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(Submitted via the ISOR Comment Submittal Form and by email to cleancars@arb.ca.gov)

Liane Randolph
Chair, California Air Resources Board
1001 I Street
Sacramento, CA 95814

Re: Comments on Advanced Clean Cars II Regulation Initial Statement of Reasons

Dear Chair Randolph:

The Valero family of companies (representing operating subsidiaries of Valero Energy Corporation – collectively “Valero”) plays a significant role in the California fuel market. In addition to operating two petroleum refineries, Valero is one of the largest, if not the largest, producers of low carbon renewable fuels supplied into California. Using existing infrastructure, our renewable fuels are being used today by the current vehicle fleet to generate the lion’s share of the actual GHG emission reductions that have been achieved from the California transportation sector under the California Low Carbon Fuel Standard. Currently, there are efforts underway to produce greater volumes of renewable fuels and to further reduce the carbon intensity of these fuels. With innovation in feedstocks and production processes and carbon capture opportunities, Valero’s low-carbon liquid fuels have outperformed, and have the continuing potential to outperform, the mandated technology choice of CARB in its ACC II proposal, on a full life-cycle carbon intensity basis as well as on a cost basis.

Valero encourages the California Air Resources Board (CARB) to reevaluate its current approach to the ACC II Program. The proposed ACC II rule seems to have been outcome determinative, designed to meet the Governor’s stated goal to electrify the transportation sector. This political goal appears to have foreclosed meaningful consideration of any low carbon option other than electrification – even if such options would achieve the same or better full life-cycle reduction, achieve reductions earlier, achieve reductions at lower cost, and achieve reductions with greater energy security. In addition to being legally impermissible under both State and Federal law, as detailed in these comments, the draft ACC II rule would forego meaningful near-term and longer emission reductions opportunities with low-carbon fuels and would have potentially severe consequences to the welfare of Californians and California businesses.

Valero offers these comments on the ACC II Program and associated ISOR to aid CARB in identifying critical gaps in legally mandated analyses that, if addressed, likely would result in a program markedly different than proposed, one which would establish the emission reduction standards to be met and challenge industry to compete to develop the most efficient and effective approaches to satisfy them. We respectfully suggest that CARB pause the current rulemaking effort to conduct the analyses recommended in these and

other comments. In the meantime, this would provide an opportunity to address some of the policy issues presented in ACC II in the context of the pending Scoping Plan update.

Valero appreciates the Board's consideration of the following comments, and we would welcome the opportunity to engage with CARB on the ACC II Program.

Respectfully yours,



Deepak Garg
VP Fuels Regulatory Planning & HSE Assurance

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VALERO'S COMMENTS ON THE PROPOSED ACC II RULE

I. CARB Should Not Proceed with the Rule until the State Implements New Programs to Mitigate Its Significant Negative Economic Impact on Californians.

As CARB's own analysis demonstrates, the Proposed Regulation will inflict harm on California's economy and make living in a state where the cost of living is already high that much more unaffordable. Although Executive Order N-79-20 ("EO"), Governor Newsom's mandate to transition to a statewide ZEV fleet and away from fossil fuels, calls for certain agencies to "identify" actions and investment strategies to improve public transportation options to ensure clean transportation solutions are accessible to all Californians,¹ it does not (and legally, cannot) provide the tremendous amount of funds necessary to fully mitigate the harmful economic impacts the Proposed Regulation will have. Ordering the phase-out of traditional vehicles without ensuring that these affordable alternative transportation options and critical supporting funds are already in place puts the cart before the horse.

CARB's Standardized Regulatory Impact Assessment ("SRIA") acknowledges that the Proposed Regulation would negatively impact nearly every major economic category the agency analyzed, including GSP, personal income, employment, and output.² Although the SRIA acknowledges that severe negative economic impacts are anticipated for specific businesses in the economy, it downplays them. For example, CARB estimates the cost of the Proposed Regulation to vehicle manufacturers to be "an average annual cost of \$199.4 million and a cumulative cost of about \$3.2 billion through 2040."³ Valero agrees with CARB's observation that "these direct costs are ultimately passed through to end-users in California,"⁴ but these costs are likely understated; each electric vehicle enjoys thousands of dollars' worth of Federal and state subsidies, which are ultimately funded by taxpayers, and automakers' ability to sell EVs to consumers depends on substantial price subsidies in the form of credit support. While CARB also claims that operational savings will "more than offset the incremental cost over the vehicle lifetime,"⁵ this ignores the reality that many Californians currently are unable to afford the upfront costs of purchasing a ZEV in the first place. With the cost of transition minerals expected to escalate as a function of limited supply and increasing demand, the costs to manufacture and purchase EVs will likely rise. The SRIA also glosses over the likelihood that many owners will lack access to residential charging, which will substantially increase their operating expenses. Consistent reliance on fast charging

¹ See Executive Order N-79-20(6)(b), (7).

