

# **Impact of 9<sup>th</sup> Circuit's Ruling in California Restaurant Association v. City of Berkeley**

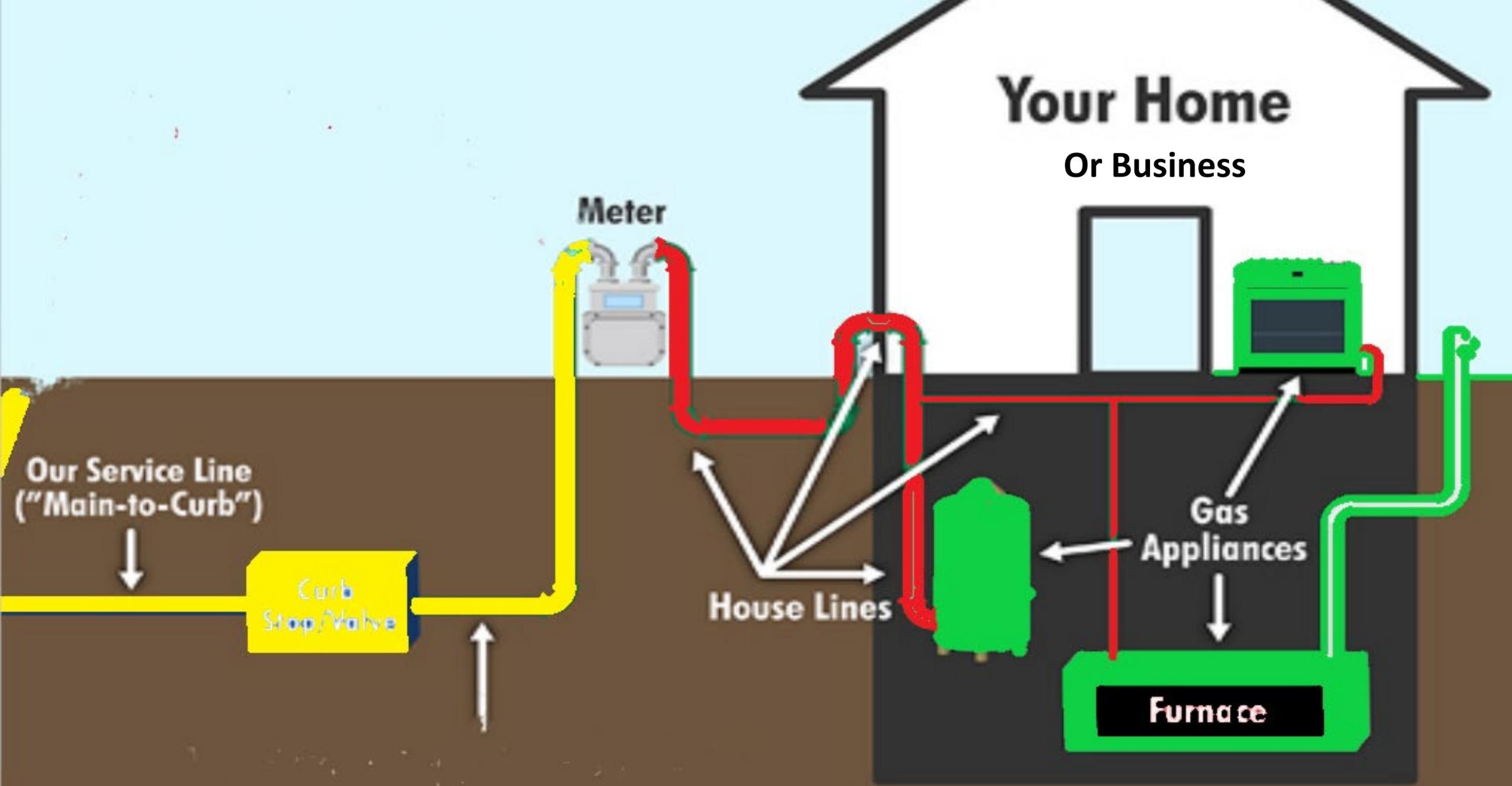
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## Case History:

