No. 21-16278

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CALIFORNIA RESTAURANT ASSOCIATION,
Plaintiff-Appellant,
v.
CITY OF BERKELEY,
Defendant-Appellee.

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

BRIEF OF *AMICI CURIAE*
AIR CONDITIONING, HEATING, AND REFRIGERATION INSTITUTE; CALIFORNIA BUILDING INDUSTRY ASSOCIATION; HEARTH, PATIO, & BARBECUE ASSOCIATION; NATIONAL ASSOCIATION OF HOME BUILDERS; NATIONAL ASSOCIATION OF MANUFACTURERS
IN SUPPORT OF PLAINTIFF-APPELLANT
CALIFORNIA RESTAURANT ASSOCIATION
AND REVERSAL OF THE DISTRICT COURT

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INTEREST OF AMICI CURIAE[1]

Plaintiff California Restaurant Association ("Association") appeals the dismissal by the U.S. District Court for the Northern District of California of the Association's challenge to the Natural Gas Infrastructure Ordinance ("Ordinance" or "Berkeley Ordinance") adopted by the City of Berkeley, California ("City"). The Ordinance, which prohibits natural gas infrastructure in newly constructed buildings,[2] is preempted by the federal Energy Policy and Conservation Act ("Act"), 42 U.S.C. § 6201 *et seq.* Amici curiae are five trade associations nationally and locally representing members in the building, building supply, and related trades who support sound and substantiated policies that reduce greenhouse gas emissions. Amici curiae members manufacture, use, and rely on products and equipment regulated by the Act. Because the Berkeley Ordinance would prevent the use of certain products and equipment covered by the Act, this challenge is important to Amici and its resolution will impact their members. Below are separate interest statements from each amicus organization.

Air Conditioning, Heating, and Refrigeration Institute

The Air Conditioning, Heating, and Refrigeration Institute ("AHRI") is a North American trade association of manufacturers of heating, ventilation, air conditioning, and refrigeration ("HVACR") equipment. AHRI aims to "be the advocate of North American HVACR and water heater manufacturers and a global leader of the industry."[3] AHRI's 315 member companies manufacture quality, efficient, and innovative residential and commercial air conditioning, space heating, water heating, and commercial refrigeration equipment and components for sale in North America

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[1] *Amici* certify that counsel of record for the Association and the City have consented to *amici* filing a brief in support of CRA. Fed. R. App. P. 29(a)(2). No party's counsel authored this brief in whole or in part, and no person—other than *amici*, their members, or their counsel—contributed money that was intended to fund preparation or submission of this brief. Fed. R. App. P. 29(a)(4)(E).

[2] Berkeley Municipal Code § 12.80.040.

[3] AHRI's mission statement is available at http://www.ahrinet.org/about-us (last visited November 9, 2021).

and around the world, accounting for more than 90 percent of HVACR and water heating equipment manufactured and sold in North America.

California Building Industry Association

The California Building Industry Association ("CBIA") is a statewide trade association based in Sacramento, California that represents approximately 3,000 member companies including homebuilders, trade contractors, architects, engineers, designers, suppliers, and industry professionals in the homebuilding, multi-family, and mixed-use development markets - employing more than 100,000 people. CBIA members strive to make the American dream of home ownership a reality for all residents of California.

Hearth, Patio & Barbecue Association

The Hearth, Patio & Barbecue Association ("HPBA") is the principal trade association representing the hearth products and barbecue industries in North America. HPBA's members include manufacturers, retailers, distributors, manufacturers' representatives, service installation firms, and other entities who have business interests related to the hearth, patio, and barbecue industries.

National Association of Home Builders

The National Association of Home Builders ("NAHB") is a trade association based in Washington, D.C. whose mission is "to protect the American Dream of housing opportunities for all, while working to achieve professional success for its members who build communities, create jobs and strengthen our economy."[4] Founded in 1942, NAHB is a federation of more than 700 state and local associations. About one-third of NAHB's approximately 140,000 members are home builders or remodelers; its builder members construct about 80 percent of all new homes built in the United States. The remaining members are associates working in closely related

[4] NAHB's mission statement is available at https://www.nahb.org/Why-NAHB/About-NAHB (last visited November 9, 2021).

fields such as building products and services. NAHB's members collectively employ over 3.4 million people nationwide.