² CARB, *Standardized Regulatory Impact Assessment* ("SRIA"), at 130 (Jan. 26, 2022), <https://dof.ca.gov/wp-content/uploads/Forecasting/Economics/Documents/ACCII-SRIA.pdf>. CARB has changed some of the economic inputs it used in calculating this summary since this time, but economic impacts in the ISOR are still mostly negative, and the ISOR does not provide a similarly comparable summary table or as detailed of a discussion of these economic effects as the SRIA does.

³ *Id.* at 99.

⁴ *Id.*

⁵ *Id.*

also will shorten battery life, resulting in a need to replace the battery and/or the vehicle more frequently.

CARB also includes a more detailed table breaking down economic impacts by business sector, which demonstrates how employment in some sectors, such as the petroleum, retail trade, and automotive repair and maintenance, and state and local government sectors, will decrease by significant amounts.⁶ But businesses will not be the only entities the Proposed Regulation negatively affects—state and local government will suffer as well. At a time when California will need to be investing more heavily in public transportation infrastructure to support those who cannot afford ZEVs, the Proposed Regulation will devastate a primary source of state and local public transportation funding in the state. In California, gasoline taxes include a 51.1 cents per gallon state excise tax, as well as a state and local sales tax that averages 3.7% across California.⁷ CARB rightly observes that “[d]isplacing gasoline with electricity will decrease the amount of gasoline dispensed,” thereby “resulting in a reduction in tax revenue collected by” state and local governments.⁸ For state governments, CARB estimates that the Proposed Regulation will cause “an increase of \$193.3 million over the first three years of the regulation and a cumulative decrease of \$851.2 million over the regulatory horizon.”⁹ Similarly, CARB estimates the total fiscal impact of the Proposed Regulation to local government will be “a decrease of \$60.4 million over the first three years of the regulation and a cumulative decrease of \$14.52 billion over the regulatory horizon.”¹⁰ Before enacting the Proposed Regulation, California must secure replacements for this decimated funding.

II. CARB Must Perform an Adequate Assessment of Economic Impacts Resulting From Its ZEV Mandates.

CARB’s limited assessment of economic impacts resulting from the forced electrification of the transportation sector fails to meet applicable legal standards requiring comprehensive assessment of economic impacts, resulting in an ISOR that underestimates the impacts of this unprecedented action. There are various provisions of the California Administrative Procedures Act (“APA”) and the California Health & Safety Code (“HSC”) that require CARB to consider the economic impacts associated with any rulemaking proposal.¹¹ Together, these provisions establish a broad requirement for CARB to consider potential impacts to California’s workers, businesses, and greater economy.¹² CARB cites to many of these provisions in its ACC II ISOR

⁶ *Id.* at 125.

⁷ *Id.* at 112.

⁸ *Id.* at 112, 115.

⁹ *Id.* at 115.

¹⁰ *Id.* at 113.

¹¹ See e.g., APA § 11346.3, 11346.5; HSC § 43101, 43018.5.

¹² See *John R. Lawson Rock & Oil, Inc. v. State Air Res. Bd.*, 20 Cal. App. 5th 77, 112 (2018) (supporting a “broad reading of the required analysis”).

as governing authority for CARB’s proposed rulemaking,¹³ but fails to comply with their mandates by conducting an insufficient economic analysis.

Specifically, the APA and HSC require CARB to assess:

- HSC §§ 43101, 43018.5 and APA § 11346.3—Impacts to the state’s economy, including specific evaluation of the following.
 - The creation of jobs within the state;
 - The creation of new businesses or the elimination of existing businesses within the state;
 - The expansion of businesses currently doing business within the state;
 - The ability of businesses in the state to compete with businesses in other states;
 - The ability of the state to maintain and attract businesses in communities with the most significant exposure to air contaminants, localized air contaminants, or both, including, but not limited to, communities with minority populations or low-income populations, or both;
 - The automobile workers and affiliated businesses in the state;
 - The benefits of the regulation to the health and welfare of California residents, worker safety, and the state’s environment.
- HSC § 57005—Less costly but equally effective alternatives to ACC II.
- APA § 11346.5(a)(7)—Adverse economic impacts on California business enterprises and individuals, including the ability of California businesses to compete with businesses in other states.
- APA § 11346.5(a)(7)(A)—The specific types of businesses that would be affected by the proposal.
- HSC § 38562(b)(8)—The potential for leakage.

