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-07669-YGR, Hon. Yvonne Gonzales Rogers

BRIEF OF THE GUARINI CENTER ON ENVIRONMENTAL, ENERGY AND LAND USE LAW AT NEW YORK UNIVERSITY SCHOOL OF LAW AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE'S PETITION FOR REHEARING EN BANC

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DISCLOSURE STATEMENT

The Guarini Center on Environmental, Energy and Land Use Law ("Guarini Center") is a nonpartisan, not-for-profit think tank at New York University School of Law. No publicly held entity owns an interest of more than ten percent in the Guarini Center. The Guarini Center does not have any members who have issued shares or debt securities to the public.

DATED: June 12, 2023

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TABLE OF CONTENTS

Page

DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iii

INTEREST AND IDENTITY OF *AMICUS CURIAE* 1

RULE 35 STATEMENT AND SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. EPCA Protects Purchaser "Rights" that Are Corollaries to those of Manufacturers, but the Statute Provides No "Right" to Access Natural Gas 4

A. EPCA imposes duties on manufacturers with respect to covered products, and section 6297 protects manufacturer interests corresponding to these duties. 6

B. EPCA protects purchaser interests that are corollaries to those of manufacturers, but section 6297(c) does not protect access to natural gas. 8

II. The Panel's Mistaken Understanding of Section 6297(c)'s Preemptive Scope Stemmed from its Misinterpretation of the Term "Energy Use" 13

A. The Panel misinterpreted the phrase "point of use" in the definition of "energy use." 14

B. The Panel unjustifiably ignored the final clause of the definition of "energy use." 18

C. The Panel conflated "energy availability" with "energy use," and failed to apprehend that section 6297(c) does not preempt regulations of the former. 21

CONCLUSION 23

CERTIFICATES

TABLE OF AUTHORITIES

Cases

Air Conditioning & Refrig. Inst. v. Energy Res. Conservation & Dev. Comm'n, 410 F.3d 492 (9th Cir. 2005) .... *passim*

Bldg. Indus. Ass'n of Wash. v. Wash. State Bldg. Code Council, 683 F.3d 1144 (9th Cir. 2012)..9

Borden v. eFinancial, LLC, 53 F.4th 1230 (9th Cir. 2022)......................19

Engine Mfrs. Ass'n v. SCAQMD, 541 U.S. 246 (2004)..............................5

Ga. Manufactured Hous. Ass'n, Inc. v. Spalding Cnty., 148 F.3d 1304 (11th Cir. 1998) 12

Murphy v. NCAA, 138 S. Ct. 1461 (2018) 5

NRDC v. Abraham, 355 F.3d 179 (2d Cir. 2004) 4

Puerto Rico v. Franklin California Tax-Free Tr., 579 U.S. 115 (2016)..15

San Francisco Herring Ass'n v. U.S. Dep't of the Interior, 33 F.4th 1146 (9th Cir. 2022) 15

Schanzenbach v. Town of Opal, 706 F.3d 1269 (10th Cir. 2013) 12

Scurlock v. City of Lynn Haven, 858 F.2d 1521 (11th Cir. 1988).....11, 12

Tex. Manufactured Hous. Ass'n, Inc. v. City of Nederland, 101 F.3d 1095 (5th Cir. 1996) 12

TRW Inc. v. Andrews, 534 U.S. 19 (2001)..19

United States v. Rowland, 464 F.3d 899 (9th Cir. 2006)........................19

Whitman v. American Trucking Ass'ns, 531 U.S. 457 (2001).................18

Statutes

42 U.S.C. § 5403(a)...11

42 U.S.C. § 5403(d)...11

42 U.S.C. § 5403(g)...11

42 U.S.C. § 6201 10

Statutes (Cont.)