National Association of Manufacturers

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes roughly $2.17 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for nearly three-quarters of private-sector research and development in the Nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States. The NAM is a 501(c)(6) nonprofit organization.

SUMMARY OF ARGUMENT

The Act preempts state and local regulations "concerning" the "energy use" of certain covered products—including gas appliances. 42 U.S.C. §§ 6297(c), 6316(b)(2)(A). The question before the District Court was whether the Berkeley Ordinance is a regulation "concerning" the "energy use" of a covered product and, thus, preempted under the Act. As the Association discusses in its brief, the answer to that question is unequivocally yes. The District Court, however, chose to accept the City's argument that the Ordinance is not preempted by the Act because it regulates the installation of natural gas infrastructure and does not directly or expressly regulate the "energy use" of a covered product. Op. at 18. To support its decision, the District Court concluded that the Ordinance "*at best indirectly* has [sic] an impact on the products available to consumers" and that "for preemption purposes, the fact that an ordinance focused on natural gas piping for new builds *may have some downstream impact* on commercial appliances is insufficient." Op. at 17, 18 (emphasis added).

The District Court's conclusion is not supported by the Act, which broadly preempts any ordinance "concerning" the energy use of covered products, or the Ordinance, which necessarily concerns the energy use of covered products. The District Court also erred in concluding that the Ordinance has only indirect impacts on the availability of products to consumers.

The District Court's ruling, if allowed to stand, would lead to outcomes that are inconsistent with express congressional intent in promulgating the Act. Congress envisioned the Act, enacted in 1975, as a "comprehensive energy policy"[5] intended to increase energy production and supply, reduce energy demand, and increase energy efficiency. In 1987, facing increasingly disparate state appliance standards, Congress added preemption provisions to reduce "regulatory and economic burdens on the *appliance manufacturing industry*" and to "protect the appliance industry from having to comply with a patchwork of numerous conflicting State requirements." *See* S. Rep. No. 100-6, at 2, 4 (1987) (emphasis added); H.R. Rep. No. 100-11, at 24 (1987). In so doing, Congress made clear its intention to avoid a myriad of varying state and local regulations. To achieve this goal, Congress vested the Department of Energy ("DOE" or "Department") with the authority to develop, amend, and implement the Act's minimum energy conservation standards through a robust rulemaking process that assesses the economic impacts and technical feasibility of proposed regulations.

Unlike the DOE process, in adopting the Ordinance the City of Berkeley engaged in the thinnest of analyses, with little inquiry into long-term consequences. Among these long-term consequences are impacts on those who – like Amici's members – manufacture, sell, install, and use gas appliances, including direct heating equipment, refrigerators, freezers, water heaters, and furnaces, all of which are covered

[5] *Air Conditioning and Refrigeration Inst. v. Energy Res. Conservation and Dev. Comm'n*, 410 F.3d 492, 498 (9th Cir. 2005).

products under the Act.[6] The Ordinance's prohibition on natural gas infrastructure directly and negatively affects Amici's members, many of whom are small and independently owned businesses, and the livelihoods of their employees.

In adopting the Ordinance's ban on natural gas infrastructure, the City also failed to consider economic and environmental impacts on consumers to ensure that the City's push towards eliminating natural gas does not disproportionally affect low income communities or inadvertently create other environmental or safety problems.

Amici agree with the City's laudable goals of reducing greenhouse gas emissions and combatting climate change. However, attempting to achieve those aims does not give the City license to bypass federal law. The District Court's decision must be reversed because it erroneously concluded that the Ordinance does not "concern" the "energy use" of covered products under the Act and failed to consider the serious and far-reaching real-world impacts of allowing such an Ordinance to escape preemption.

