Id.*
201. *See supra* Section II.A.1.
202. *See Berkeley III*, 89 F.4th 1094, 1106-07 (9th Cir. 2024).
203. *Engine Mfrs. Ass'n*, 541 U.S. at 255.
204. *See Berkeley III*, 89 F.4th at 1106-07.
205. *See generally* Mackinac Island, Mich., Code of Ordinances ch. 66, art. II, https://library.municode.com/mi/mackinac_island/codes/code_of_ordinances?nodeId=PTIICOOR_CH66TR_ARTIIMOVE ("Motor Vehicles").
206. *Id.* §66-64 ("Exemptions").
207. *Id.* §66-32(b) ("Scope and purpose").
208. *See Engine Mfrs. Ass'n*, 541 U.S. at 255.
209. *See supra* note 191 and accompanying text.
210. *See supra* Section III.B.1 (*Engine Manufacturers Ass'n*).
211. *See id.* (Mackinac Island).
212. *See* National Paint & Coatings Ass'n v. Chicago, 45 F.3d 1124, 1126 (1995).
213. 15 U.S.C. §2601, ELR Stat. TSCA §2.
214. In *National Paint & Coatings Ass'n*, the U.S. Court of Appeals for the Seventh Circuit upheld Chicago's ban on the sale of spray paint, finding the ban did not run afoul of the Commerce Clause because it was applied categorically without discrimination toward out-of-state producers. *See* 45 F.3d at 1131-32. The purported purpose of the ban was to cut down on graffiti, *see id.*, but under the logic of the *Berkeley* panel, should the law have fallen under a preemption challenge claiming the ban regulated permissible amounts

necessarily walked back after industry brought federal preemption claims.[215] Under the limiting principle, Albany's ban was subject to federal preemption because it compelled manufacturers to adhere to more stringent trace-chemical standards than provided under the Federal Hazardous Substances Act[216] and the Consumer Product Safety Act.[217]

2. "Cruel" Animal Products: "If," Not "How"

The Ninth Circuit also compared Berkeley's ordinance to another California ban struck down by the Supreme Court—a ban on the sale of nonambulatory pigs.[218] Yet, two other bans involving "cruel" animal products have recently survived preemption challenges—cruel pork[219] and foie gras.[220] These examples highlight the principal that, at times, the state may decide *if* an activity is to take place when the federal regulation only prescribes *how*.

☐ National Meat Ass'n. In *National Meat Ass'n*,[221] the Supreme Court struck down California's law banning the sale of pork from nonambulatory pigs.[222] The Court found the statute preempted by the Federal Meat Inspection Act[223] (FMIA), which forbids states from imposing their own unique requirements with "respect to premises, facilities and operations" of slaughterhouses.[224] Upon finding that the California law enforced this ban by regulating pigs at all points along the pork supplier's value chain—including inside the slaughterhouse—the Court ruled that the ban conflicted with the FMIA's existing slaughterhouse rules for disposal and treatment of disabled animals.[225] The Court took issue not with the prohibition of the sale of the nonambulatory pig products per se, but with the way that the law imposed requirements on producers separate from the FMIA in order to ensure compliance with the sale ban.[226]

To explain this distinction between a permissible sale ban and a law conflicting with the FMIA's slaughterhouse regulations, the Court briefly discussed a ban on the slaughter of horses and sale of horse meat lawfully enacted in several states,[227] which have been upheld by circuits around the country.[228] Unlike California's nonambulatory pork laws, these blanket bans do not tell slaughterhouses *how* to deal with horses at the point-of-slaughter; they simply remove horses from the class of animals that enter the federally regulated facility in the first place.[229] The Court suggested that this kind of state law would not necessarily wade into the FMIA's preemptive scope.[230] So, if California had simply banned the distribution of nonambulatory pigs *before* they arrived at the slaughterhouse—say, before the animal's "point of use"—would the Court have upheld the ban? We need not conjecture, because in 2023, the Court provided the answer.