42 U.S.C. § 6291(1) 16
42 U.S.C. § 6291(2) 4, 13
42 U.S.C. § 6291(4) 14, 18
42 U.S.C. § 6291(6) 20
42 U.S.C. § 6293 .... 6, 20
42 U.S.C. § 6293(b) 16
42 U.S.C. § 6294 6
42 U.S.C. § 6294(c) 6
42 U.S.C. § 6294b(a) 16
42 U.S.C. § 6295 .... 6, 10, 20
42 U.S.C. § 6295(a) 6
42 U.S.C. § 6295(b) 17
42 U.S.C. § 6295(c) 7
42 U.S.C. § 6296(a) 6
42 U.S.C. § 6297 4
42 U.S.C. § 6297(a) 6
42 U.S.C. § 6297(b) 6
42 U.S.C. § 6297(c) .... *passim*
42 U.S.C. § 6302(a) 6, 20
42 U.S.C. § 6311(1) 4
42 U.S.C. § 6316 4

Rules

Fed. R. App. P. 29(a)(4) 1
Fed. R. App. P. 35(a)(2) 3

Other Authorities

Katrina M. Wyman & Danielle Spiegel-Feld, *The Urban Environmental Renaissance*, 108 Cal. L. Rev. 305 (2020) 2

Nathaniel R. Mattison, *Beyond Gas Bans: Alternative Pathways to Reduce Building Emissions in Light of State Preemption Laws*, Guarini Center Policy Paper (2022), https://guarinicenter.org/document/beyond-gas-bans/ 2

INTEREST AND IDENTITY OF *AMICUS CURIAE*

Amicus curiae Guarini Center on Environmental, Energy and Land Use Law at New York University School of Law ("Guarini Center") respectfully submits this brief in support of Defendant-Appellee City of Berkeley's ("Berkeley") petition for en banc rehearing of this case.[1] All parties have consented to the Guarini Center's filing.

Through research, writing, and stakeholder engagement, the Guarini Center endeavors to advance local governments' efforts to facilitate the transition to a zero-carbon economic model. Our work has focused, *inter alia*, on policies for decarbonizing buildings, including studying whether New York City should adopt a carbon trading program for buildings pursuant to Local Law 97 of 2019, its landmark climate law capping building emissions.

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[1] This brief does not purport to represent the views, if any, of New York University School of Law. Furthermore, per Fed. R. App. P. 29(a)(4)(E), no party's counsel authored this brief either in whole or in part, and no person contributed money intended to fund this brief's preparation or submission.

The Guarini Center is interested in ensuring that the Court properly defines the scope of preemption under 42 U.S.C. § 6297(c),[2] since the Energy Policy and Conservation Act ("EPCA") plays an important role in shaping states' and localities' initiatives to reduce buildings' environmental impacts. The Guarini Center's scholars have analyzed EPCA's text and related case law as part of research supporting localities' authority to advance their residents' environmental interests. *See* Katrina M. Wyman & Danielle Spiegel-Feld, *The Urban Environmental Renaissance*, 108 Cal. L. Rev. 305 (2020); Nathaniel R. Mattison, *Beyond Gas Bans: Alternative Pathways to Reduce Building Emissions in Light of State Preemption Laws*, Guarini Center Policy Paper (2022), https://guarinicenter.org/document/beyond-gas-bans/. Based on this research, the Guarini Center has concluded that Congress intended section 6297(c) to affect only a limited set of sub-national policies, and that Berkeley's Ordinance No. 7,672-N.S. (2019) ("Ordinance") is not among them.

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[2] All further section citations in this brief refer to Title 42, U.S. Code, unless otherwise indicated.

RULE 35 STATEMENT AND SUMMARY OF ARGUMENT

The Court should grant Berkeley's petition for en banc rehearing because, at a minimum, "the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a)(2). The Panel ignored relevant precedents and misapprehended Congress's intent for EPCA, leading it to hold the Ordinance preempted. Correcting the Panel's errors is vital to ensure that states and localities continue to possess their long-held police power authority to manage their residents' environmental impacts, subject only to the restrictions Congress actually has placed upon them. *See* En Banc Pet. 19–21.

The Panel correctly inferred that section 6297(c) can protect purchasers of covered products: EPCA's regulatory balance would be upset if a city could regulate purchasers in a manner that altered manufacturers' EPCA "rights" and obligations. However, the Panel erroneously interpreted section 6297(c) as protecting an interest in natural gas availability. *See* Op. 13–15. This holding conflicts with EPCA's structure and text, including the proper meaning of the term "energy use." Congress never intended section 6297(c) to reach as far as the Panel believed; much as a city can, for example, limit available sites

for mobile homes or gas stations, EPCA permits a city to limit available sites for appliances.