While the ISOR is a preliminary assessment, this assessment must still take into account fact-based analysis based on information and impacts currently known to CARB.¹⁴ Importantly, this analysis cannot “ignore evidence of impacts to specific segments of businesses already doing business in California”—as a recent decision emphasized, “[i]f the Board’s proposed regulatory amendments place the state’s thumb on the scale for one group of in-state businesses over another,

¹³ See ISOR at 11-12, 70, 73, 77, 134, 183.

¹⁴ See *California Assn. of Med. Prod. Suppliers v. Maxwell-Jolly*, 199 Cal. App. 4th 286, 304–05 (2011); *W. States Petroleum Assn. v. Bd. of Equalization*, 57 Cal. 4th 401, 428 (2013).

it need[s] to consider that impact.”¹⁵ CARB notes in its ISOR that “[t]he Executive Officer has made an initial determination that the proposed regulatory action would not have a significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other state, or on representative private persons.”¹⁶ This conclusion is not supported by fact-based analysis and overlooks key impacts stemming from the electrification of the transportation sector.

The analysis presented in the ISOR is deficient in several respects. First, CARB provides no or only superficial consideration of competitive impacts to oil and gas production and refinery businesses in the state and the numerous other businesses related to the petroleum industry (e.g., retail stations, auto maintenance shops, auto parts stores, storage terminals, asphalt production, petrochemicals, lubrication facilities, and others), and it fails to consider impacts on renewable fuels industries such as ethanol, biodiesel, and renewable diesel production. In assessing competitive advantage or disadvantage in its SRIA, CARB considers only the potential advantage to certain vehicle manufacturers as a result of already producing ZEVs.¹⁷ This analysis completely overlooks the blatant “thumb on the scale” that ACC II will place in favor of the electricity sector as compared to oil and gas producers and refineries by accelerating electrification of the transportation sector. This analysis also overlooks potential competitive disadvantages to California businesses as compared to businesses in other states.

Second, CARB fails to consider the leakage potential of its ZEV proposal, based on remaining demand for liquid fuels for ICEVs remaining in 2035 and beyond. CARB has a responsibility to minimize the “leakage” potential of any regulatory activities.¹⁸ As part of this responsibility, CARB must analyze the potential for emission reduction activities in the state to be offset by an equivalent or greater increase in emissions of GHGs outside the state. This analysis necessarily requires estimating emissions impacts outside the state, which CARB has failed to do. CARB acknowledges in its ISOR that “ICEVs will remain in use on California’s roads well beyond 2035,”¹⁹ but fails to account for the economic and emissions consequences that would occur if disadvantages to California oil and gas production, refining, and renewable fuel businesses ultimately result in greater reliance on imports to meet remaining demand for non-transportation fuels impaired by this rulemaking and/or for residual transportation fuel demand.

Third, CARB fails to consider the potential climate, environmental, health and economic impacts that may result from CARB’s rulemaking if the targets under the proposed ACC II cannot be met. California has established itself as a global leader in climate action and has a history of “aiming high” with its climate goals, only to adjust or modify aspirational targets that were ultimately unachievable. In the past, numerous and robust contingencies were available to Californians, owing to the flexibilities and capabilities of the auto manufacturing, oil and gas extraction, refining, and renewable fuels industries, to ensure that Californians have always

¹⁵ *John R. Lawson Rock & Oil, Inc. v. State Air Res. Bd.*, 20 Cal. App. 5th 77, 112 (2018).

¹⁶ ISOR at 172.

¹⁷ CARB, Standardized Regulatory Impact Assessment (“SRIA”), at 129 (Jan. 26, 2022), <https://dof.ca.gov/wp-content/uploads/Forecasting/Economics/Documents/ACCII-SRIA.pdf>.

¹⁸ HSC § 38562(b)(8).