☐ National Pork Producers Council v. Ross. After its ban on the slaughter and sale of nonambulatory pigs was struck down, California took a different tack to deal with what it perceived as inhumane treatment of pigs, banning the sale of "cruel pork."[231] In 2023, the Supreme Court upheld the state's ban in *National Pork Producers Council v. Ross*.[232] Here, California had enacted a ban on the sale of pork from pigs who had been confined in less than 24 square feet during their lifetimes.[233]

While a brief for the petitioners alluded to the federal government's overarching regulatory scheme imposed by the FMIA,[234] the Court did not even consider the possibility that this ban was preempted by federal slaughterhouse regulations.[235] Rather, at issue was whether the state's ban ran afoul of the dormant Commerce Clause.[236] The Court notes that, "absent discrimination, 'a State may exclude from its territory, or prohibit the sale therein of any articles which, in its judgment, fairly exercised, are prejudicial to' the interests of its citizens."[237] Thus, unlike California's ban on the slaughter of nonambulatory pigs, the "cruel pork" ban operates entirely at a distance from the preemptive power of the FMIA.[238] Like banned horsemeat, the state may permissibly ban "cruel pork" before it enters the federally regulated slaughterhouse.

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of lead in paint beyond federal standards of .0009% down to "zero"? *See* 16 C.F.R. §1303.1 (2023); *supra* Section II.A.2.

215. *See generally* Complaint for Declaratory and Injunctive Relief, American Apparel & Footwear Ass'n v. Albany, No. 1:15-CV-461, 2015 WL 1952705 (N.D.N.Y. Apr. 16, 2015).
216. 15 U.S.C. §1261.
217. *Id.* §2051; *see* Complaint for Declaratory and Injunctive Relief, *supra* note 215. The county of Albany settled a suit concerning its 2015 Local Law No. 1, which banned toys and clothing with *any* trace amount of seven compounds, in conflict with federal law. *See* Press Release, Toy Association, Albany County to Enforce "Toxic Free Toys Act" on Nov. 1 (Oct. 2, 2017), https://www.toyassociation.org/PressRoom2/News/2017_News/albany-county-to-enforce-toxic-free-toys-act-on-nov-1.aspx. After the suit was settled, Albany's revised law specifically avoided imposing higher standards on toys and clothing already regulated by various federal consumer protection acts. *See id.*; Albany County Department of Health, *Toxic Free Toys Act*, https://www.albanycounty.com/departments/health/health-laws-regulations/toxic-free-toys-act (last visited Feb. 8, 2024).
218. *See supra* Section I.C.3; *see generally* National Meat Ass'n v. Harris, 565 U.S. 452 (2012).
219. *See generally* National Pork Producers Council v. Ross, 598 U.S. 356, 53 ELR 20076 (2023).
220. *See generally* Association des Éleveurs de Canards et d'Oies du Québec v. Becerra, 870 F.3d 1140 (9th Cir. 2017).
221. *National Meat Ass'n*, 565 U.S. 452.
222. *Id.* at 455 (explaining that nonambulatory pigs are "pigs that cannot walk").
223. 21 U.S.C. §601.
224. *National Meat Ass'n*, 565 U.S. at 458 (quoting 21 U.S.C. §678).
225. *Id.* at 463-64.
226. *See id.* at 462-64.
227. *Id.* at 467.
228. *See, e.g.*, Cavel Int'l, Inc. v. Madigan, 500 F.3d 551, 556-57 (7th Cir. 2007); Empacadora de Carnes de Fresnillo, S.A. de C.V. v. Curry, 476 F.3d 326, 333-34 (5th Cir. 2007).
229. *See National Meat Ass'n*, 565 U.S. at 467.
230. *See id.*
231. National Pork Producers Council v. Ross, 598 U.S. 356, 53 ELR 20076 (2023).
232. *Id.* at 363-64.
233. *See* Justin Marceau & Doug Kysar, *The Supreme Court's Ruling on Prop 12 Is a Win Against Factory Farming. but the Pigs' Lives Will Still Suck*, Vox (May 12, 2023, 2:45 PM), https://www.vox.com/future-perfect/23721488/prop-12-scotus-pork-pigs-factory-farming-california-bacon.
234. *See* Brief for the Petitioner at 14, *National Pork Producers*, 598 U.S. 356.
235. *See generally National Pork Producers*, 598 U.S. 356.
236. *See id.* at 367.
237. *Id.* at 396 (quoting Guy v. Baltimore, 100 U.S. 434, 443 (1880)).
238. *Compare National Pork Producers*, 598 U.S. 356, *with* National Meat Ass'n v. Harris, 565 U.S. 452 (2012).