ARGUMENT

I. EPCA Protects Purchaser "Rights" that Are Corollaries to those of Manufacturers, but the Statute Provides No "Right" to Access Natural Gas

Congress enacted EPCA to create uniform energy performance standards for many common consumer and industrial appliances, fixtures, and product components (*i.e.*, "covered products" or "covered equipment," §§ 6291(2), 6311(1)), with the aim of reducing the nation's energy use. *Air Conditioning & Refrig. Inst. v. Energy Res. Conservation & Dev. Comm'n*, 410 F.3d 492, 499–500 (9th Cir. 2005) ("*ACRI*"); *accord. NRDC v. Abraham*, 355 F.3d 179, 185–86 (2d Cir. 2004). To ensure national uniformity, EPCA preempts many state and local requirements for covered products. *See* §§ 6297, 6316; *see also ACRI*, 410 F.3d at 500.[3] These provisions effectively protect certain manufacturer interests with respect to covered products' production and marketing, corresponding to

[3] EPCA's provisions concerning "covered equipment," as relevant here, mirror those concerning "covered products." Accordingly, like the Panel, we refer only to provisions related to "covered products" for the remainder of this brief.

manufacturers' federal duties. Put simply, for each federal duty, manufacturers have a "right" not to be subject to a competing sub-national one. *Cf. Engine Mfrs. Ass'n v. SCAQMD*, 541 U.S. 246, 255 (2004) (glossing Clean Air Act preemption provision as protecting, *inter alia*, auto manufacturers' "right to sell federally approved vehicles"); *cf. also Murphy v. NCAA*, 138 S. Ct. 1461, 1480–81 (2018).

The Panel concluded that EPCA's protections for manufacturers extend to purchasers, too, since sub-national restrictions on purchasers can alter manufacturers' EPCA interests and obligations. See Op. 22–23. Generally speaking, this conclusion is correct. However, the Panel erred when identifying *which* purchaser interests EPCA protects. Under the Panel's own reasoning, EPCA protects purchaser "rights" only as *corollaries* to manufacturers' interests and duties, and thus a purchaser "right" to access natural gas can exist only if manufacturers have a related one. The structure and text of EPCA demonstrate, however, that neither manufacturers nor purchasers have a protected interest in natural gas's continued availability.

A. EPCA imposes duties on manufacturers with respect to covered products, and section 6297 protects manufacturer interests corresponding to these duties.

EPCA imposes duties on manufacturers regarding the production and marketing of covered products, which are tied to the Department of Energy's ("DOE") measurements of those products' energy performance. Among other things, manufacturers are required to label products with disclosures concerning estimated annual operating costs, based on DOE test results, §§ 6294(c)(1), 6296(a); and to distribute only covered products at least as efficient as DOE-set energy conservation standards, §§ 6295(a), 6302(a)(5). EPCA also contains a preemption provision—section 6297—with subsections that mirror the structure of EPCA's positive requirements. *Compare* §§ 6293–94, *with* § 6297(a); *and compare* § 6295, *with* §§ 6297(b)–(c).

Section 6297 guarantees that manufacturers only will be subject to the duties imposed by sections 6293–96, where sub-national governments might attempt to enforce competing ones on covered products. *See ACRI*, 410 F.3d at 500. For example, a city cannot require manufacturers to distribute only room air conditioners that achieve higher energy

efficiency ratios than the applicable federal standards. *See* §§ 6295(c), 6297(c).

That said, section 6297 does *not* promise that manufacturers will be exempt from *all* state and local laws that might affect their products. In addition to containing explicit exemptions for certain sub-national laws, *see, e.g.*, §§ 6297(c)(1)–(9), section 6297 does *not* preempt regulations that do not implicate manufacturers' EPCA obligations and interests. For example, in *ACRI*, this Court held that section 6297(a) did not preempt California from, *inter alia*, requiring that manufacturers label their products with their names and the products' model numbers and dates of manufacture. *ACRI*, 410 F.3d at 500–02. This Court reasoned that California's regulations did not address measures of appliances' energy consumption, the actual subject of manufacturers' duties under section 6294. *Id.* at 501–02. This Court further concluded that Congress's use of the phrase "with respect to" in section 6297(a) also did not cause California's requirements to be preempted: looking to case law concerning equivalent terminology, this Court stated that "the term 'relate to' cannot be taken to extend to the furthest stretch of its indeterminacy, or else for all practical purposes pre-emption would never

run its course." *Id.* at 502 (quotation marks and citation omitted). Because California's requirements were not logically or substantially connected to manufacturers' EPCA disclosure duties, they could be enforced. *Id.*

B. EPCA protects purchaser interests that are corollaries to those of manufacturers, but section 6297(c) does not protect access to natural gas.