ARGUMENT

I. The District Court's Ruling Is Inconsistent With Congressional Intent

A. The Legislative History of the Act Indicates that Congress Intended to Centralize the Relevant Regulatory Framework and Avoid Disparate State and Local Regulations

The Act, passed in response to the oil crisis faced by the United States in the early 1970s, sought to create a "comprehensive energy policy" and address "the serious economic and national security problems associated with our nation's continued reliance on foreign energy resources."[7] The foremost goals of the Act were to increase energy production and supply, reduce energy demand, increase energy efficiency, and give the executive branch additional powers to respond to the energy crisis.[8]

The Act established the Energy Conservation Program for Consumer Products that regulates, among other things, the energy use and energy efficiency of certain

[6] 42 U.S.C. § 6292(a).
[7] *Air Conditioning and Refrigeration Inst.*, 410 F.3d at 498.
[8] *Id.*

appliances. As originally enacted, the Act permitted significant state involvement in appliance regulation.[9] However, in 1987, Congress responded to a growing trend in "separate State appliance standards" that "ha[d] begun to emerge" by passing the National Appliance Energy Conservation Act ("NAECA"). S. Rep. No. 100-6, at 4 (1987). For decades, Congress has recognized that the appliance manufacturing industry was part of a national market that requires consistent and workable federal regulations in order to effectively achieve the energy conservation standards envisioned by the Act. The purpose of the NAECA amendment was therefore to "reduce the regulatory and economic burdens on the appliance manufacturing industry through the establishment of energy conservation standards" and to protect the appliance manufacturing industry from "a growing patchwork of differing State regulations which would increasingly complicate their design, production, and marketing plans." *See* S. Rep. No. 100-6, at 2, 4 (1987); *see also* H.R. Rep. No. 100-11, at 24 (1987) (the NAECA amendment was "designed to protect the appliance industry from having to comply with a patchwork of numerous conflicting State requirements"). Allowing localities to fashion piecemeal regulations both disrupts the ultimate objective of the Act and contradicts Congress's clear legislative intent.

B. The Department of Energy's Rulemaking Process Shows the Scope and Depth of Analysis Necessary to Regulate in Accordance with Congressional Intent

Congress vested the DOE with authority to develop, amend, and implement the Act's minimum energy conservation standards. *See* 42 U.S.C. §§ 6295(m)(1), 6295(hh)(3), 6313(a)(6)(A)(ii), (B)(i), (C), 6313(c)(6)(B), (f)(5). The Act authorizes DOE to establish energy conservation standards for covered consumer and commercial appliances that are both technologically feasible and economically justified, while also resulting in a "significant conservation of energy." 42 U.S.C. §§ 6295(o)(3)(B) and 6313(d)(4).

[9] *Id.* at 499.

In exercising its responsibility to establish these standards, DOE engages in a comprehensive preliminary assessment and rulemaking process. 10 C.F.R. §§ 430.21 *et seq*. DOE begins the process with an initial assessment that includes publishing notice in the Federal Register that DOE is considering initiating a rulemaking regarding a covered appliance and soliciting comments from stakeholders on whether to proceed with the rulemaking. 10 C.F.R. § 430 App. A(6)(a)-(h). If DOE decides that a rulemaking is appropriate based on the information, data, and comments provided in the early assessment, the Department proceeds in four phases:

- **Framework Phase:** DOE publishes a framework document that presents the basic analytical and procedural principles and legal authorities that will guide the rulemaking. The framework document also typically solicits feedback in the form of requests for information or notices of data availability.

- **Preliminary Analysis Phase:** DOE gathers available data and information about the product's technical, economic, and market characteristics. This includes undertaking an energy savings analysis, identifying and conducting an engineering analysis of design options, selecting candidate standard levels, and engaging stakeholders.

- **Notice of Proposed Rulemaking Phase:** In the notice of proposed rulemaking phase, DOE considers public comments from the preliminary analysis phase, revises the assessment, and proposes standards determined to result in the maximum technologically feasible *and* economically justified improvement in energy efficiency.