☐ Association des Éleveurs de Canards et d'Oies du Québec v. Becerra. The ability of a state to ban an activity before it reaches federal preemptive power is even more clearly demonstrated in *Association des Éleveurs de Canards et d'Oies du Québec v. Becerra*,[239] in which producers challenged California's ban on the sale of foie gras that prohibited the controversial force-feeding method in birds.[240] After the petitioners' dormant Commerce Clause challenge was dismissed,[241] petitioners claimed that the federal Poultry Products Inspection Act[242] (PPIA) preempted California's law through its express preemption clause that says "ingredient requirements . . . in addition to, or different than, those made under [the PPIA] may not be imposed by any State."[243] However, the Ninth Circuit found no preemption.[244] It reasoned that even if California's law resulted in a total ban of foie gras, the ban would not conflict with the PPIA's preemption clause, because the PPIA targets the *processing* of poultry products but does not mandate that a *particular type* of poultry be produced for people to eat.[245]

The court found that the PPIA's ingredient requirement governs only the "physical composition of poultry products."[246] The court pointed to other states' ban on the slaughtering of horses and reasoned that "if a state bans a poultry product like foie gras, there is nothing for the PPIA to regulate," and Congress' ingredient requirements for poultry products "do[ ] not preclude a state from banning products—here, for example, on the basis of animal cruelty—well before the birds are slaughtered."[247] The court further distinguished California's ban on foie gras from *National Meat Ass'n* through reasoning similar to the discussion above.[248]

☐ *Regulating upstream*. Is Berkeley's ban closer to the overturned ban on nonambulatory pigs or the permissible ban on cruel pork? Might banning natural gas fuel piping before its use by the appliance mirror the banning of the foie gras feeding method before the duck is processed for consumption?[249] The answer initially depends on whether the court interprets Berkeley's ban to reach into the preempted area of EPCA—back to the question of how broadly to define "energy use."[250]

Yet another way to frame the question is to ask whether a state may ban an activity "upstream" that has some "downstream" effects in a federally regulated area. These cases on cruel animal products demonstrate that, often, in enacting a ban with downstream effects, the state may decide "if" but not "how." Congress cannot force California to sell "cruel pork,"[251] but California cannot tell pork producers how to treat animals once inside the federally regulated slaughterhouse.[252]

Examples of state-level bans on the sale of cruel pork, foie gras, and horse meat illustrate the relationship between federal meat processing laws—enacted pursuant to the Constitution's commerce powers—and the state's ability to ban an activity it finds detrimental to the health and safety of its citizens.[253] How the animal is processed in interstate commerce lies within the federal government's domain but not the question of whether the animal may be sold in the state in the first place.[254] Thus, under the limiting principle, California's ban on pork from nonambulatory pigs compelled slaughterhouses to comply with regulations that conflicted with the FMIA,[255] yet the state's laws banning cruel pork and foie gras survive because they did not tell federally regulated slaughterhouses *how* to operate.[256]

If a comparison between ducks and natural gas seems too remote, the next case offers a closer analogy—in the energy sector.

3. Uranium Mining: The State's Purpose Does Not Matter

In explaining its reasoning for striking down Berkeley's natural gas ban ordinance, the Ninth Circuit explained, "Berkeley can't evade preemption by merely moving up one step in the energy chain."[257] Yet, that is arguably what Virginia did in *Virginia Uranium*,[258] as it lawfully banned uranium mining prior to the point in the value chain where federal regulation took effect.[259] *Virginia Uranium* further illustrates that, when defining the reach of federal preemption, the state's purpose does not matter.

In *Virginia Uranium*, the Supreme Court examined a claim of implied field and conflict preemption.[260] Virginia, out of safety concerns, banned all uranium mining, prompting a claim from petitioners that the Atomic Energy Act[261] (AEA) preempted Virginia's ban because the Nuclear Regulatory Commission (NRC) is the sole authority governing nuclear safety concerns in uranium processing.[262] The Court, however, examined the language of the enabling act, finding that the power of NRC to regulate safety begins "*after* [uranium's] removal from its place of deposit in nature."[263] Virginia banned the initial mining of