To justify its holding, the Panel argued that it was following precedents concerning other preemption clauses, notably *Engine Manufacturers Association v. SCAQMD*. Op. 22–23. From these cases, the Panel argued that "States and localities can't skirt the text of broad preemption provisions by doing *indirectly* what Congress says they can't do *directly*." *Id.* at 23. As a general proposition, the Panel was correct: EPCA *can* protect purchasers, when doing so furthers Congress's purpose of insulating manufacturers from competing sub-national mandates on their covered products' energy performance and labeling, since states and localities otherwise might restrict manufacturers' production or marketing activities in ways EPCA clearly would forbid if manufacturers themselves were regulated. *See also* En. Banc. Pet 15–16.

Yet, even under the Panel's own logic, purchasers' "rights" under EPCA only exist insofar as they relate to manufacturers' interests and duties. For example, EPCA limits a state's ability to require that covered products be more efficient than federal standards in order to be purchased, or to be installed in new construction. *See* §§ 6297(c)(1), (3); *cf. Bldg. Indus. Ass'n of Wash. v. Wash. State Bldg. Code Council*, 683 F.3d 1144, 1151–52 (9th Cir. 2012) (holding that state building code for new construction, with energy saving requirements that were cheaper to achieve by installing appliances exceeding federal efficiency standards, was *not* preempted by EPCA because "allowing less expensive, more efficient [appliance] options does not *require* builders to use more efficient products" in their projects (emphasis added)). These purchaser-focused protections make sense: they logically relate to manufacturers' "right" (absent an exception) not to be compelled by a state to distribute only versions of their products more efficient than the standards set under section 6295.

Accordingly, a purchaser interest in accessing natural gas can exist only if manufacturers have a related interest under EPCA. EPCA, however, contains no such manufacturer interest. To begin with,

Congress's declared purposes for EPCA do not support a manufacturer interest in natural gas's continued availability. Instead, Congress's statement of purpose generally favors reduced energy consumption, and does not favor natural gas (or any other fossil fuel). § 6201.

Moreover, the relevant substantive provision—section 6295—does not imply a manufacturer interest in natural gas's further availability. Section 6295 sets initial energy conservation standards for a range of covered products, and provides a process for those standards' upward amendment. *See generally* § 6295. Like other EPCA provisions, section 6295—in conjunction with section 6297(c)—only assures manufacturers that their appliances may be offered for sale if they comply with its terms; it provides no guarantee, though, that those appliances must or will be used. Thus, the Panel incorrectly held that section 6297(c) of EPCA preempts the Ordinance: EPCA does not protect a corollary purchaser right to access natural gas, because nothing in section 6295 (or elsewhere) protects a manufacturer expectation of natural gas availability.

Case law interpreting other statutes reflects similar limits on the preemption of sub-national regulations affecting product purchasers.

Even "broad" provisions do not reach state and local regulations that diminish purchaser choice, so long as those regulations do not invade the "rights" Congress actually has chosen to protect.

For instance, the National Manufactured Housing Construction and Safety Standards Act ("NMHCSSA") creates a program to develop national standards (including energy conservation standards) for mobile home construction, and provides that "no State or political subdivision … shall have any authority either to establish, or to continue in effect" construction standards for covered mobile homes that are not identical to federal ones—a rule that is meant to be "broadly and liberally construed." §§ 5403(a), (d), (g). Like EPCA, NMHCSSA thus essentially grants mobile home manufacturers a "right" not to be subject to competing sub-national standards affecting mobile home production. Also like EPCA, purchasers, too, enjoy some degree of protection: for example, a locality cannot compel residents to install only mobile homes exceeding federal standards. *See Scurlock v. City of Lynn Haven*, 858 F.2d 1521, 1524–25 (11th Cir. 1988) (holding NMHCSSA preempted zoning ordinance requiring mobile homes to meet construction standards different from

federal ones to be installed, since ordinance effectively conditioned mobile homes' location on compliance with local standards).