- **Final Rule Phase:** DOE considers public input, further revises its assessment where appropriate, and issues the final rule, which establishes any mandatory minimum energy conservation standards. Generally, final rules require that manufacturers comply with the standard within 3 to 5 years, providing time to make any investments required.

Id. at (6)(a)-(h). During each of these phases, DOE conducts a rigorous assessment of the technological feasibility and economic justification for the standard. For example, DOE considers: (1) economic impacts of the standard on manufacturers and on consumers; (2) "savings in operating costs throughout the estimated average life of the covered product" as compared to increases in prices, charges, and maintenance expenses likely to result from the standard; (3) the total projected amount of energy

savings "likely to result directly" from the standard; (4) "any lessening of the utility or the performance of the covered products" likely to result from the standard; (5) the impact of any lessening of competition, as determined in writing by the Attorney General, likely to result; (6) "the need for national energy…conservation;" and (7) other factors the Secretary considers relevant. 42 U.S.C. § 6295(o)(2)(B)(i).

The depth of analysis that DOE undertakes when establishing national standards underscores exactly why Congress vested it with such authority. The impacts of the regulatory scheme on regulated markets are so complex that they must be thoroughly assessed at a federal level and standards implemented through comprehensive, nationwide policies that adequately reflect the considerations outlined above. Municipalities are not equipped to undertake such an analysis.

In enacting its Ordinance, the City did not consider any of the factors DOE is statutorily required to consider—proving Congress's wisdom in requiring a federal entity to analyze and make decisions in this field. Rather than conduct a robust inquiry into the technical feasibility and economic justifications of the Ordinance,[10] the City took at face value the unsubstantiated recommendation of the Community Environmental Advisory Committee (CEAC) that "the Council consider phasing out natural gas appliances in new buildings for climate, health and safety reasons."[11] The three-page CEAC report relies only on a single study by researchers at University of

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[10] City of Berkeley Action Calendar, at 2-3 (July 9, 2019). The City chose to enact the Ordinance pursuant to its health and safety police power, *id.*, instead of following the specific procedures mandated by the California Building Standards Code and the California Energy Code when seeking to impose more stringent regulations on buildings standards and energy use. *Id. See also*, Billi Romain on Behalf of City of Berkeley, "Berkeley Support to Phase Out Fossil Fuels with Clean Electrification,"(June 28, 2018). Links to all articles and reports cited in this brief are provided in the "Other Authorities" section in the Table of Authorities.

[11] Community Environmental Advisory Commission, *Phasing Out Natural Gas for Heating and Cooking* (Nov. 1, 2016).

California at Berkeley and two reports by the National Fire Protection Association on the cause of home fires from gas appliances.[12]

Notably, the CEAC report makes no reference to any stakeholder engagement during the assessment or stakeholder input on the ultimate recommendation, nor does it provide an analysis of the economic or technological implications of phasing out natural gas and natural gas infrastructure.[13] Even more troubling, the City made no additional inquiry of its own into the impacts of the Ordinance on local individuals or industries and certainly did not contemplate the broader market impacts beyond Berkeley. This flies in the face of Congress's intent in crafting "comprehensive energy policy" that adequately ties the "significant conservation of energy" to valid economic and technological justifications. 42 U.S.C. 6295(o)(3)(B) and 6313(d)(4). *See also*, *Air Conditioning*, 410 F.3d at 498.

C. Had the City Conducted a Meaningful Analysis, It Would Have Identified Potentially Significant Adverse Impacts Associated with the Ordinance

Had the City conducted a meaningful analysis and considered the factors the Act requires DOE to account for, it would have identified potentially significant impacts that would result from the adoption of the Ordinance.

First, the City (and the District Court) failed to consider how to address or mitigate the Ordinance's tangible impacts on Amici's members and the consumers who depend on members' goods and services. For example:

- Reducing the number of jobs for gas-appliance installers and reducing revenues for companies that produce and sell gas appliances.
- Depressing rapidly the use of effective and energy efficient products such as tankless water heaters, which are predominately gas-powered and high-efficiency.[14] This would

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[12] *Id.*

[13] *Id.*

[14] Tankless water heaters are also called "instantaneous water heaters." Virtually all whole-home instantaneous water heaters are gas-powered because it requires too much

negatively and directly impact businesses that manufacture, stores that supply, and individuals that install tankless water heaters.

