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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

CALIFORNIA RESTAURANT ASSOCIATION,

Plaintiff,

v.

CITY OF BERKELEY,

Defendant.

No. 4:19-CV-07668-YGR

NOTICE OF MOTION AND MOTION TO DISMISS FIRST AMENDED COMPLAINT PURSUANT TO FED. R. CIV. P. 12(B)(1) AND 12(B)(6); MEMORANDUM OF POINTS AND AUTHORITIES

Judge: Hon. Yvonne Gonzalez Rogers
Date: October 20, 2020
Time: 2:00 p.m.
Location: Courtroom 1, Fourth Floor

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NOTICE IS HEREBY GIVEN that on October 20, 2020, at 2:00 p.m., or as soon thereafter as counsel may be heard by the above-entitled Court, located at 1301 Clay Street, Courtroom 1, Fourth Floor, Oakland, California, or through means of videoconference as determined by the Court, Defendant City of Berkeley ("City") will and hereby does move the Court to dismiss all claims for relief in the First Amended Complaint filed by Plaintiff California Restaurant Association pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

The City makes this motion on the grounds that the Court lacks jurisdiction to entertain the claims for relief alleged in the First Amended Complaint and that Plaintiff fails to state a claim upon which relief may be granted. Accordingly, the City seeks dismissal of this action with prejudice. This motion is based upon this Notice of Motion, the below Memorandum of Points and Authorities, the Request for Judicial Notice, the Declarations of Jordan Klein, Steven Buckley, Jay Ogden, and Christopher D. Jensen, the pleadings on file in this action, and other matters as may be presented to the Court at the time of the hearing.

STATEMENT OF ISSUES TO BE DECIDED

1. Does Plaintiff have standing to maintain this action?
2. Are Plaintiff's claims ripe for adjudication?
3. Has Plaintiff failed to state a claim upon which relief may be granted?

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On July 23, 2019, the City adopted an ordinance that will progressively eliminate natural gas connections from new buildings constructed in the City. The ambition of this first-in-the-nation attempt to tackle the adverse climate and health impacts of natural gas in buildings was tempered by two carefully crafted exemptions that ensure the City's Natural Gas Infrastructure Ordinance ("Ordinance") is both feasible to implement and consistent with state and federal law. The first exemption allows any newly constructed building that cannot meet state (and implicitly, federal) energy efficiency requirements to install natural gas infrastructure and comply with the mixed-fuel (*i.e.*, both gas and electric) provisions of Berkeley's recently adopted local Energy Code Amendments (commonly known as a "reach code"). The second

exemption gives the City's Zoning Adjustments Board (or in some cases, City staff) broad discretion to consider exemptions in the "public interest" in deciding whether to allow the installation of natural gas infrastructure in new buildings.

Rather than waiting for its members to attempt to take advantage of these carefully crafted exemptions, Plaintiff elected to file this lawsuit. As of the filing of this motion, no permitting decisions have been made under the City's Ordinance, and no restaurant has sought an exemption under either the "building type" or "public interest" exemptions discussed above. Plaintiff has conceded that there is no basis for challenging the actual application of the Ordinance to any of its members, and admits that this action is a facial challenge seeking a declaration that the Ordinance is preempted by state and federal law. Plaintiff's facial challenge is a request for an advisory opinion that fails to meet constitutional requirements for standing and ripeness. As such, the Court lacks jurisdiction to hear this case.

Plaintiff's claims also fail on the merits. With respect to Plaintiff's sole federal claim for relief under the Energy Policy and Conservation Act ("EPCA"), the Court has correctly held that provisions of EPCA related to the energy efficiency of appliances do not preempt an Ordinance that regulates natural gas infrastructure in newly constructed buildings. Nothing in the First Amended Complaint should cause the Court to revisit that conclusion—Plaintiff's limited new allegations do not change the fact that the City's Ordinance does not regulate the energy efficiency of appliances, and therefore the Ordinance is not preempted.

Plaintiff's state law claims also fail as a matter of law, and in any event, are subject to dismissal under 28 U.S.C. § 1367(c) if Plaintiff's sole federal claim for relief is dismissed. In either case, the Court should dismiss all of Plaintiff's claims for relief, and uphold the City's carefully crafted efforts to address greenhouse gas emissions from newly constructed buildings and to limit the construction of new natural gas infrastructure that will soon become obsolete.

II. BACKGROUND

A. The City's Natural Gas Infrastructure Ordinance

On July 23, 2019, the Berkeley City Council adopted Ordinance No. 7,672-N.S. *See* Request for Judicial Notice ("RJN"), Exh. 1. The Ordinance, codified in Chapter 12.80 of the

Berkeley Municipal Code ("BMC"), provides—subject to certain exceptions—that "Natural Gas Infrastructure shall be prohibited in Newly Constructed Buildings." *Id.* § 12.80.040.A.[1] The Ordinance is intended to "eliminate obsolete natural gas infrastructure and associated greenhouse gas emissions in new buildings where all-electric infrastructure can be most practicably integrated, thereby reducing the environmental and health hazards produced by the consumption and transportation of natural gas." *Id.* § 12.80.010.H. The Ordinance took effect of January 1, 2020. *Id.* § 12.80.080.

The Ordinance contains two exceptions to the general ban on new Natural Gas Infrastructure to ensure that compliance with the California Energy Code is feasible and to allow for the installation of Natural Gas Infrastructure where specific uses require natural gas. The first exemption, in BMC § 12.80.040.A.1, provides that "Natural Gas Infrastructure may be permitted in a Newly Constructed Building if the Applicant establishes that it is not physically feasible to construct the building without Natural Gas Infrastructure." *Id.* § 12.80.040.A.1. The definition of "physically feasible" allows for an exemption from the ban on natural gas infrastructure where compliance with the California Energy Code would be impossible for all-electric construction. *Id.*; *see also* RJN, Exh. 2 at 19 (staff report noting that the Natural Gas Infrastructure Ordinance will be implemented for certain "building types and systems as the California Energy Commission creates [computer] models that allow developers to have their buildings approved"). Consistent with these provisions to ensure compliance with the Energy Code, the Ordinance expressly disavows any intention to amend the Energy Code or to set standards regulating the use of appliances. RJN, Exh. 1 § 12.80.020.C. ("This chapter [the Ordinance] shall in no way be construed as amending California Energy Code requirements under California Code of Regulations, Title 24, Part 6, nor as requiring the use or installation of any specific appliance or system as a condition of approval.").

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[1] "Natural Gas Infrastructure" is be defined 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." RJN, Exh. 1 § 12.80.030.E. "Newly Constructed Building" is defined as "a building that has never before been used or occupied for any purpose." *Id.* § 12.80.030.F.