NMHCSSA's preemptive reach, however, is not unlimited. Even if a city may not use its zoning authority to set different standards for mobile homes' construction, the same city *may* use zoning to limit mobile homes to particular lots, or may refuse to permit mobile homes at all, without being preempted. *See id.* at 1525 ("Undoubtedly [the city] could limit Zone R-AA to conventionally-built residences and exclude mobile homes."); *accord. Tex. Manufactured Hous. Ass'n, Inc. v. City of Nederland*, 101 F.3d 1095, 1100 (5th Cir. 1996). NMHCSSA's preemption rule furthermore allows local laws limiting mobile home installation based on units' age, *Schanzenbach v. Town of Opal*, 706 F.3d 1269, 1272–76 (10th Cir. 2013) (upholding ordinance forbidding installation of homes manufactured more than 10 years before permit application), and units' roof pitch, *Ga. Manufactured Hous. Ass'n, Inc. v. Spalding Cnty.*, 148 F.3d 1304, 1308–11 (11th Cir. 1998) (upholding ordinance requiring 4:12 roof pitch for homes to be installed), since such ordinances do not compel manufacturers to depart from federal standards, even indirectly. In short, where no federal "right" under

NMHCSSA is implicated, a state or locality can exercise its traditional powers in ways that limit purchasers' use of mobile homes, such as by directing purchaser choices *among* NMHCSSA-compliant homes, or by forbidding them outright. EPCA's structure and text demonstrate that the Panel should have come to a similar conclusion here: at most, the Ordinance cabins purchaser choice among EPCA-compliant products, and does not compel super-efficient appliances' installation.

II. The Panel's Mistaken Understanding of Section 6297(c)'s Preemptive Scope Stemmed from its Misinterpretation of the Term "Energy Use"

Section 6297(c) provides that, absent an applicable exception, "effective on the effective date of an energy conservation standard … prescribed under section 6295 … for any covered product, no State regulation concerning the … energy use … of such covered product shall be effective with respect to such product …." § 6297(c). As noted earlier, "covered products" consist of "consumer products" whose energy performance is regulated under EPCA. § 6291(2). Congress furthermore has given "energy use" a specialized meaning, denoting "the quantity of energy directly consumed by a consumer product at point of use,

determined in accordance with test procedures under section 6293 of this title." § 6291(4).

Construing these paragraphs, the Panel held that section 6297(c) preempts the Ordinance because "a regulation on 'energy use' fairly encompasses an ordinance that effectively eliminates the 'use' of an energy source." Op. 15. Yet the Panel's reasoning relies on a misinterpretation of "energy use." While it is true that the Ordinance reduces the natural gas available in new construction to "zero," it has no effect on the natural gas quantities appliances are *designed* to consume, which the statutory text shows is all Congress intended the term "energy use" to address. Even section 6297(c)'s use of the word "concerning" cannot stretch EPCA's preemptive effect to reach the Ordinance: to hold otherwise breaks from the statute's text and structure, applicable precedent, and the Panel's own reasoning concerning the existence of purchaser "rights."

A. The Panel misinterpreted the phrase "point of use" in the definition of "energy use."

The Panel's first error in interpreting "energy use" arose from its gloss on the phrase "point of use" within the statutory definition. The Panel said that "as a matter of ordinary meaning, 'point of use' means *the*

'place where something is used.'" Op. 13 (emphasis added and citation omitted). The Panel argued that this means "that EPCA is concerned with the end-user's ability to *use* installed covered products at their intended final destinations." *Id.*; *see also id.* at 15 ("This means that we measure energy use … from where consumers *use* the products."). The problem is that the Panel's conclusion rests on a word—"the"—that Congress did not use, which alters the phrase's meaning in a manner contrary to the statutory context.

"The words of a statute"— like "point of use"—"must be read in their context and with a view to their place in the overall statutory scheme," *San Francisco Herring Ass'n v. U.S. Dep't of the Interior*, 33 F.4th 1146, 1152 (9th Cir. 2022) (quotation marks and citation omitted), and "our constitutional structure does not permit [a court] to rewrite the statute that Congress has enacted," *Puerto Rico v. Franklin California Tax-Free Tr.*, 579 U.S. 115, 130 (2016) (quotation marks omitted).