- Reducing energy diversity for consumers that, in the face of increasing power outages in areas of California, want a reliable home heating source that is not dependent on electricity.[15] This is especially critical for consumers in low income communities who cannot afford costly alternatives.

Manufacturers, suppliers, builders, and installers want and need to make forecasts in order to meet market demands, but they are challenged to do so in the midst of uncertainty created by new, evolving, and sometimes competing mandates from: (1) the Department of Energy; (2) the California Energy Commission; (3) local air districts like the Bay Area Air Quality Management District and the South Coast Air Quality Management District; (4) other states' regulations that have impacts on California's market; (5) **and now, potentially myriad, local ordinances.**

Second, the City (and the District Court) did not adequately consider the environmental, health, and safety impacts that could result from rapid building electrification. Since the Berkeley Ordinance was enacted, similar ordinances have proliferated across California and have been introduced in other states.[16] Currently, electrical grids may not be sufficiently robust to satisfy the demands of all new construction under new municipal standards like the Berkeley Ordinance in the

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electricity to heat water at the requisite rate. *See* AHRI Directory of Certified Performance at www.AHRIDirectory.org.

[15] Rick Rojas and Marie Fazio, "Winter Storm Brings Icy Temperatures and Cuts Power Across U.S." N.Y. Times (Feb. 14, 2021); Will Wright and Campbell Robertson, "Burst Pipes and Power Outages in Battered Texas," N.Y. Times (Feb. 21, 2021); Andrew Freedman et al., "Frigid, icy weather plague central and eastern U.S. while millions in Texas remain in the dark," Wash. Post (Feb. 16, 2021).

[16] For a current list of municipal actions in California as of July 22, 2021, *see* Matt Gough, "California's Cities Lead the Way to a Gas-Free Future," Sierra Club (Jul. 22, 2021). *See also*, Katherine Blunt, "Battle Brews Over Banning Natural Gas to Homes," Wall Street Journal (May 31, 2021).

timeframe required.[17] This forces people to turn to alternative energy sources during periods of intermittent service—like gasoline or charcoal—that create greater GHG emissions and more negative air quality impacts than natural gas.[18]

Further, the use of alternative energy sources during electrical failures exposes consumers to additional health and safety risks.[19] For example, during Winter Storm Uri, Texans died from exposure to extreme temperatures while others suffered from exposure to high levels of carbon monoxide through the use of charcoal grills or vehicles run in confined spaces in an effort to stay warm.[20] Similarly, after Hurricane Ida, Louisianans died or were injured when they were trapped inside their homes due to electrical failures that rendered useless air-conditioning units, elevators, and other electricity-dependent avenues for reprieve from the dangerous heat.[21]

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[17] For example, on September 10, 2021, the DOE approved a request by the California Independent System Operator Corporation (CAISO) to dispatch more than 200 MW of natural gas-fired generation capacity beyond currently permitted levels. The request for emergency order was submitted by the agency "to compensate for project shortfalls in power supply" and "to preserve the reliability of [the] bulk electric power system in California." Department of Energy, Order No. 202-21-2, (Sept. 10, 2021); *see also* Brad Plumer, "A Glimpse of America's Future: Climate Change Means Trouble for Power Grids," N.Y. Times (Feb. 16, 2021); Ivan Penn, "Hurricane Ida Exposes Grid Weaknesses as New Orleans Goes Dark," N.Y. Times (Aug. 3, 2021).

[18] *See, e.g.*, Ivan Penn, "Its Electric Grid Under Strain, California Turns to Batteries," N.Y. Times (Sept. 3, 2020); Miriam Jordan, "Power is Still Off for Millions After Winter Storm," N.Y. Times (Feb. 16, 2021) (noting that many people used "wood-burning or gas fireplaces" or "charcoal grills" to heat their homes following Winter Storm Uri).