239. 870 F.3d 1140 (9th Cir. 2017).
240. *Id.* at 1142-44.
241. *Id.* at 1145 (recounting the case's procedural history).
242. 21 U.S.C. §451.
243. Association des Éleveurs de Canards et d'Oies du Québec v. Becerra, 870 F.3d 1140, 1146 (9th Cir. 2017) (citing 21 U.S.C. §467(e)).
244. *Id.* at 1150.
245. *Id.*
246. *Id.*
247. *See id.*
248. *See id.* at 1151-52.
249. Note that *purpose* does not appear to play a decisive role in these slaughter regulation cases—both the state and the federal laws in question are concerned with ensuring the health and safety of animal products. *See supra* Section III.B.2.
250. *See supra* Section II.A.1.
251. *See supra* Section III.B.2 (*National Meat Ass'n*).
252. *See id.* (*National Pork Producers Council v. Ross*).
253. *See id.*
254. *See id.*
255. 21 U.S.C. §601.
256. *See supra* Section III.B.2.
257. *Berkeley III*, 89 F.4th 1094, 1107 (9th Cir. 2024). The panel noted that even though a "state law was 'less direct than it might be' . . . it 'produce[d] the very effect that the federal law sought to avoid.'" *Id.* (quoting Rowe v. New Hampshire Motor Transp. Ass'n, 552 U.S. 364, 372 (2008)).
258. Virginia Uranium, Inc. v. Warren, 139 S. Ct. 1894, 49 ELR 20104 (2019).
259. *See generally id.* at 1908-09.
260. *Id.* at 1901.
261. 42 U.S.C. §2011.
262. *See Virginia Uranium*, 139 S. Ct. at 1900-01.
263. *Id.* at 1902 (quoting 42 U.S.C. §2092).

uranium before federal regulations concerning the milling and processing of that uranium could take effect.[264]

The petitioners argued that the statute *impliedly* preempted Virginia's ban, as the Act carved out authority for the state only to regulate activities "for purposes *other than* protection against radiation hazards."[265] They argued that this subsection expanded the AEA's preemptive effect by displacing *any* state law whose *purpose* is protection against "radiation hazards."[266]

The Court accepted none of this and refused to look beyond the text to divine the Virginia Legislature's purpose in order to find a state conflict with the federal text.[267] Justice Neil Gorsuch wrote for the plurality:

> And every indication in the law before us suggests that Congress elected to leave mining regulation on private land to the States and grant the NRC regulatory authority only *after* uranium is removed from the earth. That compromise may not be the only permissible or even the most rationally attractive one, but it is surely both permissible and rational to think that Congress might have chosen to regulate the more novel aspects of nuclear power while leaving to States their traditional function of regulating mining activities on private lands within their boundaries.[268]

Likewise, in *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*,[269] the Court noted that NRC was "not given authority over the generation of electricity itself, or over the economic question whether a particular plant should be built."[270] Because uranium is only regulated after its removal from the ground, Virginia's ban does not have the effect of conflicting with NRC, and the ban is not preempted.[271] The concurrence framed its reasoning in *Virginia Uranium* this way: "A state law regulating an upstream activity within the State's authority is not preempted simply because a downstream activity falls within a federally occupied field."[272]

The plurality decision in *Virginia Uranium* illustrates the Court's debate regarding the role of purpose in a preemption question: should the Court consider the state's rationale when determining whether the state law conflicts with federal law? Justices Gorsuch, Thomas, and Brett Kavanaugh found a purpose inquiry convoluted and unhelpful,[273] while Justice Ruth Bader Ginsburg and the concurring liberal justices wished the Court to remain open to questions of legislative motive generally.[274]

In contrast, the dissent argued that "upstream" state legislation is subject to findings of preemption if both the state law's effect and purpose are to regulate within a federally preempted field.[275] Chief Justice John Roberts argued that the Court should have considered Virginia's rationale.[276] Roberts believed that the key question in the case was "whether a State can purport to regulate a field that is not preempted (uranium mining safety) as an indirect means of regulating other fields that are preempted (safety concerns about uranium milling and tailings)."[277] He reasoned that because Virginia had not provided a "nonsafety rationale" for its mining ban—and it had not disputed that the safety of uranium processing *was the reason* for its ban—the ban should be preempted, as its *purpose was to regulate within a preempted field*.[278]

Justice Gorsuch, writing the lead opinion, pushed back at the dissent's insistence that the Court should attempt to peer into the state legislature's purpose.[279] He explained that "this Court has generally treated field preemption inquiries like this one as depending on *what* the State did, not *why* it did it."[280] If Congress intended to supersede state law, the state's purpose—real or pretense—should have no bearing.[281]

4. *Virginia Uranium:* Why Berkeley Prevails

Justices Gorsuch and Thomas may continue to win converts toward their beliefs that, like the presumption against preemption, "freewheeling" inquiries that look beyond the text have no place in the Court's reasoning.[282] Yet, no matter which opinion in *Virginia Uranium* may predominate in a future Court, Berkeley's ban ordinance seems likely to prevail.