From the statutory context, it is apparent that Congress did not intend "point of use" to refer to any *actual* site of use ("*the* point of use"),

but rather an *anticipated* site of use ("*a* point of use").[4] In the first instance, Congress defined "consumer product" as "any article," other than an automobile, that consumes energy and that "to any significant extent, is distributed in commerce for personal use or consumption by individuals," *but* "without regard to whether such article … is in fact distributed in commerce for personal use or consumption by [individuals]." § 6291(1). In short, an object is a "consumer product" that may be eligible for "covered product" treatment based on its *anticipated* use, not its actual use. This demonstrates that the circumstances of appliances' actual use generally are not relevant within EPCA's regulatory scheme.

Furthermore, in section 6293—to which Congress specifically referred in defining "energy use"—EPCA provides that DOE's testing procedures must "be reasonably designed to produce test results which measure … energy use … of a covered product *during a representative average use cycle or period of use* …." § 6293(b)(3) (emphasis added). These words plainly convey that "point of use" does not refer to actual

[4] But for one exception not relevant here, § 6294b(a)(2)(B), Congress did not use the phrase "point of use" elsewhere in those portions of EPCA concerning covered products.

installation sites, as the Panel believed. For a test result to be "representative" of an "average use cycle," it must be realistic, but it necessarily will be an idealized amount; it represents, at most, the amount of energy that would be used *if* the appliance were used.

Contrary to the Panel's argument, "point of use" thus reflects that Congress, in formulating EPCA, was not concerned with the availability of particular energy sources at purchasers' locations (*i.e.*, appliance sites' suitability). Rather, the phrase shows in miniature how Congress's focus was on products' proper design, production, and marketing. As Congress's actual use of the term "energy use"—and thus "point of use"—demonstrates, appliances' installation sites matter for EPCA only to the extent that, if appliances are installed, they should perform at least at the level of federal standards. *See, e.g.*, § 6295(b)(1) (energy conservation standards for refrigerators and freezers represent "maximum energy use allowed in kilowatt hours per year"). But "point of use" does not support the inference that Congress wanted appliances to be usable anywhere in particular, or used everywhere; EPCA manifests no purpose of having appliances be used at sites where circumstances make them unusable. This is consistent with what was explained at a conceptual level in Part

I, *supra*—namely, that EPCA creates no "right" for manufacturers to expect the availability of natural gas, and thus no corresponding right for purchasers. It is implausible that Congress would have hidden such an elephantine concern in such a small textual mousehole. *Cf. Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

B. The Panel unjustifiably ignored the final clause of the definition of "energy use."

The Panel made a second error in interpreting "energy use" when it failed to consider the effect of the final clause of the statutory definition on the word "quantity." As noted earlier, Congress defined "energy use" as "the quantity of energy directly consumed by a consumer product at point of use, *determined in accordance with test procedures under section 6293 of this title*." § 6291(4) (emphasis added). When quoting and interpreting this paragraph, however, the Panel ignored all of the words following the comma and relied on a dictionary to gloss the meaning of "quantity." This led the Panel to conclude that zero is a "quantity," within EPCA's scheme, and that a regulation like the Ordinance that makes "zero natural gas" available for use is preempted. *See* Op. 13–15.

"It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no

clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quotation marks and citation omitted). And, contrary to the Panel's approach, a court cannot simply substitute the dictionary for the words Congress actually has used. *Cf. United States v. Rowland*, 464 F.3d 899, 905 (9th Cir. 2006) ("The problem with [this] argument is that [it] resorts to a common dictionary meaning before determining whether the term is otherwise defined in the statute. When a word is defined in a statute, courts are not at liberty to look beyond the statutory definition." (quotation marks and citation omitted)).