¹⁹ ISOR at 12.

enjoyed security of access to personal mobility – i.e., dealer lots full of vehicles and gas stations with ample supplies of fuel. Now, CARB is closing the door on those industries, stripping them of their flexibilities and eliminating the contingencies that Californians have historically relied upon. Moreover, it is doing so in the midst of “unprecedented stress on California’s energy system”,¹ record inflation, extraordinary supply chain disruptions, global uncertainty due to the lingering pandemic and the war in Ukraine, and critical concerns about the availability, cost and foreign dependence of minerals needed for EV batteries. As we have learned from the energy crises caused by the war in Ukraine and the impacts to global climate efforts, CARB cannot responsibly move forward on the ACC II rulemaking without analyzing the risks and impacts of its own actions and establishing viable contingencies. Questions that CARB must be held accountable to answer include:

- Driven by policies like those in California, automakers have committed to ending production of ICEVs. What if we cannot secure the minerals needed for EV batteries, and the automakers cannot supply the needed EVs?
- What will happen to the price of EVs once the costs are no longer subsidized through the sale of ICEVs? And if the cost of critical minerals continues to rise? What if Californians cannot afford to purchase EVs?
- What if the build-out of charging infrastructure cannot keep up with the ACC II mandates, and Californians cannot charge their EVs?
- What if the grid cannot reliably keep up with the ACC II mandates, and Californians find themselves routinely stranded, unable to get to and from work/ school, unable to obtain food or medical assistance?

Finally, despite CARB’s access to ample information related to the economic impacts of electrification and existing strains on California’s grid, CARB has failed to address these impacts, constraining its analysis to a narrow consideration of direct costs centered around vehicle manufacturing and ownership.²⁰ CARB’s SRIA concludes that only vehicle manufacturers are directly affected by the proposed ACC II program,²¹ which fails to account for extensive economic impacts stemming from the electrification of the transportation sector, discussed in detail below. This assessment is therefore insufficient to fulfill CARB’s legal duty to broadly consider economic impacts.

III. CARB Must Consider Grid Reliability Impacts from the Electrification of the Transportation Sector.

As part of its evaluation of potential economic impacts to the welfare of California residents and in-state businesses, CARB must assess grid reliability impacts stemming from ACC II’s forced electrification of the transportation sector.

²⁰ See SRIA at 98.

²¹ See *Major Regulations Standardized Regulatory Impact Assessment Summary*, <https://dof.ca.gov/wp-content/uploads/Forecasting/Economics/Documents/Summary-ACCII-SRIA.pdf>.

ACC II and other CARB rulemakings will intensify California’s current supply challenges by exponentially increasing demand for electricity in California. The accelerated buildout of California’s electrical grid will itself have public health consequences for local communities. California has 25,526 miles of higher voltage transmission lines, and 239,557 miles of distribution lines²²—enough to stretch from the Earth to the moon. Additional electrical infrastructure will need to be introduced into the environment as a result of increasing demand for reliable and renewable energy supplies under ACC II. The electrical buildout required will have considerable impacts on communities living in proximity to visual intrusion (for overhead power lines), noise and a reduction of property values, along with potential health risks associated with the increased likelihood of wildfires and exposure to electromagnetic fields. Disadvantaged communities will bear the burden of living approximate to California’s expanding grid, containing high-voltage transmission and power lines as well as battery storage technologies prone to thermal runaway, which can trigger releases of toxic and explosive gasses while also starting fires that impact neighboring cells. Above-ground power lines expose those nearby to the risk of electrocution and electric shock injury due to downed or faulty power wires and defective equipment. Storms and trees routinely knock down cables and natural elements cause deterioration of inadequately maintained infrastructure. These dangerous conditions lead to deaths, injuries, and heightened wildfire risk. California’s rural and low-income stakeholders would also bear the risk of any medical unknowns. Claims about health effects from exposure to magnetic fields have been made since the late 1970s.²³ Pooled analyses showed a small but consistent association between childhood leukemia and living near an overhead power line, and led to renewed attention for the potential health risks of power lines.²⁴ A 2007 report by the World Health Organization concluded that when it comes to the link between power lines and childhood leukemia “...on balance, the evidence is not strong enough to be considered causal, but sufficiently strong to remain a concern”.²⁵

While securing additional generation capacity will mitigate some of these supply challenges, overreliance on renewable generation may exacerbate existing shortages, particularly during early evening hours. The California Public Utility Commission’s (“CPUC”) recently adopted Integrated Resource Plan for 2018-2020 demonstrates that substantial new resource capacity will be required to support accelerated electrification.²⁶ The CPUC’s preferred portfolio for electricity generation heavily relies on substantial scale-up of renewable resources that already face reliability challenges:

²² “*Why not bury California’s fire-prone power lines underground? The reason is sky high*”, Janel Wilson, - Oct. 11, 2019.