First, might we borrow Justice Gorsuch's words to precisely delineate that EPCA regulates the energy use of a covered appliance "only *after*" that energy has arrived "at

264. *See id*. at 1901-02.
265. *Id*. at 1902-03 (emphasis added) (quoting 42 U.S.C. §2021(k)).
266. *Id*.
267. *See id*. at 1903. The petitioners and the dissent argued against the Court's reliance on *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 13 ELR 20519 (1983), suggesting it was distinguishable, because there California's purpose in banning new nuclear construction was apparently economic rather than safety, posing no conflict with the AEA and NRC. *See id*. at 216; *Virginia Uranium*, 139 S. Ct. at 1918 (Roberts, C.J., dissenting).
268. *Virginia Uranium*, 139 S. Ct. at 1908.
269. 461 U.S. 190.
270. *Id*. at 209.
271. *Virginia Uranium*, 139 S. Ct. at 1908-09.
272. *Id*. at 1914-15 (Ginsburg, J., concurring).
273. *See id*. at 1906 ("[F]ederal courts would have to allow depositions of state legislators and governors, and perhaps haul them into court for cross-examination at trial about their subjective motivations in passing a mining statute.").
274. *See id*. at 1909 (Ginsburg, J., concurring) (arguing that "the discussion of the perils of inquiring into legislative motive . . . sweeps well beyond the confines of this case").
275. *See id*. at 1917 (Roberts, C.J., dissenting).
276. *See id*. at 1917-18.
277. *See id*. at 1916.
278. *See id*. at 1918.
279. *See id*. at 1906 (plurality opinion) ("Our field preemption cases proceed as they do, moreover, for good reasons. Consider just some of the costs to cooperative federalism and individual liberty we would invite by inquiring into state legislative purpose too precipitately.").
280. *Id*. at 1905. Justice Gorsuch notes that the Court has more recently cast doubt as to whether the inquiry into California's purpose in *Pacific Gas* was necessary. *Id*. at 1904; *see supra* note 267 and accompanying text.
281. *See generally* Pharmaceutical Rsch. & Mfrs. of Am. v. Walsh, 538 U.S. 644, 682 (2003) (Thomas, J., concurring) ("The disagreement between the plurality and dissent in this case aptly illustrates why '[a] freewheeling judicial inquiry into whether a state statute is in tension with federal objectives . . . undercut[s] the principle that it is Congress rather than the courts that preempts state law.'" (citation omitted)).
282. *See supra* notes 61, 66-67 and accompanying text.

point of use"?[283] Whether the Court construes "point of use" as a discrete time and place, such as the end-user's premises, or, more accurately, as an abstract measurement of anticipated performance, the Court could rationally conclude that Congress chose to regulate "the more novel aspect[ ]" of appliance energy conservation "while leaving to the States their traditional function" of regulating natural gas infrastructure within state boundaries.[284] Thus, EPCA controls when *energy meets the appliance*—literally or in the abstract—and not before.

Likewise, in the language of the *Virginia Uranium* concurrence, Berkeley's ban of an "upstream activity" is not preempted simply because it has some "indirect effects" in a "downstream" federally regulated area.[285] Virginia did not regulate the "radiological safety of tailings storage," only "an antecedent activity subject to exclusive state authority."[286] Similarly, the concurrence should find Berkeley has the authority to prescribe when and where fuel piping can be installed even if it means a downstream regulated appliance will actually consume "zero" energy.[287] Berkeley's ban does not function as a preempted building code any more than Virginia's mining ban functions as a safety regulation.

Lastly, under the reasoning of the dissent, Berkeley's ban evidences legitimate local purpose unrelated to EPCA regulations.[288] Rendered through Chief Justice Roberts' purpose inquiry, Berkeley's rationale supports the conclusion that its ban operates entirely within its historic police powers to provide for the health and safety of its citizens; the ordinance does not purport to indirectly regulate in the field of appliance energy conservation standards.[289]

C. *Putting the Ban Back Together*

The bans examined above suggest this limiting principle to help courts determine whether a state or local ban is federally preempted: does the ban compel a regulated party to adhere to a standard conflicting with federal law?[290]

