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News : US law preempts Berkeley, California's ban on gas in buildings: appeals court

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Published on - Tue, 18 Apr 2023 17:47:14 EST

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- Preemption argument prevails before court
- Berkeley was first **California** city to ban **gas**

A **US** appeals court panel found that a federal law preempts Berkeley, **California** 's 2019 natural **gas** ban, overturning a lower court ruling to dismiss a case brought by a **California** restaurant trade group to overturn the pioneering policy.

The three-judge panel for the 9th **US** Circuit Court of Appeals on April 17 reversed a decision from the **US** District Court for the Northern District of **California** and remanded the case for further proceedings.

In rendering the decision, the appellate court panel essentially concurred with the **California** Restaurant Association. The CRA had argued that the federal Energy Policy and Conservation Act, or EPCA, preempts the Berkeley **gas** ban, which prohibited local officials from issuing a building permit for new construction projects that include **gas** infrastructure within the building.

The EPCA regulates the energy efficiency and use of consumer products and preempts local and state regulations for EPCA-covered products. In a 2019 lawsuit, the CRA argued that the Berkeley ordinance clashed with EPCA's jurisdiction over regulating the quantity of **gas** consumed in appliances.

In July 2021, **US** District Court Judge Yvonne Gonzalez Rogers dismissed CRA's interpretation of the EPCA as expansive and unpersuasive.

In an opinion by Judge Patrick Bumatay, the appeals court panel noted that the EPCA "expressly preempts state and local regulations concerning the energy use of many natural **gas** appliances." While Berkeley did not directly ban those appliances, it took a circuitous route to achieve the same outcome, rendering the equipment useless.

The panel held that the EPCA's preemption provision applies to building codes that regulate **gas** use in equipment covered by the law. By prohibiting **gas** piping in new construction, Berkeley prevented those covered appliances from using **gas**, the panel said.

Judge Diarmuid O'Scannlain said he only reached the opinion that the EPCA preempts the Berkeley **gas** ban due to Ninth Circuit precedent. However, O'Scannlain said the law in this area is "troubling and confused — beset by tensions in **Supreme Court** precedents, disagreement among the circuits, and important practical questions still unanswered."

Judge M. Miller Baker expressed reservations about the CRA's standing, but regarding preemption, he wrote that "the Berkeley ordinance cut 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 the premises where such products are used."

Impact of decision unclear

Berkeley was the first **California** city to pass an ordinance broadly restricting **gas** use in new construction. The Bay Area policy push has since catalyzed a movement in several states to prohibit **gas** use in new residential and commercial buildings.

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But despite Berkeley's status as a first mover, it was not clear how impactful the appeals court decision would be.

In **California**, most local and county governments opted to follow a model developed in Menlo Park, which requires all-**electric** construction through an amendment to the state's Building Energy Efficiency Standards, known as Title 24. Some **California** cities that initially followed Berkeley's model have since adopted a Title 24-based approach, including Berkeley itself.

Local and state governments have pursued a variety of policy pathways in their jurisdictions, with the Berkeley model becoming less influential in the nearly four years since it was enacted.

"The vast majority of cities within the 9th circuit and beyond who have passed policies to restrict pollution from **gas** appliances will not be impacted by this decision, and there are still ample pathways to upgrade new buildings to clean energy technologies," Matt Vespa, a senior attorney at **Earthjustice**, said in an April 17 statement.

The ruling applies only to the nine states within the Ninth Circuit, including **Washington** and **Oregon**, where electrification movements have taken root, Vespa said

Still, the American **Gas** Association, which represents the **US**' **gas** utilities and filed an amicus brief on behalf of CRA, applauded the decision.

"The **US** Court of Appeals for the Ninth Circuit took a huge step today that will both safeguard energy choice for **California** consumers and help our nation continue on a path to achieving our energy and environmental goals," association President and CEO Karen Harbert said a statement.

Berkeley drew support from environmentalists, the federal government, and a group of politically progressive states during CRA's appeal.

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