

FANNING THE FLAMES: SECOND CIRCUIT SPLITS WITH NINTH CIRCUIT ON FEDERAL PREEMPTION OF NATURAL GAS RESTRICTIONS

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For years, the fight over state and local natural gas bans played out largely through a patchwork of local regulations and district court cases, with one notable exception: the Ninth Circuit's 2024 decision in *California Restaurant Association v. City of Berkeley (CRA)*.¹ This summer, it reached a second courts of appeals—the Second Circuit—producing a circuit split. Since 2024, *CRA* had been the sole appellate word on the issue, holding that the federal Energy Policy and Conservation Act (EPCA) preempts local gas bans.² But in late June, the Second Circuit broke from *CRA* in *Mulhern Gas*, upholding New York's fossil-fuel appliance bans and rejecting *CRA*'s reasoning under EPCA.³ Days later, the Ninth Circuit itself added ambiguity in *Rinnai America*, upholding a California emissions rule on narrower grounds and distinguishing *CRA*.⁴ The result is a fractured landscape that makes US Supreme Court review of EPCA preemption a real possibility.

THE SECOND CIRCUIT BREAKS FROM NINTH CIRCUIT AND UPHOLDS NEW YORK'S GAS BANS

On 30 June 2026, the Second Circuit held in *Mulhern Gas Co., Inc. v. Mosley and Association of Contracting Plumbers of the City of New York, Inc. v. City of New York* that EPCA does not expressly preempt two New York measures: (1) the state's directive to adopt regulations prohibiting fossil-fuel appliances in new buildings; and (2) New York City's Local Law 154, which prohibits combustion emitting 25 kilograms or more of carbon dioxide per million Btu in new residential buildings.⁵ The court's analysis turned on EPCA's definition of “energy use,” which the statute defines as “the quantity of energy directly consumed by a consumer product at point of use, determined in accordance with test procedures.”⁶ That, the court reasoned, is a fixed measure set by controlled testing before a product reaches consumers; nothing a consumer does afterwards changes that appliance's “energy use.”⁷ As a consequence, a law that bars consumers from using an appliance has “little to do” with that appliance's “energy use” as EPCA defines the term.⁸

On that reading, the challenged laws govern the type of energy an appliance consumes, not the amount, and so they fall outside of EPCA's reach. That framing put the Second Circuit in direct conflict with the Ninth Circuit's *CRA* decision, which read “energy use” to “fairly encompass[] an ordinance that effectively eliminates the 'use' of an energy source.” The court found that *CRA* “halves the statutory definition”—seizing on the phrase “point of use” while ignoring the EPCA's requirement that energy use be “determined in accordance with test procedures”—and thereby “render[s] meaningless” part of the statute's text.

Acknowledging the significance of its departure, the Second Circuit found “the reasons for divergence too compelling” and “reluctantly” concluded it was necessary to “create a split among the Circuits,” expressly adopting Judge Friedland’s *CRA* dissent as “the better interpretation.”⁹

THE NINTH CIRCUIT NARROWS ITS OWN APPROACH TO EPCA PREEMPTION, ALLOWING SOME EMISSIONS REGULATION

Two days after *Mulhern Gas*, the Ninth Circuit upheld the South Coast Air Quality Management District Rule 1146.2 in *Rinnai America Corporation v. South Coast Air Quality Management District*. The rule phases in bans on gas-fired water heaters, boilers, and process heaters emitting more than zero nitrous oxides—an emissions standard adopted under the federal Clean Air Act (CAA) to bring the nation’s smoggiest air basin into ozone attainment.¹⁰

Writing for the majority, Judge Koh held that EPCA does not preempt the rule on two independent grounds: first, EPCA does not reach appliance emissions standards enacted under the CAA, and second, the rule in any event regulates “process heaters,” which EPCA does not cover.¹¹ Critically, *Rinnai America* cabins *CRA* rather than repudiating it. The court distinguished *CRA*—which struck down a building code barring gas piping at the point of delivery, rendering appliances useless—from Rule 1146.2, which erects no barrier to natural gas and dictates only emissions, not the amount or type of energy used.¹² The court reiterated *CRA*’s description of itself as “very narrow.”¹³ The upshot is that even within the Ninth Circuit, CAA emissions rules now stand on different footing than *CRA*-style gas bans.

