

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.

Appeal from the United States District Court
For the Northern District of California
Honorable Yvonne Gonzales Rogers
(4:19-cv-07668-YGR)

**BRIEF OF *AMICUS CURIAE* SIERRA CLUB
IN SUPPORT OF PETITION FOR REHEARING EN BANC**

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RULE 29 STATEMENTS

Pursuant to Ninth Cir. R. 29-2(a), *amicus curiae* certifies that all parties in this proceeding have consented to the filing of this amicus brief.

Pursuant to Fed. R. App. P. 29(b)(4), (a)(4)(E), *amicus curiae* states that no party or party's counsel authored this brief in whole or in part, and that no other person besides *amicus curiae* or its counsel contributed money that was intended to fund preparation or submittal of this brief.

/s/ Gloria Smith
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June 12, 2023

TABLE OF CONTENTS

	Page
RULE 29 STATEMENTS	1
IDENTITY AND INTERESTS OF <i>AMICUS</i>	1
INTRODUCTION AND SUMMARY OF ARGUMENT	1
ARGUMENT	2
I. This Case’s Implications for State and Local Clean Building Policies Are of Exceptional Importance to Climate, Air Quality, and Health.....	2
A. <i>Burning Gas in Buildings Is a Major Source of Greenhouse Gas Emissions and Health-Harming Pollution.</i>	2
B. <i>State and Local Clean Building Policies Across the Ninth Circuit Are Critical for Achieving Climate, Air Quality, and Health Objectives.</i>	7
C. <i>The Panel’s Sweeping Decision Threatens State and Local Authority to Adopt Clean Building Policies.</i>	12
CONCLUSION	14
CERTIFICATE OF COMPLIANCE.....	15
CERTIFICATE OF SERVICE	16

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Ctr. for Cmty. Action & Env’t Just. v. Fed. Aviation Admin.</i> , 61 F.4th 633 (9th Cir. 2023)	6
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STATUTES	
42 U.S.C. § 7407(a)	11
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IDENTITY AND INTERESTS OF *AMICUS*

Founded in 1892, Sierra Club is the nation’s oldest and largest grassroots environmental organization, with more than 715,000 members and 1.8 million supporters, including over 230,000 members in Ninth Circuit States. For decades, Sierra Club has supported policies that limit our nation’s dependence on fossil fuels and promote clean energy. Sierra Club has played a critical advocacy role in developing, enacting, and defending clean building policies throughout the Ninth Circuit, including many local building electrification policies across California and beyond, and Washington’s landmark statewide clean building codes.

INTRODUCTION AND SUMMARY OF ARGUMENT

Buildings are major emitters of climate-destabilizing and health-harming pollution, including indoor pollution that directly exposes children to dangerous concentrations of toxic gases. Policymakers across the Ninth Circuit have determined that clean building policies—like the Berkeley ordinance in question, which represents an exercise of traditional police powers—are indispensable for achieving their climate, air quality, and health goals.

As set forth in the City’s rehearing petition and the other supporting *amicus* briefs, the panel decision fundamentally misreads and misapplies the Energy Policy and Conservation Act (“EPCA”) as preempting essential public health and climate protections that have nothing to do with the energy efficiency of EPCA-

covered products. If allowed to stand, the panel decision would eliminate important tools for reducing climate pollution and protecting air quality, at a time when we cannot afford delay. Its sweeping language and undefined scope have already invited lawsuits against urgently needed initiatives and are sure to have chilling effects on local governments pursuing clean building policies of all kinds.

Because overturning the misguided panel decision is “of exceptional importance” to preserving States’ and localities’ traditional and critical authority to curb emissions from buildings, the Court should grant rehearing en banc. *See* Fed. R. App. P. 35(a)(2).

ARGUMENT

I. This Case’s Implications for State and Local Clean Building Policies Are of Exceptional Importance to Climate, Air Quality, and Health.