[19] *See, e.g.*, Perla Trevizo et al., "Texas enabled the worst carbon monoxide poisoning catastrophe in recent U.S. history," Texas Tribune (Aug. 17, 2021); Reis Thebault et al., "58 People Died in Last Week's Frigid Weather. Some of Them Were Just Trying to Stay Warm," Wash. Post (Feb. 21, 2021); Giulia McDonnell Nieto del Rio et al., Extreme Cold Killed Texans in Their Bedrooms, Vehicles and Backyards," N.Y. Times (Feb. 19, 2021; Nicholas Bogel-Burroughs and Katy Reckdahl, "The Greatest Killer in New Orleans Wasn't the Hurricane. It Was the Heat," N.Y. Times (Sept. 16, 2021).

[20] *See*, Trevizo, *supra* n.19; McDonell Nieto del Rio, *supra* n.18.

[21] Bogel-Burroughs and Reckdahl, *supra* n.18.

An evaluation of the environmental, health, and safety impacts of rapid building electrification is complex, with factors weighing both for and against such measures. But most importantly, here, the City did not (and is not equipped to) engage in the type of robust evaluation with stakeholder input that is needed to set energy policy.

Finally, the City (and District Court) did not adequately consider the consequences that a shift from gas to electric would have on household energy costs, and, in particular, did not consider the fact that those impacts would be disproportionately borne by consumers and households on fixed and low incomes. These costs are not inconsequential. A 2015 study by the U.S. Energy Information Administration concluded that the average household expenditure for heating a home with natural gas was $540.[22] For electric heating, average household expenditures were $1,128.[23] Low income communities would bear a disproportionately higher burden as they spend a higher percentage of their budgets on energy bills, particularly as seasonal temperatures become more extreme.[24] This is especially meaningful in California, where electricity rates are 60% above and gas rates are 20% below the national averages.[25]

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[22] U.S. Energy Information Administration, *Residential Energy Consumption Survey*, at 1 (2015).

[23] *Id.*

[24] According to the survey, more than 20% of families went without basic necessities like food and health care to pay for their energy bills at some point in the year. Meanwhile, 11% of respondents kept their homes at unsafe or unhealthy temperatures. *Id.* Gridworks, *California's Gas System in Transition: Equitable, Affordable, Decarbonized and Smaller*, at 6 (2019) ("One third of California households do not have sufficient income to meet their basic costs of living and energy insecurity affects approximately 25% of Californians today. In a survey of low-income California households conducted by The Utility Reform Network, more than 80% of respondents felt that their utility bills were too high, and 36% had cut back on buying food in order to pay their utility bill.").

[25] California State Profile and Energy Estimates, U.S. Energy Information Administration (last accessed November 9, 2021), https://www.eia.gov/state/?sid=CA#tabs-5

If not addressed, the inequities of electrification will only widen as the demand for natural gas declines. Studies indicate that widespread electrification could reduce the demand for natural gas by over 90% by 2050.[26] The decline in demand for natural gas leads to higher costs because they are spread over a smaller base, creating a situation where people with the means to electrify avoid the rising costs of natural gas while those who cannot afford or do not have the option to electrify (like renters) are stuck with higher gas rates. In fact, one study's lowest cost scenario estimates residential gas rates increasing from about $1.50 per therm to as much as $19 per therm by 2050.[27] Another study by the University of California at Berkeley found that, in general, electrification mandates, particularly in colder climates, will leave households "worse off by $1,000 or more annually" than they are in the absence of electrification mandates.[28]

Given this, the City's adoption of the Ordinance required a careful, multi-factor analysis that accounted for the expansive reach of the Ordinance's potential impacts. The fact that the City decided to forego any such analysis in favor of a singular focus on presumed climate change benefits proves Congress's wisdom in preempting state and local rules through the NAECA.

