Oral Argument Scheduled for May 12, 2022

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
(Hon. Yvonne Gonzales Rogers, Presiding)
District Court Case No. 4:19-cv-07668-YGR

APPELLEE CITY OF BERKELEY'S RESPONSE TO AMERICAN GAS ASSOCIATION BRIEF *AMICUS CURIAE*

Tony Francois
Peter S. Prows
BRISCOE IVESTER & BAZEL LLP
235 Montgomery Street, Suite 935
San Francisco, CA 94104
Phone: 415.402.2700

Attorneys for Defendant-Appellee
CITY OF BERKELEY

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INTRODUCTION

Per this Court's order dated March 31, 2022, Dkt. # 64, Appellee City of Berkeley files this response to American Gas Association's Brief *Amicus Curiae* in support of Appellant California Restaurant Association, Dkt. ## 60-2, 65.

ARGUMENT

The Gas Association's brief offers nothing to the Court's evaluation of the only issue in this case, i.e., whether the Energy Policy and Conservation Act preempts the City's Ordinance. That is the only claim advanced by Appellant California Restaurant Association in this appeal. The Gas Association's brief cites no provision of EPCA, see Dkt # 60-2 at *v* (Table of Authorities), and offers no argument that EPCA preempts the Ordinance.

The Gas Association does rehearse the Restaurant Association's tangent that the Natural Gas Act not preempting the Ordinance does not mean that EPCA doesn't preempt the Ordinance. Both trade groups get this point backwards. The City and its supporting amici reference the Natural Gas Act primarily to show how implausible the Restaurant Association's reading of 42 U.S.C. § 6297 is. It is implausible that Congress, after striking a careful balance between federal and state/local authority over natural gas regulation, undid that balance without remark in the preemption provisions of an appliance efficiency program. City's Answering Brief at 37, Dkt # 25; U.S. Amicus Brief at 22-23 & n.6, Dkt # 33; States' Amicus

Brief at 27-30, Dkt # 34; Envtl. & Energy Law Prof. Amicus Brief at 8-14, Dkt # 38; Local Govt. Amicus Brief at 7-8 n.4, Dkt # 32. Yet the Gas Association's brief does not respond to or otherwise shed light on how to interpret Section 6297 or the scope of EPCA preemption. Most tellingly, the new amicus filing offers no explanation of how EPCA can be read to repeal the local control provisions of the Natural Gas Act, given the lack of any textual evidence for such an effect and the presumption against implied repeals. *See* City Answering Brief at 37-38, *Floyd v. American Honda Motor Co., Inc.*, 966 F.3d 1027, 1034 (9th Cir. 2020).

Instead of addressing the only legal issue in this appeal, the Gas Association seeks to introduce an entirely new legal theory: that the Ordinance allegedly violates the doctrine of the regulatory compact. No party to this case has raised this claim, and an amicus may not introduce it, particularly at this late stage. *Zango v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1177 n.8 (9th Cir. 2009) (citing *U.S. v. Gementera*, 370 F.3d 596, 607-08 (9th Cir. 2004)).

Aside from the regulatory compact being entirely extraneous to this appeal, the doctrine itself bears no relation to the use the Gas Association tries to make of it. Utilities have tried to use the "regulatory compact" theory as a hedge against stranded costs with some frequency, but courts have repeatedly rejected this argument. *See, e.g.*, *Energy Ass'n of N.Y. State v. Pub. Serv. Comm'n*, 653 N.Y.S.2d 502, 513 (N.Y. Sup. Ct. 1996) (utilities' arguments that "failure to guarantee full recovery of stranded costs constitutes a breach" of the "regulatory

compact" "have repeatedly been rejected by the courts"); *id*. at 516 (collecting cases); *see also id*. at 512 ("Nor do they have a property interest in customers").

None of the cases cited by the Gas Association for their discussion of the regulatory compact even remotely support the far-fetched claim that the compact gives a utility enforceable rights over a municipality's plenary authority over zoning and land use. The Association stops just shy of claiming that the compact guarantees its members a rate of customer growth, but that is the clear import of its argument. Alas for the Gas Association, courts have flatly rejected this assertion. *Energy Ass'n of N.Y. State*, 653 N.Y.S.2d at 512.

Rather, the regulatory compact respects the basic federal-state "vertical federalism" arrangement of natural gas regulation. "Consuming States may control the end use of gas." *Federal Power Comm'n v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 20-21 (1961). The Law Professors' Amicus Brief collects statutes, PUC rules, and case law affirming local control over the distribution of gas, beyond the limited areas of rate-setting and nondiscrimination that the Gas Association identifies. Envtl. & Energy Law Prof. Amicus Brief at 13-14; *see, e.g.*, Cal. Pub. Util. Code §§ 6002, 6203 (local control over franchise agreements); *E. Ohio Gas Co. v. Tax Comm'n of Ohio*, 283 U.S. 465, 471 (1931) (gas distribution is "a business of purely local concern exclusively within the jurisdiction of the state"). The Gas Association's brief fails to counter or even address any of these.