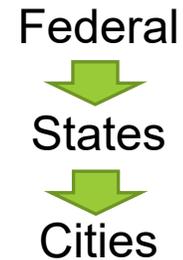
### 2019 City of Berkeley Bans Natural Gas

- Prohibition of Natural Gas Infrastructure in New Buildings  
Berkeley Municipal Code Chapter 12.80
- The Ordinance provides that “Natural Gas Infrastructure shall be prohibited in Newly Constructed Buildings.” Berkeley Mun. Code § 12.80.040(A).
- 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 as specified in the California Mechanical Code and Plumbing Code.”  
*Id.* § 12.80.030(E).



# California Restaurant Association Lawsuit:

- In Nov. of 2019 the California Restaurant Association sues Berkeley in Federal District Court
  - Arguing that the federal Energy Policy and Conservation Act (“EPCA”) preempted the Ordinance.
  - Preemption is a legal doctrine that allows a higher level of government to limit or even eliminate the power of a lower level of government to regulate a particular subject. Some statutes have explicit preemption language and others do not, but it can still be implied by the structure of the statute.



- **EPCA was passed in 1975**-was a response to the 1973 oil crisis and given the Long title:
  - An Act to increase domestic energy supplies and availability; to restrain energy demand; to prepare for energy emergencies and for other purposes*
- **EPCA directs the Department of Energy to set energy efficiency standards for appliances and expressly states that:**
  - “no State regulation concerning energy efficiency, energy use, or water use of such covered product shall be effective with respect to [that] product.” 42 U.S.C. § 6297(c).

## The District Court ruled in favor of Berkely:

- EPCA preemption should be “interpreted in a limited manner,”
  - in order to give deference to an area of law “historically the province of state and local regulation.” *Cal. Rest. Ass’n v. City of Berkeley*, 547 F. Supp. 3d 878, 891 (N.D. Cal. 2021).
  - This is further based on the precedent that there is a presumption against preemption and any finding of preemption should be clearly stated in the Statute
- The Ordinance does “not facially regulate or mandate any particular type of product or appliance” it is not preempted by EPCA. In other words, EPCA only prevents the direct regulation of appliances and does not prohibit local laws that only indirectly affect the use of regulated appliances.
- Case was appealed to the 9<sup>th</sup> Circuit

# 9<sup>th</sup> Circuit Court of Appeals Strike Down Berkley Gas Ban:

- Court determined that EPCA preemption is broader and “extends to regulations that address the products themselves and the onsite infrastructure for their use of natural gas.” *Cal. Rest. Ass’n. v. City of Berkely*, No. 21-1678 at p.15 (9th Cir. Apr. 17, 2023).
- The Court of Appeals decision hinged in large part on its understanding of the term “energy use” in EPCA.
  - “energy use” is based on consumption that happens “at point of use.”
  - “This means that we measure energy use not from where the products roll off the factory floor, but from where consumers use the products.”
- Preventing natural gas appliances from being connected to natural gas infrastructure was essentially regulating their “energy use” to a level of zero
- Explicit exceptions in the preemption section of EPCA, § 6297(f)(1)–(3) as further confirmation that EPCA preemption extends to building codes that regulate natural gas usage.
  - EPCA provides that 7 specific requirements are met a building code will not be preempted
  - In essence the code must allow for an option for a builder to meet code requirements using natural gas products. Although they may require other offsets if natural gas appliances are installed (ie better insulation, solar power)

- The 9<sup>th</sup> Circuit rejected similar arguments from DOE itself made in an amicus brief in favor of the City of Berkeley
  - Several environmental non-profits and the States of California, Maryland, Massachusetts, New Jersey, New Mexico, New York, Oregon, Washington, the District of Columbia and the City of New York.
  - Several industry groups filed briefs in favor of preemption including the American Gas Association, National Association of Home Builders, and National Association of Manufacturers
- US attorneys on behalf of DOE argued that EPCA only prohibits “state and local regulations that impose energy conservation standards or similar performance standards for the efficiency or energy consumption of certain appliances.” Again, the Court rejected the notion that EPCA’s preemption is this narrow and that the plain meaning of EPCA requires a broader interpretation.
- Further, adding that “the ability to use covered products is “meaningless” if consumers can’t access the natural gas available to them within the City of Berkeley.”

