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Gas Stove Ban Update: Ninth Circuit Says “No” to City of Berkeley Ban on Gas Stoves

The gas stove wars continue to heat up. On April 17, 2023, the United States Court of Appeals for the Ninth Circuit took a stand and ruled that the City of Berkeley does not have the authority to prohibit connecting natural gas lines to newly constructed buildings. For the Ninth Circuit, the City’s gas appliance ban was preempted by federal law under the Energy Policy and Conservation Act (“ECPA”)¹.

Here’s the background of the case. In July 2019, the Council of the City of Berkeley, California adopted an Ordinance titled “Prohibition of Natural Gas Infrastructure in New Buildings” (the “Berkeley Ordinance”)². Effectively, the Berkeley Ordinance prohibited the installation of new gas stoves in both commercial and residential settings. In November 2019, the California Restaurant Association (the “CRA”) filed a lawsuit challenging the City of Berkeley’s authority to pass such a sweeping prohibition, claiming that the Berkeley Ordinance is preempted by federal authority to regulate natural gas under the ECPA. Given the commercial and environmental interest in the fate of the Berkeley Ordinance, several high-profile third parties formally weighed in on the lawsuit, further compounding the already substantial stakes of the case.

The United States District Court for the Northern District of California dismissed the CRA’s claim under the ECPA in July 2021, upholding the Berkeley Ordinance. According to the District Court, the ECPA ought to be “interpreted in a limited manner” to prevent federal law from “sweep[ing] into areas that are historically the province of state and local regulation.”³ The District Court viewed the Berkeley Ordinance favorably, arguing its impact on consumer products as “at best indirect, lacking the impact of “facially



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regulat[ing] or mandat[ing] any particular type of product or appliance.” The CRA appealed the decision to the Ninth Circuit where, last week, it prevailed.

In a unanimous decision, the Ninth Circuit reversed the District Court, characterizing the Berkeley Ordinance as practically banning natural gas appliances—directly contradicting the District Court’s view that the City was not regulating any particular type of product.⁴ Writing for the three-judge panel, Judge Patrick J. Bumatay held that: “By its plain text and structure, EPCA’s preemption provision encompasses building codes that regulate natural gas use by covered products.” Under the ECPA, Judge Bumatay did not view as meaningful the distinction between “banning natural gas piping within buildings rather than banning natural gas products themselves.” While the decision was unanimous, the remaining two judges on the panel filed Concurring Opinions.

Given the national attention to the Berkeley Ordinance, we expect the City to seek a full en banc review of the decision. In fact, on April 20, the City of Berkeley already put forth an unopposed motion to extend the deadline for filing its petition for a rehearing en banc from May 1, 2023 to May 31, 2023.

While the City of Berkeley case continues to work its way through the appellate process, we expect to see the Ninth Circuit’s unanimous opinion embolden opponents of similar natural gas prohibitions in cities and municipalities across the country. At the same time, given the Court’s preemption finding, individuals and environmental groups opposing gas stoves may bring lawsuits of their own in the hopes of achieving more favorable results.

To this point, local governments and the courts have taken centerstage in the gas stove wars, but the Consumer Product Safety Commission (“CPSC”) and Department of Energy (“DOE”) are both considering detailed rulemakings on the health effects of gas appliances.⁵ How the Executive Branch ultimately decides to position itself in the debate may ultimately determine how consequential the unsettled court cases will be.

For now, the regulation of gas stoves not only remains a key focus of the CPSC and DOE, but a growing litigation target.



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¹ 42 U.S.C. § 6297(c)

² City of Berkeley, California. Ordinance No. 7,672-N.S.

³ *Cal. Rest. Ass'n v. City of Berkeley*, 547 F. Supp. 3d. (N.D. Cal. 2021).

⁴ *Cal. Rest. Ass'n v. Berkeley*, 9th Cir., No. 21-16278, 4/17/23.

⁵ <https://www.cpsc.gov/About-CPSC/Commissioner/Richard-Trumka/Statement/CPSC-Approves-Request-for-Information-on-Gas-Stove-Hazards-and-Potential-Solutions>; Energy Conservation Program: Energy Conservation Standards for Consumer Conventional Cooking Products, 88 Fed. Reg. 6818 (proposed Feb. 1, 2023).