The second exception allows for an exemption from the ban on Natural Gas Infrastructure when it is established that the use of natural gas "serves the public interest." RJN, Exh. 1 § 12.80.050.A. This exemption allows for a discretionary determination made by the City's Zoning Adjustments Board or, in some cases at the staff level, as part of the entitlement process for new construction. *Id.* § 12.80.020.D. In reviewing requests for a public interest exemption, the Zoning Adjustments Board or City staff must consider (1) "[t]he availability of alternative technologies or systems that do not use natural gas" and (2) "[a]ny other impacts that the decision to allow Natural Gas Infrastructure may have on the health, safety, or welfare of the public." *Id.* § 12.80.050.A.

B. Local Amendments to the Building Standards and Energy Codes

The Natural Gas Infrastructure Ordinance does not affect state Building Standards Code requirements, and provisions of the Code relating to natural gas installation will continued to apply in structures where Natural Gas Infrastructure is allowed (including all existing structures and any new structures subject to the exemptions in BMC § 12.80.040.A.1 or § 12.80.050.A). Nevertheless, the City filed the Ordinance with the Building Standards Commission along with other local code amendments adopted as part of the 2019 amendments to Building Standards Code. RJN, Exh. 3. The Ordinance and the City's submission to the Building Standards Commission include findings that such changes "are reasonably necessary because of local climatic, geological or topographical conditions," made pursuant to Health & Safety Code § 17958.7. *Id.* at 76-86.

In addition, subsequent to the adoption of the Ordinance, the City enacted local amendments to the California Energy Code, which regulates the energy efficiency of newly constructed buildings. The local amendments to the Energy Code, known as a "reach code," require cost-effective increases in energy efficiency to support the implementation of the Natural Gas Infrastructure Ordinance. RJN, Exh. 4 at 4-5. The City's reach code is "electric-favored," meaning that mixed-fuel buildings must achieve additional energy efficiency reductions to comply with the code's requirements, whereas all-electric buildings need only meet the standard, state-mandated Energy Code's requirements. *Id.* at 5-6. The City's reach code is supported by

1 cost-effectiveness studies for each of the covered building types. *Id.* at 82-316. Critically, both
2 electric-only and mixed-fuel buildings permitted under the reach code must comply with state
3 energy efficiency standards. *Id.* at 6 (noting that "[n]ew all-electric buildings . . . must . . .
4 demonstrate compliance with the Energy Code"). In this way, the Ordinance works in tandem
5 with the reach code by requiring the construction of all-electric buildings that meet Energy Code
6 requirements, unless doing so is not feasible.

7 The City submitted the reach code to the California Energy Commission for approval on
8 December 6, 2020. RJN, Exh. 5. On February 20, 2020, the Energy Commission approved the
9 City's locally adopted "reach code" Energy Code amendments. RJN, Ex. 6.

10 These local Energy Code amendments are distinct from the Natural Gas Infrastructure
11 Ordinance, which does not set energy efficiency standards and was therefore not submitted to
12 the Energy Commission for review. On February 6, 2020, the Energy Commission confirmed
13 that the Ordinance "does not establish energy conservation, energy insulation, or energy
14 efficiency standards" that are subject to the review by the Commission. RJN, Exh. 7 (Feb. 6,
15 2020 Letter from Energy Commission).

16 **C. Plaintiff's Facial Challenge to the Natural Gas Infrastructure Ordinance**

17 Plaintiff has conceded that this action is a facial challenge to the Natural Gas
18 Infrastructure Ordinance. The operative pleading, the First Amended Complaint ("FAC"),
19 alleges that Plaintiff's members "rely on gas for cooking particular types of food, whether it be
20 flame-seared meats, charred vegetables, or the use of intense heat from a flame under a wok,"
21 and that "restaurants specializing in international foods so prized in the Bay Area will be unable
22 to prepare many of their specialties without natural gas." FAC ¶ 8. However, Plaintiff does not
23 allege that any of its members has applied for and been denied a permit for the construction of
24 Natural Gas Infrastructure in a Newly Constructed Building.

25 Notwithstanding the failure of Plaintiff to allege a present harm to any of its members,
26 Plaintiff filed this Complaint on November 21, 2019. The Complaint sought declaratory and
27 injunctive relief, alleging that the Natural Gas Infrastructure Ordinance is preempted by the
28 federal Energy Policy and Conservation Act ("EPCA"). Complaint ¶¶ 51-56; FAC ¶¶ 98-104. In

addition, in apparent ignorance of the City's Building and Energy Code adoption process, the Complaint alleged violations of the California Building Standards and Energy Codes. *Id.* ¶¶ 68-90; FAC ¶¶ 116-137. The Complaint also alleged the Ordinance is an "unenforceable exercise of police power," which is simply a different way of stating Plaintiff's argument that the Ordinance is inconsistent with the Building Standards Code. *Id.* ¶¶ 57-67; FAC ¶¶ 105-115.

On January 13, 2020, the City moved to dismiss the original Complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The Court granted the City's motion as to all claims for relief, holding that (1) Plaintiff lacked standing, (2) Plaintiff's claims for relief were not ripe for judicial review, and (3) Plaintiff failed to state a claim for relief. Dkt. # 41. (The Court denied the City's motion to dismiss based on other jurisdictional grounds.) The Court granted Plaintiff leave to amend to address the deficiencies in the original Complaint. *Id.*

Plaintiff's new "allegations" are almost exclusively legal arguments that do not alter the conclusion the Court reached in ruling on the City's first motion to dismiss. The sole new material factual allegation in the FAC attempts to cure Plaintiff's lack of standing, alleging that Plaintiff "has one or more members who are interested in opening a new restaurant or in relocating a restaurant to a new building in Berkeley after January 1, 2020, but who cannot do so because of the Ordinance's ban on natural gas." FAC ¶ 15. Plaintiff has declined to identify who these members might be, and City Economic Development and Planning staff have no knowledge of any chef or restauranteur, whether a member of Plaintiff's organization or otherwise, seeking to open a restaurant in a Newly Constructed Building in the City of Berkeley that would be subject to the requirements of the Natural Gas Infrastructure Ordinance. Declaration of Jordan Klein ("Klein Decl.") ¶ 3; Declaration of Steven Buckley ("Buckley Decl.") ¶¶ 3-4.

Based on the continued absence of evidence to support Plaintiff's jurisdictional allegations and Plaintiff's continued failure to allege facts sufficient to state a claim for relief, the City file this motion to dismiss the FAC pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

III. LEGAL STANDARDS

Fed. R. Civ. P. 12(b)(1): Any party may move to dismiss an action for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). The plaintiff bears the burden of establishing federal subject matter jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 376-78 (1994). In ruling on a motion to dismiss under Rule 12(b)(1), the Court is not limited to considering the allegations in the complaint. *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987). The Court is "free to hear evidence regarding jurisdiction and to rule on that issue prior to trial, resolving factual disputes where necessary." *Id.* (citation omitted). When a defendant makes a factual challenge "by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).