As a result of these two circuit court decisions, we have a landscape in which outright bans on fossil-fuel appliances survive in the Second Circuit but remain preempted in the Ninth, while CAA-based emissions rules stand apart from both.

LOOKING AHEAD

Both the *Mulhern Gas* and *Rinnai America* decisions are subject to further review. Indeed, plaintiffs-appellants in both cases have been granted extensions of time to file petitions for panel or *en banc* rehearing, and briefing is expected to be filed in both in the coming months. If rehearing is denied (or not sought), the plaintiffs-appellants would have 90 days from the date of the judgment or denial of rehearing to file a petition for a writ of certiorari in the US Supreme Court.¹⁴ Given that the Second Circuit has now expressly acknowledged the circuit split with the Ninth Circuit and the national significance of the EPCA preemption question for building electrification policy, *Mulhern Gas* presents a strong candidate for Supreme Court review.

The back-to-back decisions in *Mulhern Gas* and *Rinnai America* represent a potential watershed moment in the ongoing debate over state and local natural gas restrictions. In practical terms, enforceability depends on where a new construction project is located and how the applicable rule is written. For now, outright fossil-fuel bans remain enforceable in the Second Circuit but are preempted under *CRA* in the Ninth, while CAA emissions rules may fare differently than outright bans. Stakeholders across the energy, construction, manufacturing, and real estate sectors—especially those operating across multiple jurisdictions—will need to weigh how this evolving patchwork affects their planning, while closely monitoring these litigation developments, which could set the stage for a

definitive national resolution by the Supreme Court on whether EPCA preempts state and local fossil-fuel appliance restrictions.

We will continue to monitor these developments and provide timely updates as the legal landscape evolves.

FOOTNOTES

¹ For K&L Gates's prior coverage of this litigation, see David L. Wochner et al., [*Heat Check: Federal Courts Weigh In on Natural Gas Appliance Restrictions*](#) (K&L Gates Apr. 1, 2026); Varu Chilakamarri et al., [*Natural Gas Bans: From New York to Washington, Courts Shift the Landscape on Legality of State and Local Gas Bans*](#) (K&L Gates Apr. 7, 2025); Benjamin A. Mayer et al., [*It's a Gas! Federal and State Developments Continue to Light Up the Natural Gas Debate*](#) (K&L Gates Feb. 26, 2024); David L. Wochner et al., [*Ninth Circuit Cans Berkeley Gas Ban Under Federal Law*](#), (K&L Gates Apr. 21, 2023).

² *Cal. Rest. Ass'n v. City of Berkeley*, 89 F.4th 1094 (9th Cir. 2024).

³ *Mulhern Gas Co., Inc. v. Mosley*, Nos. 25-977 & 25-2041, slip op. at 39 (2d Cir. June 30, 2026).

⁴ *Rinnai Am. Corp. v. South Coast Air Quality Mgmt. Dist.*, No. 25-5129, slip op. at 25–32 (9th Cir. July 2, 2026). K&L Gates represented amicus curiae Navien, Inc. in the proceeding.

⁵ See N.Y.C. Local Law No. 154 (2021); N.Y. Energy L. § 11-104(6)–(8); N.Y. Exec. L. § 378(19).

⁶ *Mulhern Gas*, slip op. at 39 (quoting 42 U.S.C. § 6291(4)).

⁷ *Id.* at 11.

⁸ *Id.*

⁹ *Id.* at 39.

¹⁰ *Rinnai America*, slip op. at 12-15.

¹¹ *Id.* at 17–18, 33.

¹² *Id.* at 27–28.

¹³ *Id.* at 30.

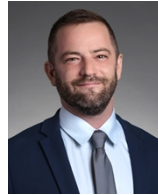
¹⁴ Supreme Court Rule 13.1.

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