



**GREEN ENERGY  
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Molly C. Dwyer, Clerk of the Court  
United States Court of Appeals for the Ninth Circuit  
95 7th Street  
San Francisco, CA 94103

**Re: *California Restaurant Association v. City of Berkeley*, 21-16278**

**Letter of the Cities of Bellingham, Washington and Talent,  
Oregon, and the Mayors of Ashland, Eugene, and Milwaukie,  
Oregon Supporting Arguments made by Defendant-Appellee City  
of Berkeley's Petition for Rehearing *En Banc***

Dear Ms. Dwyer:

In accordance with Rule 29 of the Federal Rules of Appellate Procedure and the Circuit Advisory Committee Note to Rule 29-1, the cities of Bellingham, Washington and Talent, Oregon, and the Mayors of Ashland, Eugene, and Milwaukie, Oregon, respectfully submit this letter in support of the petition for rehearing *en banc* filed by Defendant-Appellee City of Berkeley ("City") in *California Restaurant Association v. City of Berkeley*.<sup>1</sup>

As petitioner demonstrates, the panel decision is incorrectly decided and offers confusing and conflicting directions to local governments about their

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<sup>1</sup> This letter was prepared by the Green Energy Institute at Lewis & Clark Law School, a grant-funded organization supporting local government decarbonization efforts.

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authority over their public rights of way, as well as their power to address and preserve public health and safety. Additionally, the panel's broadly phrased opinion could attract litigation challenging public health and safety regulations, or home rule authority, if the action happens to affect the availability of fuel for use in a "covered product."

First, the conflicted reasoning in and between the opinions regarding whether or not EPCA requires a local government to allow the delivery of natural gas affects how cities regulate their public rights of way. Does EPCA preempt a regulation prohibiting expansion of natural gas distribution lines or not? What about a decision to decommission natural gas distribution lines? The unclear and potentially sweeping scope of the panel's decision will prevent cities from exercising their traditional jurisdiction to plan in the way that is best for their communities.

Likely to create confusion and litigation for municipalities is the panel's explanation that eliminating the use of an energy source is preempted by EPCA, and that "[p]ut simply, by enacting EPCA, Congress ensured that States and localities could not prevent consumers from using covered products in their homes, kitchens, and businesses." Op. 15. Consider, too, the admonition that "a regulation that bans the delivery of natural gas to products that operate on natural gas 'concerns' the energy use of those products," Op. 16, and "States and localities

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can't skirt the text of broad preemption provisions by doing *indirectly* what Congress says they can't do *directly*." Op. 23.

The panel then assures local governments that its "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," Op. 22, and "[i]f a state or local government terminates existing gas utility service or declines to extend such service, EPCA *likely* has no application." Op. 42 (concurrence, J. Baker) (emphasis added). The breadth of the panel's reasoning, despite the oblique assurances otherwise, could leave cities with the impression that the federal government now obliges them to use public rights of way to deliver natural gas for use by covered products in homes, kitchens, and businesses.

Second, the same broad statements quoted above, untethered to any limiting constraints, draw into question other fundamental aspects of local governments' police power to exercise "the inherent and plenary power of a sovereign to make all laws necessary and proper to preserve the public security, order, health, morality and justice." Black's Law Dictionary (10th ed. 2009) (defining *Police Power*). The panel's opinion threatens a local government's authority to protect its residents with air quality regulations, health policies, fire codes, and emergency response, among others.

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To protect the ability to act on behalf of public health and safety—vital areas traditionally left in the hands of the governments most familiar with their residents’ needs—and avoid frivolous litigation, the cities of Bellingham, Washington and Talent, Oregon, and the mayors of Ashland, Eugene and Milwaukie, Oregon, request the court grant the City of Berkeley’s petition for rehearing *en banc*.

Sincerely,

/s/ Melissa Powers

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