A. Burning Gas in Buildings Is a Major Source of Greenhouse Gas Emissions and Health-Harming Pollution.

Climate destabilization caused by greenhouse gas emissions—a significant portion of which are generated by burning fossil fuels in buildings—poses an existential threat to human health, welfare, and the environment. The United Nations recently declared that the “window of opportunity to secure a liveable and sustainable future for all,” by drastically reducing emissions in all sectors, is

rapidly closing¹ and delivered its most alarming assessment to date of the impacts of climate change, including increasingly deadly heat waves, wildfires, drought, and floods.² These climate-driven disasters have become all too familiar to residents of Ninth Circuit States, where some of the most extreme impacts have been felt.³

Recognizing the importance of local action, the United Nations assessment highlights urban systems as “critical for achieving deep emissions reductions,” and explicitly emphasizes the “design, construction, retrofit, and use of buildings” as key emission mitigation elements.⁴ Likewise, policymakers in Berkeley, across

¹ United Nations Intergovernmental Panel on Climate Change, *Climate Change 2023: Synthesis Report of the Sixth Assessment Report: Summary for Policymakers* 24 (2023) [hereinafter *IPCC SYR AR6*], https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf.

² *Id.* at 5–7.

³ Sjoukje Y. Philip et al., *Rapid Attribution Analysis of the Extraordinary Heat Wave on the Pacific Coast of the US and Canada in June 2021*, 13 *Earth Sys. Dynamics* 1689, 1690 (2022), <https://doi.org/10.5194/esd-13-1689-2022> (finding that the 2021 Pacific Northwest heat wave was “virtually impossible without human-caused climate change”); A. Park Williams et al., *Rapid Intensification of the Emerging Southwestern North American Megadrought in 2020–2021*, 12 *Nature Climate Change* 232 (2022), <https://doi.org/10.1038/s41558-022-01290-z>; U.S. Env’t Prot. Agency, *Climate Change Indicators: Wildfires: Figure 5. Change in Annual Burned Acreage by State between 1984-2001 and 2002-2020*, <https://www.epa.gov/climate-indicators/climate-change-indicators-wildfires> (last updated Mar. 21, 2023); Cal. Governor’s Office Plan. & Rsch. et al., *California’s Fourth Climate Change Assessment: Statewide Summary Report* (2018), https://www.energy.ca.gov/sites/default/files/2019-11/Statewide_Reports-SUM-CCCA4-2018-013_Statewide_Summary_Report_ADA.pdf.

⁴ *IPCC SYR AR6*, *supra* note 1, at 29.

California, and throughout the Ninth Circuit (and beyond) have recognized the need for aggressive action on building emissions.⁵ Commercial and residential buildings are responsible for over 96 million metric tons of annual greenhouse gas emissions in Ninth Circuit States, representing over 12 percent of those States' total emissions (almost as much climate pollution as produced by the States' fossil fuel power generation)⁶ and producing climate harm whose monetized value is over \$18.6 billion.⁷ In Berkeley, gas combustion in buildings accounts for over 30 percent of all climate pollution.⁸

⁵ See, e.g., Cal. Air Res. Bd., *2022 Scoping Plan for Achieving Carbon Neutrality* 13, 211–15 (2022) [hereinafter *CARB 2022 Scoping Plan*], <https://ww2.arb.ca.gov/sites/default/files/2022-11/2022-sp.pdf> (“Achieving carbon neutrality must include transitioning away from fossil gas in residential and commercial buildings... .”); Bay Area Air Quality Mgmt. Dist., *Final Staff Report: Proposed Amendments to Building Appliance Rules* 16, 23–25 (2023) [hereinafter *BAAQMD Staff Report*], https://www.baaqmd.gov/~/media/dotgov/files/rules/reg-9-rule-4-nitrogen-oxides-from-fan-type-residential-central-furnaces/2021-amendments/documents/20230307_fsr_rules0904and0906-pdf.pdf?la=en (“As one of the largest single contributors to District-wide NOx emissions from stationary sources, Air District staff sees the further regulation of emissions from [commercial and residential gas combustion] as a key opportunity... .”).

⁶ Data compiled from U.S. Env'tl Prot. Agency, *Greenhouse Gas Inventory Data Explorer* [hereinafter *EPA GHG Inventory*], <https://cfpub.epa.gov/ghgdata/inventoryexplorer/> (last updated May 16, 2023).