D. Without a Robust Analysis, the Ordinance is Unlikely to Achieve Its Goals

The Ordinance is unlikely to achieve its intended goals because it is not based on the findings of a robust multi-factor analysis. Recently, the Community Climate Collaborative ("C3") and Local Energy Alliance Program ("LEAP") published a report sharing the results of a pilot residential electrification project conducted in Charlottesville and Albemarle County, Virginia.[29] The report, titled *Lessons in Residential*

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[26] Gridworks, *California's Gas System in Transition*, *supra* n. 24 at 1.
[27] *Id.* at 2.
[28] Lucas W. Davis, *What Matters for Electrification? Evidence from 70 Years of U.S. Home Heating Choices*, Haas School of Business U.C. Berkeley Energy Institute (July 2021).
[29] Community Climate Collaborative, *Lessons in Residential Electrification Project and Report* (August 2021).

Electrification Project and Report, found that electrification retrofits on eight low-and moderate-income ("LMI") homes reduced energy consumption and GHG emissions but ***did not necessarily cut costs or carbon emissions across the board***.[30]

LEAP provided home energy efficiency upgrades and replaced natural gas heating and cooking appliances with electric appliances in eight LMI households. C3 then tracked and analyzed the energy usage of the participating households over the course of two winters.

Among the key findings were that GHG emissions decreased significantly (between -56.3% and -68.0%) for households that formerly used heating oil, while emissions reductions for homes that formerly used natural gas followed a less clear trend, with some seeing a small increase in emissions.[31] Savings on monthly energy bills varied across the participating homes, with some seeing savings and others modest increases. The report indicates that individual energy use patterns and other unique, relevant factors will need to be further analyzed.[32]

The Virginia study demonstrates that when municipalities approach energy conservation programs with faulty assumptions and underdeveloped analytical methodologies, the results are inconclusive and potentially damaging.[33] The Virginia study's unanticipated results underscore why Congress created a comprehensive national energy conservation policy implemented through regulatory processes that consider economic impacts, technical feasibility, sustainability, and the quantitative results that the given policy has on energy conservation.

II. The Ordinance Concerns the Energy Use of Covered Products

As discussed in more detail in the Association's brief, the Ordinance must be viewed as running afoul of the Act's preemption of "any State or local regulation

[30] *Id.*
[31] *Id.* at 3, 9.
[32] *Id.* at 3.
[33] *Id.* at 6.

concerning the energy efficiency or energy use of a [covered] product." 42 U.S.C. § 6316(b)(2)(A). There is no dispute that gas appliances are products that are covered under the Act. Moreover, the Ordinance concerns the energy use of such products. The Act defines "energy use" as "the quantity of [electricity, or fossil fuels] directly consumed" by covered products or industrial equipment at the point of use. 42 U.S.C. §§ 6291(4), 6311(4). By banning the installation of natural gas connections in new construction, the Ordinance necessarily ensures that the quantity of fossil fuels consumed by a subset of covered products—gas appliances—is driven to zero. The Ordinance therefore concerns the energy use of covered products and, as such, is expressly preempted by the Act.

The District Court's conclusion to the contrary rests in part on the premise that "[t]he Berkeley Ordinance does not facially regulate or mandate any particular type of product or appliance. Instead, the Ordinance focused on regulating the underlying gas infrastructure. This is *at best indirectly* has [sic] an impact on the products available to consumers." Op. at 17 (emphasis added). The Court went on to say that "for preemption purposes, the fact that an ordinance focused on natural gas piping for new builds *may have some downstream impact* on commercial appliances is insufficient." *Id.* at 18 (emphasis added).

It is unclear, however, why the District Court concluded that an Ordinance that functionally prohibits the use of gas-powered appliances has only "indirect" impacts on the availability of such appliances to homeowners and others or "may only have some downstream impact" or what this conclusion is based on. Indeed, prohibiting the use of gas appliances is the very purpose of the Ordinance. As illustrated above, it is hard to imagine impacts that could be more direct.

CONCLUSION

For the foregoing reasons, Amici respectfully urge the Court to reverse the decision of the District Court.

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CERTIFICATE OF SERVICE

I certify that on November 10, 2021 I caused this brief to be filed via the Ninth Circuit's CM/ECF, which I understand caused service on all registered parties.

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