Fed. R. Civ. P. 12(b)(6): In ruling on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the Court may consider "the facts and inferences apparent from the complaint itself, documents incorporated by reference into the complaint, matters of public record, and facts susceptible to judicial notice." *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010). A complaint must allege facts that are sufficient to state a "plausible" claim for relief to survive a motion to dismiss. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556-57 (2007). Moreover, unlike well-pleaded facts, "legal conclusions are not entitled to the assumption of truth." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

The Court may deny leave to amend if it is apparent from the pleadings that amendment would be futile. *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1061 (9th Cir. 2004).

IV. ARGUMENT

A. The Court Should Dismiss the FAC for Lack of Subject Matter Jurisdiction.

1. Plaintiff Lacks Standing.

Article III, § 2 of the U.S. Constitution limits a federal court's power to "actual cases or controversies" and requires a plaintiff to plead and prove standing to file a lawsuit. *Spokeo, Inc.*

1 *v. Robins*, __U.S.__, 136 S.Ct. 1540, 1547 (2016). To establish standing, a plaintiff "must have
2 (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the
3 defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* (citations
4 omitted).

5 Injury in fact is "the 'first and foremost' of standing's three elements. *Spokeo*, 136 S.Ct.
6 at 1547 (quoting *Steel Co. v. Citizens for Better Envt.*, 523 U.S. 83, 103 (1998)) (original
7 alterations omitted). "To establish injury in fact, a plaintiff must show that he or she suffered 'an
8 invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or
9 imminent, not conjectural or hypothetical.'" *Id.* at 1548 (quoting *Lujan v. Defenders of Wildlife*,
10 504 U.S. 555, 560 (1992)). The "mere existence of a statute," which may or may not ever be
11 applied to a plaintiff, is insufficient to establish standing. *Jensen v. National Marine Fisheries*
12 *Service (NOAA)*, 512 F.2d 1189, 1191 (9th Cir.1975) (possibility that fishing boat owners and
13 operators could be prosecuted for violating federal regulation does not give rise to case or
14 controversy under Article III); *Stoianoff v. State of Mont.* 695 F.2d 1214, 1223 (9th Cir. 1983)
15 (operator of "head shop" had no standing to challenge statute restricting advertisements of drug
16 paraphernalia, in the absence of any actual or pending threat of prosecution).

17 Here, Plaintiff has conceded that this action is limited a facial challenge to the validity of
18 the Natural Gas Infrastructure Ordinance—*i.e.*, Plaintiff is challenging the "mere existence" of
19 the Ordinance. Plaintiff alleges that it "has one or more members who are interested in opening a
20 new restaurant or in relocating a restaurant to a new building in Berkeley after January 1, 2020,
21 but who cannot do so because of the Ordinance's ban on natural gas." FAC ¶ 15. This allegation
22 is not plausible. Neither the City's Planning Department, which would process an application to
23 construct a new building, nor its Office of Economic Development, which works to support
24 businesses interested in operating in the City, is aware of any restauranteur or chef interested in
25 opening a restaurant in a Newly Constructed Building that would be subject to the Ordinance.
26 Klein Decl. ¶ 3; Buckley Decl. ¶¶ 3-4. Plaintiff's bare allegations of harm do not meet its burden
27 of proving subject matter jurisdiction.

28 Further, a plaintiff "must demonstrate standing for each claim he or she seeks to press

and for each form of relief sought." *Washington Envtl. Council v. Bellon*, 732 F.3d 1131, 1139 (9th Cir. 2013) (citing *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006)). With respect to Plaintiff's EPCA claim, this standard requires Plaintiff to show that one of its members would seek to install an appliance that is covered by EPCA. Like the original Complaint, the FAC alleges preemption under EPCA's "consumer products" provisions, and in particular, based on its member's purported interest in purchasing gas-fired ovens and dishwashers that are regulated as consumer products under 42 U.S.C. § 6292(a). FAC ¶ 54.

This cannot be the basis for Plaintiff's standing to bring a claim under EPCA because it would be impossible to install an oven classified as a consumer product in a commercial kitchen in the City of Berkeley. Any new commercial kitchen would be required to meet the standards set forth in the California Retail Food Code, Health and Safety Code § 113700 *et seq. See* Declaration of Jay Ogden ("Ogden Decl.") ¶¶ 3-4. The Retail Food Code states: "All new and replacement gas-fired appliances shall meet applicable ANSI standards." Health and Safety Code § 114301(d).[2] ANSI standards clearly differentiate equipment under separate categories as either commercial or residential, and label them as such in their specifications. Ogden Decl. ¶ 3. Based on ANSI standards, the City of Berkeley Environmental Health Division would not approve kitchen equipment, including ovens/stoves and ranges and dishwashers, for use in a commercial kitchen unless the equipment is certified for commercial use. *Id.* ¶ 4. Thus, the "consumer products" standards in EPCA would never apply to Plaintiff's members.

The FAC also refers to "industrial equipment" covered by EPCA such as "commercial package air conditioning and heating equipment," "warm air furnaces," and "several types of water heaters"—although, notably not to commercial ovens, which are not covered by the statute. FAC ¶ 60 (citing 42 U.S.C. § 6311(2)(B)). However, those appliances are typically installed as "building systems" by developers of Newly Constructed Buildings in Berkeley. Ogden Decl. ¶ 5. The typical new restaurant space in Berkeley is a ground floor-unit in a multi-

[2] The American National Standards Institute ("ANSI") is a private, not-for-profit organization that sets voluntary standards for a wide range of consumer, commercial, and industrial products. Ogden Decl. ¶ 3.

story mixed use building, and in many if not most such buildings, air conditioning, space heating, and hot water heating will be supplied entirely by owner-installed building systems. *Id.* The restaurant owner or operator would have not a role in selecting those systems. *See* 42 U.S.C. § 6311(1). It is thus entirely speculative as to whether any of Plaintiff's members would be impacted by the application of the Natural Gas Infrastructure Ordinance to equipment they may or may not purchase. Thus, any alleged injury that Plaintiff could suffer from the Ordinance is speculative and hypothetical, and is not sufficient to establish standing.[3]

2. The FAC Should Be Dismissed Because It Is Unripe.

Plaintiff's claims are also unripe for judicial review. The doctrines of standing and ripeness are "closely related," but ripeness "requires an additional inquiry into 'whether the harm asserted has matured sufficiently to warrant judicial intervention.'" *Pacific Legal Found. v. State Energy Res. Conservation & Dev. Comm'n*, 659 F.2d 903, 915 (9th Cir. 1981) (citing *Warth v. Seldin*, 422 U.S. 490, 499 n.10 (1975)). "For a case to be ripe, it must present issues that are 'definite and concrete, not hypothetical or abstract.'" *Bishop Paiute Tribe v. Inyo Cnty*, 863 F.3d 1144, 1153 (9th Cir. 2017) (quoting *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000)). The ripeness doctrine applies to challenges to legislation or regulations, and courts have held that if the issues raised by such a challenge "would be illuminated by the development of a better factual record, the challenged statute or regulation is generally not considered fit for adjudication until it has actually been applied." *Pacific Legal Found.*, 659 F.2d at 915 (citations omitted). Thus, there is a higher bar for establishing ripeness when a challenge to legislation is brought as a facial challenge.