## Judge O'Scannlain's Concurring Opinion

- Judge O'Scannlain in a concurring opinion seems troubled by the assumption in the majority opinion that the presumption against preemption is negated by express preemption language in a statute.
- He goes on to reference “conflicting lines of cases” at the Supreme Court level when it comes to deciding when to apply the presumption against preemption. He ultimately determines that in the 9<sup>th</sup> Circuit at least, “I am bound to hold that the presumption against preemption does not apply to the express-preemption provision before us today.”
- One can infer that without this presumption he may have dissented from the majority opinion and that other Judges in another circuit may not apply this presumption

## Current Case Status:

- As of now Berkeley has not decided whether to appeal the case
- They could seek an en banc appeal where the entire 9<sup>th</sup> Circuit will re-hear the appeal, or they could appeal to the Supreme Court
- In both cases the Court would have the option to decline the appeal
- Or they could pass a new law that is structured differently. Possibly by amending the building code as allowed by the State of California

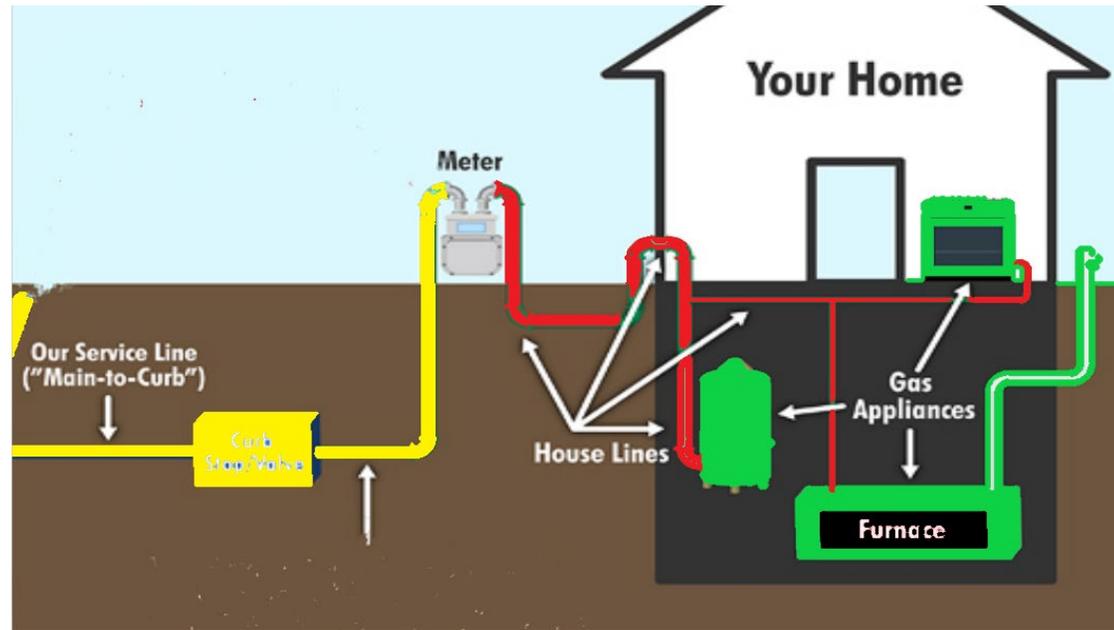
## Impact on a Potential Natural Gas Ban in Ann Arbor:

- 9th Circuit's decision does not have binding effect in Ann Arbor
- It will almost certainly be cited in support of overturning other natural gas bans but courts outside of the 9<sup>th</sup> Circuit are free to make their own legal determination



## The decision also only applies to gas bans that are structured similarly to Berkeley's

- Berkeley's ban was passed as a Health and Safety measure, separate from their building code
- And the ban specifically banned the gas piping from the meter to the appliances