"When interpreting a modifying clause set off by commas, the most natural way to view the modifier is as applying to the entire preceding clause." *Borden v. eFinancial, LLC*, 53 F.4th 1230, 1233 (9th Cir. 2022) (quotation marks and citation omitted). Taking this commonsense approach, it is clear that the Panel wrongly rejected the argument advanced in Berkeley's merits brief regarding how the final clause shapes the meaning of "quantity." *See* Berkeley Br. 19–28. Read as a whole, the statutory definition of "energy use" makes plain that not all possible quantities of energy are relevant, for EPCA's purposes. Rather, the final

clause conveys that the quantities of energy that matter in the subsequent sections—including section 6297(c)—are those that are measured (or measurable) through section 6293's testing procedures, which necessarily are more than "zero." Taken in context, "energy use" is just a measurement of a product's energy intensity, and an ingredient in the formulation of energy conservation standards. § 6291(6); *see also generally* §§ 6293, 6295.

As with Congress's use of "point of use," this narrow meaning of "quantity" affirms that Congress's primary focus for EPCA was in regulating and standardizing products' design, production, and marketing. *See also* En Banc Pet. 13–14. Congress was concerned with later aspects of products' life-cycles only to the extent that goods might not perform as intended due to manufacturers' or dealers' actions, *see* §§ 6302(a)(5)–(6), or to the extent that conditions imposed by sub-national governments might interfere with federal regulatory efforts. In the latter case, Congress still limited its concern to state and local regulations that assign to a covered product, or assume about it, a positive level of energy intensity different from the energy conservation standard set under EPCA. *See* § 6297(c) ("no State regulation concerning the … energy use

… *of such covered product* …" (emphasis added)). A regulation like the Ordinance, which merely makes some sites unsuitable for certain appliances without assigning or assuming any fuel-utilization standard, is no such interfering regulation, and thus not preempted.

C. The Panel conflated "energy availability" with "energy use," and failed to apprehend that section 6297(c) does not preempt regulations of the former.

Fundamentally, the Panel's interpretive moves collapsed the conceptual and legal differences between regulations pertaining to the energy potentially available to a covered product and those pertaining to the "energy use" of the product. Yet, as explained in the preceding two sections, the text the Panel relied on for its reasoning does not support such elision, since "energy use" merely signifies an amount of energy that should be transformed into appliance output *if a site is appropriate*, while conveying no Congressional concern for the quantity or quality of sites that may be available for appliances to do their work. *Accord.* En Banc Pet. 14–15. In addition, as explained in Part I *supra*, the structure of duties and "rights" created by EPCA in general does not support the Panel's reading of "energy use" as requiring particular energy sources to be available. Put in its starkest fashion, the Panel's interpretation of

EPCA is like arguing that a local ban on new gas stations (a regulation of "energy availability") sets a lower local fuel economy standard for cars (a regulation of "energy use")—a proposition everyone would recognize is erroneous.

The only remaining justification for the Panel's holding, then, is its reliance on the broadening effect of the word "concerning" on section 6297(c)'s reach. *See* Op. 15–16. Like the Panel's other justifications, however, this is untenable. As noted *supra* in Part I.A, this Court has held that similar terms in adjacent provisions of EPCA cannot be read as extending without limit. *See ACRI*, 410 F.3d at 502 (interpreting the phrase "with respect to" in § 6297(a)(1)). And as explained in Part I.B, EPCA's preemptive effect—under the Panel's *own* logic concerning purchaser "rights"—stops where manufacturers' EPCA "rights" are exhausted, which excludes any "right" pertaining to the availability of natural gas.

The only reasonable conclusion, therefore, is that section 6297(c) does not preempt the Ordinance, and the Panel erred in holding otherwise.

CONCLUSION

For the foregoing reasons, the Court should grant Berkeley's petition for en banc rehearing and vacate the Panel's opinion.

June 12, 2023

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CERTIFICATE OF COMPLIANCE

9th Cir. Case Number(s): 21-16278.

I am the attorney or self-represented party.

This brief contains 4,173 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and Fed. R. App. P 32(a)(6).

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DATED: June 12, 2023

Respectfully submitted,

/s/ Nathaniel R. Mattison
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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of June, 2023, a true and correct copy of the foregoing Brief of the Guarini Center on Environmental, Energy and Land Use Law at New York University School of Law as *Amicus Curiae* in Support of Defendant-Appellee's Petition for Rehearing En Banc was filed with the Clerk of the United States Court of Appeals for the Ninth Circuit via the Court's CM/ECF system. Counsel for all parties are registered CM/ECF users and will be served by the appellate CM/ECF system.

DATED: June 12, 2023

Respectfully submitted,

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