Clark v. City of Seattle, 899 F.3d. 802 (9th Cir 2018), illustrates these principles. The case arose from a group of rideshare drivers' challenge to a Seattle ordinance that established a

[3] In addition, Plaintiff's alleged injury is conjectural, hypothetical, and insufficient to establish standing. While the type of facial challenge Plaintiff has advanced here may be available under limited circumstances where First Amendment violations are alleged, there is no basis for challenging an ordinary land use regulation on this ground. *See Oregon Barter Fair v. Jackson County, Oregon*, 372 F.3d 1128 (9th Cir. 2004); *Calvary Chapel Bible Fellowship v. County of Riverside*, 2017 WL 6883866, at *8 (C.D. Cal. Aug. 18, 2017)). Plaintiff's challenge to the Natural Gas Infrastructure Ordinance must be brought as an as-applied challenge.

complex collective bargaining process for qualifying for-hire drivers in the city. *Id.* at 805-06. The drivers asserted that they did not wish to be represented by the union selected to represent them through the city-mandated process and did not wish to be bound by any future agreement the union may reach with rideshare companies. *Id.* at 807. The court observed that it was "speculative" whether the union would ever reach an agreement and represent the drivers, and therefore the drivers' challenge to the ordinance was unripe. *Id.* at 811.[4]

Here, Plaintiff's hypothetical claims are equally speculative. Under the Natural Gas Infrastructure Ordinance, Plaintiff or its members can seek authorization to construct Natural Gas Infrastructure in Newly Constructed Buildings under two separate exemptions: the first based on the infeasibility of compliance with the California Energy Code, and the second based on whether the proposed use "serves the public interest." RJN, Exh. 1 §§ 12.80.040.A.1, 12.80.050.A. With respect for the public interest exemption, the City's Zoning Adjustments Board or Zoning Officer would be required to consider "[t]he availability of alternative technologies or systems that do not use natural gas" in considering whether to approve the installation of Natural Gas Infrastructure in a Newly Constructed Building. *Id.* § 12.80.050.A.1. Plaintiff or any of its impacted members would have the opportunity to present evidence of the need for natural gas in restaurants and the availability and limitations of technologies that do not use natural gas. *See* FAC ¶ 8. Similarly, the permit applicant could apply for the infeasibility exemption by presenting evidence that compliance with the California Energy Code would not be feasible for an all-electric building. See RJN, Exh. 1 § 12.80.040.A.1. Plaintiff improperly seeks to short-circuit this process and adjudicate the validity of the Natural Gas Infrastructure

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[4] Similarly, in *Murphy v. New Milford Zoning Commission*, 402 F.3d 342 (2d Cir. 2005), the plaintiffs filed suit challenge a city zoning enforcement officer's determination that prayer meetings at their home violated single-family zoning regulations. *Id.* at 345. The court held that in the absence of a determination of the plaintiffs' rights by the city's zoning board, the plaintiffs' claims were not ripe for adjudication. *Id.* at 352-53. The court observed that the zoning board was "in the most advantageous position to interpret its own regulations and apply them to the situations before it," and noted "the virtual impossibility of determining what use will be permitted on a particular lot of land when its use is subject to the decision of a regulatory body invested with great discretion, which it has not yet even been asked to exercise." *Id.* (original alteration omitted). The court concluded that until the zoning board had been given the opportunity to exercise its discretion, "the dispute remain[ed] a matter of unique local import over which we lack jurisdiction." *Id.* at 354.

Ordinance in all circumstances, as applied to all Newly Constructed Buildings in Berkeley.

Moreover, with respect to Plaintiff's EPCA preemption claim, it is unclear whether any of Plaintiff's members would be in a position to raise the objections to the Ordinance asserted in this case. Plaintiff's EPCA claim alleges preemption based on the regulation of consumer appliances ("covered products" under 42 U.S.C. § 6297(c)), but as previously discussed, the California Retail Food Code prohibits the installation of non-commercially rated appliances in a commercial kitchen. Ogden Decl. ¶¶ 3-4; Health and Safety Code § 114301(d). And with respect to "industrial equipment," it is unclear when and if a restaurant owner would have any need to install commercial air conditioning, heating, or water heating equipment that is covered by EPCA in a Newly Constructed Building in Berkeley. Ogden Decl. ¶ 5; *see discussion* at Section IV.A.1, *supra*. The uncertain impact of the Ordinance on Plaintiff's members is particularly concerning in the context of attempting to establish ripeness in a case brought as a facial challenge. *See Pacific Legal Found.*, 659 F.2d at 915.

At very least, the speculative nature of Plaintiff's alleged injury makes clear that this case is not ready for adjudication in the absence of the "development of a better factual record," *see id.*, and therefore this action, and in particular, Petitioner's EPCA claim, is not ripe.

B. The Natural Gas Infrastructure Ordinance Is Not Preempted by EPCA.

1. EPCA's Preemption Provisions Are Narrowly Construed and Contemplate Concurrent State and Federal Regulation of Energy Efficiency.

"Federal preemption occurs when: (1) Congress enacts a statute that explicitly preempts state law; (2) state law actually conflicts with federal law; or (3) federal law occupies a legislative field to such an extent that it is reasonable to conclude that Congress left no room for state regulation in that field." *Hendricks v. StarKist Co.*, 30 F. Supp. 3d 917, 925 (N.D. Cal. 2014) (quoting *Chae v. SLM Corp.*, 593 F.3d 936, 941 (9th Cir. 2010)). Where federal law intrudes on the historic police powers of state and local governments, the federal statute should not supersede state law "unless a 'clear and manifest purpose of Congress' exists." *Id.* (citing *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)). "Parties seeking to invalidate a state law based on preemption bear the considerable burden of overcoming the starting presumption that Congress

1 does not intend to supplant state law." *Stengel v. Medtronic*, 704 F.3d 1224, 1227–28 (9th Cir.
2 2013) (en banc) (citation and internal quotation marks omitted).

3 "Express preemption results from a Congressional expression of intent to displace state
4 law." *Hendricks*, 30 F. Supp. 3d at 925 (citing *Chae*, 593 F.3d at 942). Conflict preemption
5 arises when "compliance with both federal and state regulations is a physical impossibility."
6 *Bank of Am. v. City & Cnty. of San Francisco*, 309 F.3d 551, 558 (9th Cir. 2002) (citing *Florida*
7 *Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963)). Conflict preemption may
8 also exist where "state law 'stands as an obstacle to the accomplishment and execution of the full
9 purposes and objectives of Congress.'" *Id.* (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).
10 Showing conflict preemption is a "demanding defense." *Hendricks*, 30 F. Supp. 3d at 926
11 (quoting *Wyeth*, 555 U.S. at 573).