⁷ Based on the latest social cost of carbon estimates in U.S. Env'tl Prot. Agency, *Report on the Social Cost of Greenhouse Gases: Estimates Incorporating Recent Scientific Advances - External Review Draft* 120 (2022), https://www.epa.gov/system/files/documents/2022-11/epa_scghg_report_draft_0.pdf.

⁸ City of Berkeley, *Climate Action Plan Report* 3 (2022), https://berkeleyca.gov/sites/default/files/2022-05/February%208%202022%20CAP%20Workshop_Slides_final_0.pdf.

Buildings are also major contributors to both ambient and indoor air pollution, with serious consequences for public health. In Ninth Circuit States, fossil fuel combustion in the residential and commercial sectors emits over 72,000 tons of annual ambient nitrogen oxide pollution (“NO_x”), one of the six “criteria pollutants” that are the primary focus of the Clean Air Act.⁹ These emissions cause direct health harms, and they contribute to the formation of other harmful criteria pollutants including fine particle pollution (“PM_{2.5}”) and ozone, the main component of smog. According to the U.S. Environmental Protection Agency’s *Co-Benefits Risk Assessment Health Impacts Screening and Mapping Tool*, building emissions from Ninth Circuit States may cause more than 8,500 asthma attacks, 160 heart attacks, and 600 premature deaths, at a monetized cost of over \$6.7 billion.¹⁰ These harms fall disproportionately on people of color, who,

⁹ Data compiled from U.S. Env’t Prot. Agency, *2020 National Emissions Inventory (NEI) Data Retrieval Tool*, <https://www.epa.gov/air-emissions-inventories/2020-national-emissions-inventory-nei-data> (last updated May 31, 2023).

¹⁰ U.S. Env’t Prot. Agency, *Co-Benefits Risk Assessment Health Impacts Screening and Mapping Tool (COBRA): Cobra Web Edition*, <https://cobra.epa.gov/> (last visited June 10, 2023). Values are estimated by reducing all residential and commercial/institutional fossil fuel emissions by 100 percent at a 3 percent discount rate, and do not include Alaska or Hawaii.

nationwide, are exposed to approximately 90 percent more ambient PM_{2.5} from residential gas combustion than are whites.¹¹

Finally, emissions sources like gas stoves, which are not directly vented to the outdoors, pollute indoor air in the homes and businesses where they are used. A growing body of research shows that gas stoves frequently cause indoor NO_x concentrations to exceed health-based standards for outdoor air.¹² Children living in homes with gas stoves are 42 percent more likely to experience asthma symptoms.¹³ Nearly 13 percent of childhood asthma nationwide is attributable to gas stove use, and in California that figure is over 20 percent.¹⁴ As with building pollution's climate and outdoor air quality effects, the harms of indoor pollution

¹¹ Christopher W. Tessum et al., *PM_{2.5} Polluters Disproportionately and Systemically Affect People of Color in the United States*, 7 *Sci. Advances* eabf4491, supplementary data file S2 (2021), <https://doi.org/10.1126/sciadv.abf4491>; see also *Ctr. for Cmty. Action & Env't Just. v. Fed. Aviation Admin.*, 61 F.4th 633, 655 (9th Cir. 2023) (Rawlinson, J., dissenting) (discussing environmental racism).

¹² WE ACT for Env't J., *Out of Gas, In With Justice: Studying the Impacts of Induction Stoves on Indoor Air Quality in Affordable Housing* 15, 25 (2023) [hereinafter *WE ACT Out of Gas*], <https://www.weact.org/wp-content/uploads/2023/02/Out-of-Gas-Report-FINAL.pdf>; Jennifer M. Logue et al., *Pollutant Exposures from Natural Gas Cooking Burners: A Simulation-Based Assessment for Southern California*, 122 *Env't Health Persps.* 43 (2014), <https://doi.org/10.1289/ehp.1306673>.

¹³ Weiwei Lin et al., *Meta-Analysis of the Effects of Indoor Nitrogen Dioxide and Gas Cooking on Asthma and Wheeze in Children*, 42 *Int'l J. Epidemiology* 1724, 1728 (2013), <https://doi.org/10.1093/ije/dyt150>.