## Potential Options available to Ann Arbor:

- **Passing an ordinance like Berkeley's:**
  - Ann Arbor could use its ability to pass laws for the benefit of public health and safety to pass something similar
  - Federal preemption by EPCA as espoused in the 9<sup>th</sup> Circuit opinion is certainly a risk but as previously stated the 6<sup>th</sup> Circuit could interpret EPCA differently.
  - This would also face the additional hurdle of overcoming preemption by State law in Michigan
  - Prescribes the building codes for cities in Michigan without explicitly allowing cities to amend it
  - This approach probably faces the greatest risk of being invalidated by a court challenge.

## Using Ann Arbor's Zoning authority to ban natural gas use

- This is different than the Berkeley Ordinance which used the city's inherent police powers to protect public health and safety
- However, it's unclear how a court would view a Zoning regulation with respect to EPCA preemption
- The argument could be made that a Zoning regulation banning natural gas use would also be preempted because it would prevent the use of appliances certified by the DOE in a similar way to the Berkeley ordinance
- On the other hand, the Berkeley ban specifically banned the natural gas piping necessary to deliver natural gas which is directly tied to the appliance. A zoning regulation could be structured in a way that would be further removed from a regulation on the gas appliances themselves. Also, zoning regulations unlike building code regulations are not specifically mentioned in EPCA.

## A Local Ordinance that Complies with EPCA's Exception

- Either a general ordinance or Zoning regulation that complies with the building code exception spelled out in § 6297(f)(3) as referenced earlier in the presentation might be another way to go
- While this section of EPCA specifically refers to building codes, Berkeley ordinance was not part of the building code (although the 9<sup>th</sup> Circ. referred to it as a building code). Zoning regulations are not building codes either, but they are part of the building approval process for new projects.
  - This would require further research and analysis
- While not a total ban on natural gas connections, a regulation could be drafted that favors all electric developments while leaving open an avenue for natural gas if other strict energy efficiency measures are taken to offset the gas use
- Hopefully, this could be structured in such a way that most developers would find it easier and more affordable to simply choose the all-electric option.

## Natural Gas Distribution/Franchise

- One last potential option is suggested by the 9<sup>th</sup> Circuit's opinion and stems from local authority over natural gas distribution.
- In response to another argument in defense of the Ordinance, “Berkeley finally contends that preemption here would mean that the City must affirmatively make natural gas available everywhere.” In rejecting this argument, the Court stated that our “holding doesn't touch on whether the City has any obligation to maintain or expand the availability of a utility's delivery of gas to meters.”
- In Judge Baker's concurring opinion he also writes that, “Nor is there any indication from its text or structure that EPCA speaks to the distribution of natural gas. If a state or local government terminates existing gas utility service or declines to extend such service, EPCA likely has no application.”
- This would require further research, but there may be a way to restrict new natural gas infrastructure as part of the ongoing negotiation with DTE about renewing their franchise rights.

## Final Thoughts/Recent Developments:

- Any natural gas ban will face opposition as there are powerful interests with a strong financial incentive to try and stop such bans
- The 9<sup>th</sup> Circuit's Decision is not the last word on natural gas bans and EPCA preemption and as more bans are challenged around the country there will be additional court decisions and at some point the Supreme Court may weigh in
- This will provide greater certainty around what Cities and States can do but this will take time, likely years and as we all know this a climate emergency and we can't afford to wait
- At the May 1st AA City Counsel meeting counsel passed a resolution asking the City Attorney to provide an analysis of how the 9<sup>th</sup> Circuit opinion will impact a potential natural gas ban in Ann Arbor
  - This is a good start, but I would recommend a more collaborative approach with the City Attorney
  - If City Counsel is supportive of limiting future natural gas hookups, I would recommend working with City attorney's office, and the Office of Sustainability to craft a resolution that will have the best chance to succeed
  - While its necessary to keep the City Attorney's advice confidential in order to protect the Attorney-Client privilege; including Missy Stults and/or possibly John Mirsky should keep the privilege intact