12 Field preemption occurs "where the scheme of federal regulation is 'so pervasive as to
13 make reasonable the inference that Congress left no room for the States to supplement it.'"
14 *Valentine v. NebuAd, Inc.*, 804 F. Supp. 2d 1022, 1028 (N.D. Cal. 2011) (quoting *Gade v. Nat'l*
15 *Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992)). The concurrent system of state and federal
16 regulation of appliance energy efficiency undermines any argument that field preemption could
17 conceivably apply in this case. *See Crazy Eddie, Inc. v. Cotter*, 666 F. Supp. 503, 509–10
18 (S.D.N.Y. 1987) (noting that Congress has "specifically contemplated concurrent state
19 regulation" of energy efficiency and characterizing the plaintiff's field preemption argument as
20 implausible); *Bldg. Indus. Ass'n of Washington v. Washington State Bldg. Code Council*, 683
21 F.3d 1144, 1154 (9th Cir. 2012) (rejecting express EPCA preemption claim); *see also* K.
22 Kennedy, *The Role of Energy Efficiency in Deep Decarbonization*, 48 Envtl. L. Rep. News &
23 Analysis 10030, 10035–38 (2018) (summarizing complementary systems of federal and state
24 energy efficiency regulations). In addition, for the reasons set forth below, neither express
25 preemption nor conflict preemption provides a basis for injunctive or declaratory relief in this
26 case.
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2. EPCA Does Not Regulate the Installation of Natural Gas Infrastructure and Does Not Expressly Preempt State or Local Laws That Do So.

3 Petitioner cites 42 U.S.C. § 6297(c), which preempts—subject to numerous exceptions—
4 any state regulation "concerning the energy efficiency, energy use, or water use of [a] covered
5 product." 42 U.S.C. § 6297(c). "Covered product" includes various categories of consumer
6 products, including appliances and lighting. *Id.* §§ 6291(2), 6292. The FAC also cites EPCA
7 standards for commercial appliances, which generally "supersede any State or local regulations
8 concerning energy efficiency or energy use of a product for which a standard is prescribed or
9 established." *Id.* §§ 6313, 6316(b)(2)(A). "Covered" industrial equipment is defined in 42 U.S.C.
10 § 6311(1) and includes "commercial package air conditioning and heating equipment," "warm
11 air furnaces," and several types of water heaters, but does not include ovens for commercial
12 kitchens. *See* FAC ¶ 60. Each of these provisions turns on whether a state law or local ordinance
13 regulates the "energy efficiency" or "energy use" of a covered product, which are defined,
14 respectively, as "the ratio of the useful output of services from a consumer product to the energy
15 use of such product," and "the quantity of energy directly consumed by a consumer product at
16 point of use." *Id.* § 6291(4)-(5).

17 The Natural Gas Infrastructure Ordinance simply does not regulate "energy efficiency"
18 or "energy use" of covered products. Instead, the Ordinance limits the installation of Natural Gas
19 Infrastructure in Newly Constructed buildings by establishing restrictions on new natural gas
20 connections. The Ordinance does not in any way regulate the efficiency of consumer or
21 industrial products or the amount of energy consumed by those products and is therefore not
22 expressly preempted by EPCA.

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3. The Natural Gas Infrastructure Does Not Conflict with Federal Energy Efficiency Standards.

25 The Natural Gas Infrastructure Ordinance also ensures that a land use permit applicant
26 will not be required to install appliances that exceed federal energy efficiency standards, thereby
27 foreclosing any conflict preemption argument. As noted above, the Ordinance allows new
28 Natural Gas Infrastructure where all-electric construction cannot demonstrate compliance with

1 California Energy Code efficiency standards. RJN, Exh. 1 § 12.80.040.A.1. Consistent with this
2 exemption, the Ordinance provides that it "shall in no way be construed as amending California
3 Energy Code requirements under California Code of Regulations, Title 24, Part 6, nor as
4 requiring the use or installation of any specific appliance or system as a condition of approval."
5 *Id.* § 12.80.020.C. Thus, the Ordinance allows for a mixed-fuel (*e.g.*, gas and electric)
6 compliance pathway and the installation of new natural gas connections where compliance with
7 state energy efficiency standards is not feasible for all-electric construction. *See* RJN, Exh. 2
8 (July 9, 2019 Report to Berkeley City Council) at 19 (noting that the Natural Gas Infrastructure
9 Ordinance will be implemented for certain "building types and systems as the California Energy
10 Commission creates [computer] models that allow developers to have their buildings
11 approved").

12 This provision, which ensures compliance with the state Energy Code, also ensures
13 compliance with federal law. State building codes concerning energy efficiency or energy use,
14 including the California Energy Code, are expressly excluded from the scope of EPCA
15 preemption so long as, among other conditions, the codes do not "require that [a] covered
16 product have an energy efficiency exceeding the applicable [federal] energy conservation
17 standard" without a waiver. 42 U.S.C. § 6297(f)(3)(B). Consistent with this provision of EPCA,
18 the Energy Commission assumes that appliances meet but *do not exceed* minimum federal
19 standards in modeling the energy efficiency of Newly Constructed Buildings for purpose of
20 developing the Energy Code. *See, e.g.*, RJN, Exh. 8 (Energy Commission 2019 Residential
21 Compliance Manual) at 5-9 to 5-12 (noting, for example, that Energy Commission regulations
22 for water heaters "align with federal efficiency standards"); RJN, Exh. 9 (Energy Commission
23 2019 Nonresidential Compliance Manual), Appendix B (referencing federal standards for
24 appliance energy efficiency). Plaintiff does not, and cannot reasonably allege, that the California
25 Energy Code is inconsistent with the EPCA. The validity of building energy efficiency standards
26 adopted by the Energy Commission is simply not a disputed issue in this case.

27 The City's Ordinance incorporates the same standards, since it allows mixed-fuel
28 construction when all-electric construction cannot comply with the California Energy Code and

1 otherwise requires compliance with the Energy Code. RJN, Exh. 1 § 12.80.040.A.1. This
2 exemption forecloses any possible argument that the Natural Gas Infrastructure Ordinance
3 interferes with federal energy efficiency standards.

4 Moreover, such an implied preemption argument is impossible to credibly assert in this
5 case because Plaintiff concedes that this action is a facial challenge to the Ordinance's validity.
6 Facial challenges to legislation "often rest on speculation" and for that reason are disfavored.
7 *See, e.g.*, *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 962 (9th Cir. 2014). To prevail
8 on a facial challenge, the plaintiff "must establish that no set of circumstances exists under
9 which the Act would be valid." *Morrison v. Peterson*, 809 F.3d 1059, 1064 (9th Cir. 2015)
10 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). In other words, the plaintiff must
11 prove that "the law is unconstitutional [or otherwise unlawful] in all of its applications."
12 *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008)
13 (quoting *Salerno*, 481 U.S. at 745). The Ninth Circuit applies this standard to facial challenges
14 based on federal preemption. *Puente Arizona v. Arpaio*, 821 F.3d 1098, 1104 (9th Cir. 2016);
15 *Sprint Telephony PCS, L.P. v. Cty. of San Diego*, 543 F.3d 571, 579 (9th Cir. 2008).