¹⁴ Talor Gruenwald et al., *Population Attributable Fraction of Gas Stoves and Childhood Asthma in the United States*, 20 *Int'l J. Env't Rsch. & Pub. Health* 75 (2023), <https://doi.org/10.3390/ijerph20010075>.

from gas stoves fall disproportionately on people of color and low-income households, who more frequently live in smaller homes with poor ventilation, where this pollution accumulates more readily.¹⁵

In light of these exceptionally important climate, air quality, and health issues, it is no surprise that a large and growing number of States and municipalities have enacted policies to limit gas combustion in their buildings.

B. State and Local Clean Building Policies Across the Ninth Circuit Are Critical for Achieving Climate, Air Quality, and Health Objectives.

Recognizing the magnitude of the climate crisis and the need for responses to address building emissions, States and localities across the Circuit (and beyond) have followed Berkeley's lead and enacted a range of similar clean building policies. Many of these policies take the form of local ordinances akin to Berkeley's that prohibit gas infrastructure in new buildings.¹⁶ Other jurisdictions have adopted building code provisions that require all-electric new construction, including many of the 76 California municipalities that have enacted building

¹⁵ *WE ACT Out of Gas*, *supra* note 12, at 16; Yifang Zhu et al., *Effects of Residential Gas Appliances on Indoor and Outdoor Air Quality and Public Health in California*, UCLA Fielding Sch. Pub. Health, at 6–6, 16–17, 24–26 (Apr. 2020), <https://ucla.app.box.com/s/xyzt8jclixnetiv0269qe704wu0ihif7>.

¹⁶ *See, e.g.*, Sierra Club, *Eugene Becomes First Oregon City to Phase out Gas in New Construction* (Feb. 7, 2023), <https://www.sierraclub.org/press-releases/2023/02/eugene-becomes-first-oregon-city-phase-out-gas-new-construction>.

electrification policies.¹⁷ Washington scaled up this approach with its landmark statewide codes that require heat pump space and water heating systems in new residential and commercial construction,¹⁸ in line with a statutory goal of achieving “zero fossil-fuel greenhouse gas emission homes and buildings by the year 2031.” Wash. Rev. Code § 19.27A.020(2)(a). Finally, state and regional air quality agencies in California have proposed or enacted zero-emission standards for new space and water heating equipment that aim to align both new and existing buildings with climate targets and air quality standards.¹⁹

¹⁷ Kayah Swanson, *California’s Cities Lead the Way on Pollution-Free Homes and Buildings*, Sierra Club (Feb. 14, 2023), <https://www.sierraclub.org/articles/2021/07/californias-cities-lead-way-pollution-free-homes-and-buildings>.

¹⁸ Sierra Club, *Washington State Will Build New Homes with Heat Pumps to Cut Energy Costs and Climate Pollution, Protect Health* (Nov. 4, 2022), <https://www.sierraclub.org/press-releases/2022/11/washington-state-will-build-new-homes-heat-pumps-cut-energy-costs-and>; Sierra Club, *Washington State Takes Strongest Clean Commercial Building Action in the Nation* (Apr. 22, 2022), <https://www.sierraclub.org/press-releases/2022/04/washington-state-takes-strongest-clean-commercial-building-action-nation>.

¹⁹ See Cal. Air Res. Bd., *2022 State Strategy for the State Implementation Plan 101–03* (2022) [hereinafter *CARB SIP Strategy*], https://ww2.arb.ca.gov/sites/default/files/2022-08/2022_State_SIP_Strategy.pdf; Bay Area Air Quality Mgmt. Dist., *Rules 9-4 and 9-6 Building Appliances*, <https://www.baaqmd.gov/rules-and-compliance/rule-development/building-appliances>, (last visited June 12, 2023); South Coast Air Quality Mgmt. Dist., *2022 Air Quality Management Plan 4-13 to 4-15* (2022) [hereinafter *SCAQMD 2022 AQMP*], <http://www.aqmd.gov/docs/default-source/clean-air-plans/air-quality-management-plans/2022-air-quality-management-plan/final-2022-aqmp/final-2022-aqmp.pdf?sfvrsn=16>.