When the state regulation appears to be a ban, the court need not conduct improvisatory explorations into the state's purpose, allaying Justice Gorsuch's fears.[291] Whether Berkeley's stated purpose—to provide for the health and safety of its citizens[292]—is true or not, does not actually matter in this preemption inquiry.[293] If a municipal gas ban were crafted to somehow compel manufacturers to produce covered appliances with energy use and efficiency standards greater than those prescribed by federal law, the court should properly find the ban preempted.[294]

To be sure, the court must consider any possible violations of fundamental rights or the dormant Commerce Clause,[295] but in general, the broader the ban, the more likely the court should find the ban within the state's Tenth Amendment powers.[296] A permissible state-local ban operates wholly prior to scope of federal regulation, despite any "downstream" effects.[297]

In this way, California can ban "cruel pork" prior to the application of the FMIA.[298] Mackinac Island can impose a blanket ban on automobiles without conflicting with the CAA.[299] Chicago can ban the sale of spray paint without raising preemption claims under TSCA.[300]

Virginia can ban uranium mining before it reaches the scope of the AEA, and the ban does not actually compel adherence to greater nuclear safety protocols, regardless of the state's motivations.[301]

And Berkeley can ban new natural gas infrastructure. The city could even prohibit the use or sale of gas appliances outright. Berkeley's ban does not compel manufacturers to adhere to conflicting standards of energy use and efficiency in their appliances' design, manufacturing, and marketing under EPCA.

IV. Conclusion

Setting aside the question of whether the presumption against preemption is gone for good, the Ninth Circuit panel's reasoning in *Berkeley* was fundamentally flawed. The panel significantly misconstrued the scope of EPCA preemption, leading the court to miss the fundamental ways in which Berkeley's ban is plainly analogous to other permissible state and local bans that operate at a distance from downstream federally regulated activities.

Because Berkeley's ban does not conflict with EPCA by compelling adherence to greater appliance energy conservation standards, the ban should have been upheld. As courts around the country face new litigation of EPCA preemption claims, those that reject the Ninth Circuit's reasoning stand on solid ground.

283. *See Virginia Uranium*, 139 S. Ct. at 1908; *supra* Section II.A.1 (How to define "point of use"?); *see also* 42 U.S.C. §6291(4).
284. *Virginia Uranium*, 139 S. Ct. at 1908; *supra* Section II.A.1 (How to define "point of use"?).
285. *See Virginia Uranium*, 139 S. Ct. at 1914-15 (Ginsburg, J., concurring).
286. *Id.* at 1916.
287. *See supra* Section II.A.2.
288. In fact, the use of electric stoves in general may be *less* energy efficient than gas stoves. *See Berkeley III*, 89 F.4th 1094, 1126 (9th Cir. 2024) (Friedland, J., concurring); Petition for Rehearing, *supra* note 27, at 15.
289. *See Virginia Uranium*, 139 S. Ct. at 1918 (Roberts, C.J., dissenting); Berkeley, Cal., Mun. Code §12.80.010 (2023), https://berkeley.municipal.codes/BMC/12.80.
290. *See supra* Section III.A; *supra* note 191 and accompanying text.
291. *See Virginia Uranium*, 139 S. Ct. at 1906-07 ("State legislatures are composed of individuals who often pursue legislation for multiple and unexpressed purposes, so what legal rules should determine when and how to ascribe a particular intention to a particular legislator?").
292. *See* Berkeley, Cal., Mun. Code §12.80.010 (2023), https://berkeley.municipal.codes/BMC/12.80; *see also Berkeley III*, 89 F.4th at 1126 (explaining how the intent of the ordinance does not conflict with EPCA's energy use provisions).
293. *See supra* Section III.B.3.
294. *See supra* Section III.A; *supra* note 191 and accompanying text.
295. *See supra* Section III.B.2. When it comes to a dormant Commerce Clause challenge, "absent discrimination, a State may exclude from its territory, or prohibit the sale therein of any articles which, in its judgment, fairly exercised, are prejudicial to the interests of its citizens." National Pork Producers Council v. Ross, 598 U.S. 356, 396, 53 ELR 20076 (2023) (citations omitted).
296. *See supra* Section I.A.2.
297. *See supra* Section III.B.2 (Regulating upstream).
298. *See supra* Section III.B.2 (*National Pork Producers Council v. Ross*).
299. *See supra* Section III.B.1 (Conflicting standards).
300. *See id.*
301. *See supra* Section II.B.3.