16 *Sprint* is illustrative of the "unique burdens imposed on facial challenges." *See Puente*
17 *Arizona*, 821 F.3d at 1103. The case involved a San Diego County ordinance regulating the
18 placement of cellular sites based on aesthetics, feasibility, and other considerations. *Sprint*, 543
19 F.3d at 574-75. The plaintiff brought a facial challenge to the ordinance, arguing that it was
20 preempted by the Federal Telecommunications Act because it "effectively prohibited" the
21 provision of cellular service. *Id.* at 580. The court rejected the facial challenge, concluding that
22 the availability of a discretionary permitting process prevented the plaintiff from "meet[ing] its
23 high burden of proving that no set of circumstances exists under which the Ordinance would be
24 valid." *Id.* (citation, original alteration, and quotation marks omitted). The court contrasted the
25 ordinance in question with a hypothetical ordinance that required wireless antennas to be located
26 underground, which would render their operation infeasible in *all circumstances*. *Id.*

27 Plaintiff's speculation as to how the City may or may not apply provisions of the
28 Ordinance that allow new natural gas connections is irrelevant in determining whether Plaintiff

may maintain a facial challenge to the Ordinance. As in *Sprint*, the Ordinance at issue in this case is implemented through a discretionary permitting process that provides the ability to ensure compliance with federal law. Plaintiff's facial challenge must show that the exemptions in the Ordinance are *incapable of ensuring compliance with federal law in all circumstances* (like a requirement to place wireless antennas underground). Any allegation to this effect would be implausible and must be rejected as a matter of law.

Ultimately, any conflict preemption argument in this case faces two high hurdles: first, Plaintiff must satisfy the "demanding" standard for establishing conflict preemption (*Wyeth*, 555 U.S. at 573); and second, Plaintiff must carry the "unique burdens" of maintaining a facial challenge to the Ordinance (*Puente Arizona*, 821 F.3d at 1103). Plaintiff's allegations, even if true, fall far short of meeting the "demanding" standard for establishing that every single application of the Ordinance would result in a conflict with federal law. Accordingly, Plaintiff has not stated a claim for relief based on conflict preemption.

4. Federal Regulation of Natural Gas Infrastructure Does Not Extend to Natural Gas Connections in Homes and Businesses.

Apart from the fact that EPCA on its face does not regulate natural gas connections to individual dwellings and business, the body of federal law that actually regulates natural gas infrastructure makes clear that those connections are regulated at the state and local level, and not by the federal government. The scope of federal authority is governed by the Natural Gas Act, 15 U.S.C. § 717 *et seq.*, which was enacted in 1938 to provide "a comprehensive scheme of federal regulation of 'all wholesales of natural gas in interstate commerce.'" *S. Coast Air Quality Mgmt. Dist. v. F.E.R.C.*, 621 F.3d 1085, 1090 (9th Cir. 2010) (quoting *Northern Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. 84, 91 (1963)).[5] "Notably however, the Natural Gas Act specifically exempted from federal regulation the 'local distribution of natural gas." *Id.* Reviewing these provisions of the Natural Gas Act, the Supreme Court has observed that

[5] Congress vested FERC with authority over: (1) the "transportation of natural gas in interstate commerce"; (2) the "sale in interstate commerce of natural gas for resale"; and (3) "natural-gas companies engaged in such transportation or sale." 15 U.S.C. § 717(b).

"Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction." *Fed. Power Comm'n v. S. Cal. Edison Co.*, 376 U.S. 205, 215 (1964). Thus, "the history and judicial construction of the Natural Gas Act suggest that *all aspects related to the direct consumption of gas . . . remain within the exclusive purview of the states*." *S. Coast Air Quality Mgmt. Dist.*, 621 F.3d at 1092 (emphasis added).

The Natural Gas Act and the Supreme Court precedent set forth above predate the enactment of EPCA in 1975. In adopting (and subsequently amending) EPCA, Congress had the opportunity to extend federal authority to regulate natural gas connections to individual buildings and appliances. Congress did not do that, and instead adopted regulation that sets federal standards for "energy use" and "energy efficiency." In contrast, where Congress and the Supreme Court have actually addressed federal regulation of natural gas infrastructure, they have made it absolutely clear that the regulation of natural gas connections to individual buildings is not preempted by federal law. Plaintiff's strained attempt to find hidden meaning in EPCA provisions related to appliance energy efficiency cannot overcome Congress' clearly stated intent to allow state and local regulation of natural gas infrastructure.

5. The Natural Gas Infrastructure Ordinance Is a Permissible Health and Safety Regulation That Does Regulate Energy Efficiency.

The Natural Gas Infrastructure Ordinance is also indistinguishable from routinely adopted state and local health and safety regulations that limit when and where EPCA-covered appliances may be used. The Ordinance responds to specific short- and long-term health concerns. In the short-term, the Ordinance responds to serious indoor air quality concerns raised by the combustion of natural gas in cooking. RJN, Exh. 1 § 12.80.010.C. In the longer term, the Ordinance attempts to address the global impacts caused by the combustion of natural gas. *Id.* §§ 12.80.010.A, 12.80.010.D. Legislation to mitigate these public health impacts is well within the scope of the City's power to address "legislative objectives in furtherance of public peace, safety, morals, health and welfare." *Massingill v. Dep't of Food & Agric.*, 102 Cal. App. 4th 498, 504 (2002) (citing *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 160 (1976).)

Nothing in EPCA prohibits the exercise of a local government's police power to address

legitimate, urgent health and safety concerns, even if doing so has an indirect effect on the sale of an EPCA-regulated appliance. State or local air quality regulations routinely limit the sale of EPCA-regulated appliances to limit nitrogen oxide emissions. *See, e.g.*, RJN, Exh. 10 (regulating natural gas-fired boilers and water heaters); RJN, Exh. 11 (regulating large water heaters and small boilers and process heaters). In fact, local air districts certify and publish lists of appliances that comply with nitrogen oxide emissions standards. *See, e.g.*, RJN, Exh. 12 (table of certified large water heaters and small boilers and process heaters); RJN, Exh. 13 (list of certified residential natural gas-fired water heaters). EPCA covered-appliances not on these lists cannot be installed within the air district, regardless of whether or not they meet federal energy efficiency standards.

State and local governments also routinely adopt safety regulations for industrial equipment that qualifies as "covered equipment" under EPCA. *See* 42 U.S.C. § 6311(1). For example, California Department of Industrial Relations ("DIR") regulations require walk-in coolers or freezers to be equipped with two exits and impose other requirements on emergency egress from cold-storage units. 8 Cal. Code Regs. § 3250. DIR regulations also regulate "clothes-washing, clothes-drying and dishwashing machines," despite the fact that those appliances are subject to EPCA industrial and/or consumer appliance energy efficiency standards. 8 Cal. Code Regs. § 2395.45(a) (imposing grounding requirements on equipment); 42 U.S.C. § 6311(1)(H) (listing commercial clothes dryers); 42 U.S.C. § 6292(a)(6)-(8) (listing dishwashers, clothes washers, and clothes dryers). Plaintiff cannot credibly take the position that these routine health and safety regulations are preempted by EPCA.