The emission reduction benefits from these clean building policies are massive. Washington’s clean commercial building codes have been projected to avoid over 8 million tons of climate pollution by 2050, preventing \$900 million in monetized climate harm—with many additional reductions achievable through the State’s residential codes.²⁰ The California Air Resources Board estimates that its proposed zero-emission standards for new space and water heating equipment could reduce NO_x and greenhouse gas emissions from the State’s buildings 40 percent within just seven years of enactment,²¹ yielding 22 million metric tons of annual climate pollution reductions.²² And the dozens of local codes and ordinances enacted across the Circuit provide significant emission reduction benefits for both the climate and local residents’ health.

These state and local clean building policies are critical elements of strategies to meet climate, health, and air quality targets. Washington’s State Energy Strategy—its “blueprint for how [to] nearly eliminate the use of climate-threatening fossil fuels”—points to all-electric state building codes as essential to

²⁰ Jonny Kocher & Talor Gruenwald, *Washington State Could Lead the Nation on Building Electrification Codes*, RMI (Jan. 3, 2022), <https://rmi.org/washington-state-could-lead-the-nation-on-building-electrification-codes/>.

²¹ Cal. Air Res. Bd., *2022 State Strategy for the State Implementation Plan: Draft Measures Workshop* 96 (2021), https://ww2.arb.ca.gov/sites/default/files/2021-10/2022_SSS_October_Workshop_Presentation.pdf.

²² Based on data from *EPA GHG Inventory*, *supra* note 6.

meeting the State’s statutory decarbonization targets.²³ Similarly, California’s plan for meeting its statutory decarbonization targets identifies the City of Oakland’s all-electric new construction requirements as an example of the kinds of local policies needed to meet state climate goals.²⁴ In a report presented to Oregon’s Multnomah County Board of Commissioners, the County’s Health Department recommended “a transition away from combusting appliances in favor of healthy electric alternatives wherever possible,” as a public health measure “[t]o protect against pollution-driven respiratory problems.”²⁵

Finally, California’s statewide Air Resources Board and regional air districts have found that zero-emission new appliance standards are necessary to achieve National Ambient Air Quality Standards within their jurisdictions and have

²³ Wash. State Dep’t Com., *Washington 2021 State Energy Strategy* 3, 74–75 (2020), <https://www.commerce.wa.gov/wp-content/uploads/2020/12/Washington-2021-State-Energy-Strategy-December-2020.pdf>.

²⁴ *CARB 2022 Scoping Plan*, *supra* note 5, at 267–68.

²⁵ Multnomah Cnty., *Multnomah County Health Department Report Recommends Transitioning Away from Gas Stoves Over Health Concerns* (Nov. 10, 2022), <https://www.multco.us/multnomah-county/news/multnomah-county-health-department-report-recommends-transitioning-away-gas>.

incorporated these standards into California’s State Implementation Plan strategy.²⁶ Crucially, the Clean Air Act’s system of cooperative federalism depends on States’ authority to enact clean building policies they deem necessary to attain federal air quality requirements, which States have primary responsibility to ensure under the Act. 42 U.S.C. § 7407(a).

More broadly, American federalism recognizes States’ essential role as laboratories of democracy in devising solutions to pressing problems such as climate change.²⁷ It is exactly this role, which States and cities in the Ninth Circuit have played for decades through adoption of vanguard environmental policies that have received deference from Congress,²⁸ that the panel decision would undermine

²⁶ *CARB SIP Strategy*, *supra* note 19, at 101–03; *SCAQMD 2022 AQMP*, *supra* note 19, at ES-5 (“[T]here is no viable pathway to achieve the needed [NO_x emissions] reductions without widespread adoption of zero emissions ... technologies across all ... stationary sources, large and small.”); *BAAQMD Staff Report*, *supra* note 5, at 3; *see also* Bay Area Air Quality Mgmt. Dist., *Notice of Public Hearing* (Apr. 5, 2023), https://www.baaqmd.gov/~media/dotgov/files/rules/reg-9-rule-4-nitrogen-oxides-from-fan-type-residential-central-furnaces/2021-amendments/documents/20230405_phn_sip_rg0904_rg0906-pdf.pdf?la=en (announcing district’s intent to consider submission of standards for inclusion in State Implementation Plan).