"The Natural Gas Act of 1938 granted FPC broad powers to protect consumers against exploitation at the hands of natural gas companies. To that end, Congress meant to create a comprehensive and effective regulatory scheme of dual state and federal authority. Although federal jurisdiction was not to be exclusive, FPC regulation was to be broadly complementary to that reserved to the States, so that there would be no gaps for private interests to subvert the public welfare." *Federal Power Comm'n v. La. Power & Light Co.*, 406 U.S. 621, 631 (1972) (cleaned up); *see also* cases cited at p. 12 of Law Prof. Amicus Brief. That is to say, given the danger that unregulated monopolies pose to the public, the purpose of both federal and state-level utility regulation is to ensure that utilities are subject, in all monopoly aspects of their business, to the supervision of one or the other, with no gaps. What the federal government does not regulate in this area, state-level governments certainly do.

In contrast, accepting the scope of the regulatory compact claimed by the Gas Association would create an unregulated zone of monopoly action, *id.*, in which neither the federal government nor state or local authorities could check expansion of a gas franchise once licensed.

Just as section 1(b) of the Natural Gas Act preserves state and local jurisdiction over gas "distribution," it preserves state and local jurisdiction over gas "production or gathering." 15 U.S.C. § 717(b). Interpreting this latter reservation of jurisdiction, the Supreme Court explained: "In denying the Federal Power

Commission jurisdiction to regulate the production or gathering of natural gas, it was not the purpose of Congress to free companies such as petitioner from effective public control. The purpose of that restriction was, rather to preserve in the States powers of regulation in areas in which the States are constitutionally competent to act. . . . It was the intention of Congress to give the States full freedom in these matters." *Interstate Nat. Gas Co. v. Federal Power Comm'n*, 331 U.S. 682, 690 (1947). Logically, the same statement applies to §1(b)'s reservation of state/local jurisdiction over gas distribution.

In contrast to the overblown claims made by the Gas Association about it, the "regulatory compact" merely expresses the familiar, uncontroversial tradeoff of a utility service: "the State sanctions a utility's monopoly within a defined service area and subjects the utility to various regulatory restrictions and responsibilities," *Tyus v. Indianapolis Power & Light Co.*, 134 N.E.3d 389, 405-6 (Ind. Ct. App. 2019), and "the utility is allowed to earn a fair rate of return on its rate base," *PacifiCorp v. Pub. Serv. Comm'n of Wyo.*, 103 P.3d 862, 871 (Wyo. 2004).

But utilities have always faced the risk that sudden market shifts or competing public policies could lead to stranded investments. Sometimes the utility must absorb those losses; sometimes it can recoup a portion of value from ratepayers. *See, e.g.*, *Citizens for Fair Rates & the Environment v. N.M. Pub. Reg. Comm'n*, 503 P.3d 1138, 1154 (N.M. 2022) (upholding New Mexico law allowing utilities to recover partial value on coal plants abandoned due to climate policy); *Abrams v. Pub. Serv. Comm'n*, 67 N.Y.2d 205, 210, 218 (1986) (upholding rate

recovery for hydroelectric project abandoned due to opposition from conservation groups); *Matter of Rochester Gas & Elec. Corp. v. Public Serv. Comm'n*, 85 A.D.2d 486, 449 N.Y.S.2d 77 (1982) (denying rate recovery for property acquired for siting of canceled nuclear plants).

The "regulatory compact" and related notions of due process do not insure against these risks. *Federal Power Comm'n v. Nat. Gas Pipeline Co. of Amer.*, 315 U.S. 575, 590 (1942) ("But regulation does not insure that the business shall produce net revenues, nor does the Constitution require that the losses of the business in one year shall be restored from future earnings . . . the hazard that the property will not earn a profit remains on the company in the case of a regulated, as well as an unregulated business."); *Abrams*, 67 N.Y.2d at 217 ("Neither justice nor the Constitution obliges consumers to ensure a profitable return on an unprofitable enterprise."); *Tyus*, 134 N.E.3d at 407 ("The arrangement between the State and a utility is not a guarantee that a utility will suffer no unexpected expenses."). Nor due the regulatory and due process assertions raised by the Gas Association's brief bear at all on the preemption question before the Court.

CONCLUSION

The Gas Association's brief *amicus curiae* is off topic, inaccurate, and should be disregarded.

BRISCOE IVESTER & BAZEL LLP

DATED: April 14, 2022

By: /s/ Tony Francois
Tony Francois
Attorneys for Defendant-Appellee
CITY OF BERKELEY

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify the following:

This reply complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because it contains 1,505 words.

This reply complies with the typeface requirements of the Federal Rule of Appellate Procedure 32(a)(5), and the type style requirements of the Federal Rule of Appellate Procedure 32(a)(6), because this reply has been prepared in a proportional spaced typeface using Microsoft word in a 14-point Times New Roman font.

DATED: April 14, 2022

/s/ Tony Francois
Tony Francois

CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2022, I electronically filed the foregoing with the clerk of the Court using the CM/ECF system which will send notification of such filing to all registered CM/ECF users.

DATED: April 14, 2022

/s/ Tony Francois

Tony Francois