Similarly, while EPCA preempts state and local regulations concerning the energy efficiency of pool heaters (42 U.S.C. § 6292(a)(11)), it would be absurd to interpret the law to compel local jurisdictions to allow the construction and filling of swimming pools. In fact, local jurisdictions have acted to prevent the filling of newly constructed swimming pools in response to drought conditions. *See, e.g.*, RJN, Exh. 14 (City of Morgan Hill Resolution 15-0170); RJN, Exh. 15 (City of Buda, Tex. Ordinance No. 2012-01). Like the City of Berkeley here, these jurisdictions adopted legislation in response public health and safety emergency that had the

effect of limiting the installation and/or use of a covered appliance, without regard to federal energy efficiency standards. Plaintiff asks the Court to adopt an interpretation of EPCA that would prevent cities like Morgan Hill and Buda from adopting legislation that does not regulate energy efficiency or use to address water shortages, just as it would prevent the City of Berkeley from adopting legislation that does not regulate the energy efficiency or use to address indoor air pollution and climate change. Neither the plain language of EPCA nor common sense supports Plaintiff's novel and expansive interpretation of the statute. EPCA does not preempt local laws and regulations unless the law or regulation concerns energy use or energy efficiency. The Natural Gas Infrastructure Ordinance does not do so, and it is not preempted. [6]

6. The Legislative History of EPCA Does Not Support Plaintiff's Preemption Claim.

The Court need not consider the legislative history of EPCA to decide this case. In construing the provisions of a statute, the Court must "begin by looking at the language of the statute to determine whether it has a plain meaning." *Floyd v. Am. Honda Motor Co.*, 966 F.3d 1027 (9th Cir. 2020) (citation omitted). As the Ninth Circuit recently stated: "If the language has a plain meaning or is unambiguous, the statutory interpretation inquiry ends there, and the court do not consider the legislative history or any other extrinsic material." *Id.* (quotation marks omitted); *see also Kwai Fun Wong v. Beebe*, 732 F.3d 1030, 1042 (9th Cir. 2013) (en banc).

Here, the Court need not look beyond the plain meaning of EPCA (and the Natural Gas Act) to determine that "energy efficiency" and "energy use" do not mean "natural gas infrastructure." But if the Court chooses to consider the legislative history of EPCA, its review will simply confirm that the Natural Gas Infrastructure Ordinance is not preempted. The regulation of natural gas connections does not conflict with Congress' stated intent to provide

[6] EPCA, as amended, also regulates and generally preempts the "water use" of covered products. 42 U.S.C. § 6297(c). Plaintiff's argument also implies that state and local water conservation measures that limit the supply of water to covered products, as opposed to the efficiency of the products' water use, are preempted by EPCA. It would be absurd to interpret provisions intended to promote uniform national water conservation standards for appliances to hamstring local communities' ability to respond to drought conditions such as those that prompted the Morgan Hill and Buda, Texas legislation. The absurdity of this result further demonstrates why Plaintiff's argument must be rejected.

1 appliance manufacturers with uniform national standards for energy efficiency. See FAC ¶¶ 44-
2 45 (citing Sen. Rep. No. 100-6 (1987) and H.R. Rep No. 101-11 (1987)). The Natural Gas
3 Infrastructure Ordinance limits new natural gas connections, but it does not alter or interfere
4 with standards for the design of consumer or commercial appliances.
5 Plaintiff's preemption argument implies that Congress sought to guarantee a market for
6 natural gas appliances, but nothing is further from the truth. EPCA was motivated by the desire
7 to reduce consumption of oil and natural gas as a response to the Energy Crisis of the 1970s. *See*
8 S. Conf. Rep. 94-516, 116–17 (1975) (noting that statute is intended to "reduce domestic energy
9 consumption through the operation of specific voluntary and mandatory energy conservation
10 programs" and "reduce the vulnerability of the domestic economy to increases in import
11 prices"). The appliance energy efficiency standards program received little attention in the
12 legislative history. For example, when President Ford signed EPCA into law, he did not mention
13 the appliance efficiency program in his brief remarks other than the general observation that the
14 bill would "promote energy conservation." RJN, Exh. 16 However, in a nod to the importance of
15 reducing oil and gas consumption, President Ford did explain that EPCA would help "convert
16 more utility and industrial plants to coal." *Id.* And just one year later, in 1976, the federal
17 government published a White Paper that anticipated increasingly scarce natural gas supplies
18 and considered the "limitation of new connections of oil and gas for heating purposes" to
19 encourage the use of other fuels (mainly coal). RJN, Exh. 17 at 019, 046. Certainly EPCA was
20 not intended to *require* the use of natural gas.
21 Nothing in the 1987 amendments to EPCA changes that conclusion. Those amendments
22 were enacted as the National Appliance Energy Conservation Act of 1987 ("NAECA")
23 (P.L.100-12). NAECA arose in response to the proliferation of state appliance energy efficiency
24 standards, which resulted from a combination of federal regulatory inaction during the Reagan
25 administration and the Department of Energy's liberal policy for granting waivers for state
26 standards under EPCA. S. Rep. 100-6 at 3–4. The statute's legislative history notes the need to
27 eliminate the burden of conflicting state energy efficiency regulations on appliance manufactures
28 *See, e.g.*, *id.* at 2, 4. In contrast, there is a complete absence of discussion of natural gas

distribution or anything else suggesting that Congress intended to guarantee a market for the manufacturers of natural gas-fueled appliances. Congress' silence on this issue is not surprising, given that NAECA was adopted in the context of federal law that establishes state and local control of natural gas infrastructure, and it applied to large swaths of the county that had (and continue to have) no natural gas service whatsoever.

In sum, there is simply no credible argument that the legislative history of EPCA or its subsequent amendments compels the City of Berkeley to allow natural gas connections in all Newly Constructed Buildings. Like the plain meaning of the statute, EPCA's legislative history makes clear that the Natural Gas Infrastructure Ordinance is not preempted by federal law.

C. The Natural Gas Infrastructure Ordinance Is Not Preempted by State Law.

1. The Ordinance Is a Lawful Exercise of the City's Police Power.

The City's Natural Gas Infrastructure Ordinance is within the scope of the City's police power because it is not a "building standard" and is therefore not preempted by state law. Article XI, § 7 of the California Constitution provides that municipalities may enact ordinances "not in conflict with general laws" of the state. Cal. Constit., Art. XI, § 7. In the absence of a conflict with general state law, local jurisdictions retain "inherent police power" to control their own land use decisions. *Big Creek Lumber Co. v. Cty. of Santa Cruz*, 38 Cal. 4th 1139, 1151 (2006). The City's enactment of legislation to address public health effects of natural gas use and to reduce the eventual costs that will be incurred due to the abandonment of obsolete Natural Gas Infrastructure falls squarely within the City's broad authority to enact legislation "in furtherance of public peace, safety, morals, health and welfare." *Massingill*, 102 Cal. App. 4th at 504.