²⁷ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

²⁸ *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1079 (9th Cir. 2013) (“California’s role as a leader in developing air-quality standards has been explicitly endorsed by Congress in the face of warnings about a fragmented national market.”).

through faulty interpretation of a statute that does not even purport to concern itself with pollution control.

C. The Panel’s Sweeping Decision Threatens State and Local Authority to Adopt Clean Building Policies.

If left to stand, the panel’s troublingly expansive decision would eliminate important mechanisms for reducing climate change-causing emissions as the clock runs out on our time to act. It would also hamstring States’ and localities’ ability to protect their residents from health-harming pollution. Dozens of ordinances patterned on Berkeley’s would be invalidated, but the trouble would not end there.

The decision’s untenably broad language and the lack of any discernible limiting principle cast a shadow over clean building policies of all kinds. Indeed, the decision’s chilling effect has already been felt in Washington. Last month, the Washington State Building Code Council voted to delay implementation of clean building codes following a lawsuit brought by local gas companies.²⁹ The gas companies’ complaint relies on the same illogical reasoning as the panel decision—that is, a State’s prohibition of an appliance is a preempted “regulation concerning the ... energy use” of that appliance because such prohibition (or a requirement that one category of appliance is used rather than another) amounts to

²⁹ See David Iaconangelo, “Washington State Hits the Brakes on Landmark Gas Ban,” E&E News, May 25, 2023, <https://www.eenews.net/articles/washington-state-hits-the-brakes-on-landmark-gas-ban/>.

a requirement that the appliance use *no* energy. *Rivera v. Wash. State Bldg. Code Comm'n*, No. 1:23-cv-03070 (E.D. Wash.), Compl. ¶¶ 61–70, ECF No. 1, May 22, 2023.

Already, the threat of lawsuits like the Washington case has caused municipalities that would otherwise pursue needed clean building policies to take a cautious approach, for fear of the panel decision’s “broad reasoning that could be read to mean that *any* state or local law that in effect precludes (or even reduces) the use of natural gas is preempted.”³⁰ Litigation taking aim at the authority of States and municipalities to exercise their long-held police powers will abound if the panel’s decision, which fundamentally misapprehends our federal-state system, is left uncorrected.

The immense and complex challenge of climate change, which cuts across all sectors of the economy, requires States and localities to act in the areas where they are uniquely positioned to do so. The regulation of construction, local infrastructure, and building emissions is one such area, falling squarely within the traditional sphere of local authority.³¹ Berkeley and many other localities have

³⁰ Jeffrey Melching, Irvine City Attorney, *Request for City Council Action: Building Electrification Ordinance Update and Options 2* (June 13, 2023) (emphasis in original), https://irvine.granicus.com/MetaViewer.php?view_id=&event_id=2221&meta_id=140899.

³¹ Br. of *Amici Curiae* Nat’l League of Cities et al. 5–7, Docket Entry 32; Br. of *Amici Curiae* California et al. 27–30, Docket Entry 34; Br. of *Amici Curiae* Energy & Environmental Law Professors 8, Docket Entry 38.

answered the call, adopting clean building policies that make major strides to tackle these decidedly local sources of climate and air pollution. The federal government, which to date has been unable to adequately address the challenge of building emissions, is encouraging this local leadership,³² and has endorsed an interpretation of EPCA that would allow it to continue.³³ Neither EPCA's text, context, nor history suggest that it broadly forecloses this necessary state and local leadership, and the Court should grant rehearing to restore it.

CONCLUSION

For these reasons, the Court should grant rehearing en banc.

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³² Inflation Reduction Act, Pub. L. No. 117-169 § 50131, 136 Stat. 2041–42 (2022); U.S. Dep't Energy, *Technical Assistance for the Adoption of Building Energy Codes*, <https://www.energy.gov/scep/technical-assistance-adoption-building-energy-codes> (last visited June 10, 2023).

³³ Br. of United States, Docket Entry 33.

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Circuit Rule 35-4 and 40-1, this brief of *amicus curiae* is prepared in a format, typeface, and type style that complies with Fed. R. App. P. 32(a)(4)-(6) and contains 3038 words.

Dated: June 12, 2023

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CERTIFICATE OF SERVICE

I certify that on June 12, 2023, I electronically filed the foregoing document with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all other parties in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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