Plaintiff's argument to the contrary rests on the erroneous proposition that the Natural Gas Infrastructure Ordinance is a "building standard" within the meaning of the California Building Standards Code. That argument is unsupported by the plain meaning of the term "building standard" and defies common sense. California Health & Safety Code § 18909(a) defines a "building standard" as "any rule, regulation, order, or other requirement . . . that specifically regulates, requires, or forbids the method of use, properties, performance, or types of materials used in the construction, alteration, improvement, repair, or rehabilitation of a

building, structure, factory-built housing, or other improvement to real property, including fixtures therein, and as determined by the commission." Cal. Health & Safety Code § 18909(a). The Natural Gas Infrastructure Ordinance does not regulate methods of construction at all; rather, it limits the installation of new Natural Gas Infrastructure to reduce greenhouse gas emissions from new construction and to reduce the expenditure of resources to install new natural gas connections that will soon become obsolete. This is an exercise of the City's police power to enact legislation to advance public welfare and is not a preempted "building standard."

The FAC offers a laundry list of Building Code provisions that are purportedly impacted by the Ordinance (FAC ¶¶ 86-90), but the Ordinance does not affect those provisions at all. In fact, those provisions, which regulate the methods of construction of natural gas appliances and other infrastructure, will continue to apply in the City where the installation of Natural Gas Infrastructure in Newly Constructed Buildings is allowed, consistent with the exemptions in BMC § 12.80.040.A.1 and § 12.80.050.B. These provisions could not be identified by "amendments, additions or deletions [to the Building Code] expressly marked" (FAC ¶ 92) because they remain in effect and will continue to apply to Newly Constructed Buildings that qualify for the exemptions adopted by the City. The fact that building standards governing the construction of Natural Gas Infrastructure Ordinance will not be applied in every Newly Constructed Building does not make the Ordinance a Building Code amendment. The Natural Gas Infrastructure Ordinance is a lawful exercise of the City's police power under California law and is not preempted by the California Building Standards Code.

2. The Ordinance Is Not Preempted by State Law Because It Was Filed with the California Building Standards Commission.

The Natural Gas Infrastructure Ordinance is also valid if construed as a building standard because it was filed with the California Building Standards Commission pursuant to Health & Safety Code § 17958.7. As noted above, Health & Safety Code §§ 17958.5, 17958.7, and 18941.5 authorize a local jurisdiction to amend state building standards if the jurisdiction "make[s] an express finding that such modifications or changes are reasonably necessary because of local climatic, geological or topographical conditions" and files those findings and

any modification or change to Building Standards Code with the California Building Standards Commission. Health & Safety Code § 17958.7(a). The findings are a legislative act, and are reviewed only for whether there was a "reasonable basis" for the local jurisdiction's decision. *ABS Inst. v. City of Lancaster*, 24 Cal. App. 4th 285, 296 (1994). The local building standards become operative upon submission to the Building Standards Commission, unless the Commission rejects the filed standards. *Id.* § 17958.7(a)-(b).

The City filed the Ordinance with the Building Standards Commission on December 17, 2019, along with other local building standards amendments that the City adopted in December 2019 and that took effect on January 1, 2020. RJN, Exh. 3. As explained above, the Ordinance does not repeal or amend any existing provisions of the Building Standards Code, and therefore no "deletions" of code provisions were required pursuant to Health & Safety Code § 17958. The City also submitted its findings of necessity due to local conditions, which apply to the Ordinance, thereby satisfying the requirements of Health & Safety Code § 17958.7. Thus, to the extent that the Court may construe the Natural Gas Infrastructure Ordinance as a building standard, its submission to the Building Standards Commission complied with the process set forth in Health & Safety Code § 17958.7

3. The Ordinance Does Not Conflict with the California Energy Code.

As noted above, the California Energy Commission establishes state energy efficiency standards for Newly Constructed Buildings, which are codified as the Energy Code at Part 6 of Title 24 of the California Code of Regulations. The powers of the Commission include the power to review and approve local energy efficiency standards, or "energy standards," pursuant to Section 10-106 of the Energy Code. *See* RJN, Exh. 18 (24 Cal. Code Regs. Pt. 6, § 10-106, and Acknowledgements Page (defining "Energy Standards")).

The Natural Gas Infrastructure Ordinance does not establish or modify energy efficiency standards for all-electric or mixed-fuel construction—those standards were modified by the local "reach code" amendments to the Energy Code that were approved by the California Energy Commission on February 20, 2020. RJN, Exh. 6. The Natural Gas Infrastructure Ordinance does not affect the independent obligation to enforce the Energy Code, inclusive of any approved

local amendments.

Further, as noted above, the exemptions in the Ordinance ensure that there is no conflict with state energy efficiency standards. The Ordinance expressly provides an exemption from the prohibition on new Natural Gas Infrastructure to any building where all-electric construction cannot demonstrate compliance with state energy efficiency standards. RJN, Exh. 1 § 12.80.040.A.1. This exemption forecloses any possible argument that the Natural Gas Infrastructure Ordinance interferes with state energy efficiency standards.

Finally, the Energy Commission has recently confirmed the common-sense conclusion that limitations on Natural Gas Infrastructure are not energy efficiency standards. On February 6, 2020, the Energy Commission wrote to the City to confirm that "the City has authority under the California Constitution to prohibit installation of hazardous natural gas piping infrastructure when granting use permits for new buildings" and that the Natural Gas Infrastructure Ordinance "is not an energy efficiency standard subject to review by the CEC." RJN, Exh. 7 at 2. The Court should defer to the Energy Commission's reasonable interpretation of a statute the Commission has jurisdiction to implement and deny Plaintiff's claim for relief under the California Energy Code.

D. The Court Should Decline to Exercise Jurisdiction Under 28 U.S.C. § 1367(c) If Plaintiff's EPCA Claim Is Dismissed.

Under 28 U.S.C. § 1367(c), a district court "has discretion to retain or dismiss state law claims when the federal basis for an action drops away." *Shanaghan v. Cahill*, 58 F.3d 106, 109 (4th Cir. 1995) (citing 28 U.S.C. § 1367); *Acri v. Varian Assocs., Inc.*, 114 F.3d 999, 1000 (9th Cir. 1997) (en banc)). The dismissal of Plaintiff's EPCA claim tips the balance strongly against the Court retaining jurisdiction over any remaining state law claims, should they not also be dismissed. There is no benefit to having these state law issues adjudicated in a federal forum, and the interests of comity weigh heavily in favor of dismissing any remaining state law claims.

V. CONCLUSION

For the reasons stated above, the Court should dismiss all of Plaintiff's claims for relief with prejudice and enter judgment in favor of the City.

Dated: September 14, 2020

BERKELEY CITY ATTORNEY'S OFFICE

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