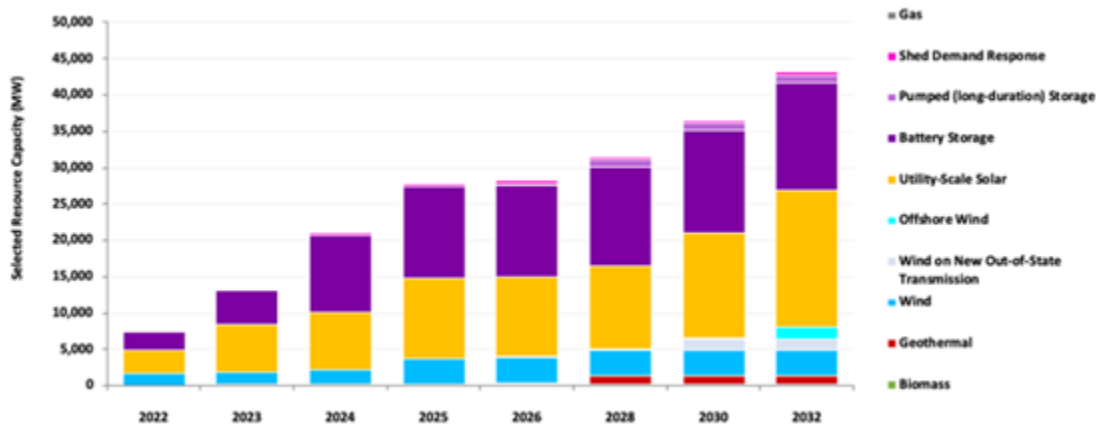
²³ Wertheimer N, Leeper E: Electrical wiring configurations and childhood-cancer. *Am J Epidemiol.* 1979, 109: 273-284.

²⁴ Ahlbom A, Day N, Feychting M, Roman E, Skinner J, Dockerty J, Linet M, McBride M, Michaelis J, Olsen JH, Tynes T, Verkasalo PK: A pooled analysis of magnetic fields and childhood leukaemia. *Br J Cancer.* 2000, 83: 692-698. 10.1054/bjoc.2000.1376; Greenland S, Sheppard AR, Kaune WT, Poole C, Kelsh MA: A pooled analysis of magnetic fields, wire codes, and childhood leukemia. *Epidemiology.* 2000, 11: 624-634. 10.1097/00001648-200011000-00003.

²⁵ World Health Organization. *Extremely Low Frequency Fields.* Switzerland: WHO press; 2007, p. 12.

²⁶ CPUC, Order Instituting Rulemaking to Continue Electric Integrated Resource Planning and Related Procurement Processes, Decision No. 22-02-004 (Feb. 10, 2022), <https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M451/K412/451412947.PDF>.

New Resource Buildout Based on CPUC's Preferred Portfolio²⁷



By 2026, when ACC II goes into effect, the CPUC must plan for a new resource buildout of 28,154 MW, climbing to 43,131 MW by 2032.²⁸ Nearly half of this capacity depends on battery storage, for which feasibility has not been demonstrated, and the majority of the remaining capacity is supplied by utility-scale solar, which also involves significant feasibility concerns.²⁹ Battery storage at this scale would result in significant additional demand for critical minerals, increasing consumers' costs for both electricity and for electric vehicles. And with increasing reliance on solar and wind generation, California also faces reliability hazards due to power inverters that serve solar and wind farms not being able to "ride-through" short-term disturbances, as occurred in California on four separate occasions between June and August 2021.³⁰ CARB has failed to include *any* assessment of these reliability challenges, despite its legal duty to do so.³¹

IV. CARB Must Fairly and Accurately Consider Lifecycle Emissions in its ACC II Proposal.

In taking its cue for this rule from the Governor's directive to transition to electric vehicles, and by inaccurately deeming vehicles other than ICEV to be "Zero Emission Vehicles," CARB

²⁷ *Id.* at 87.

²⁸ *Id.*

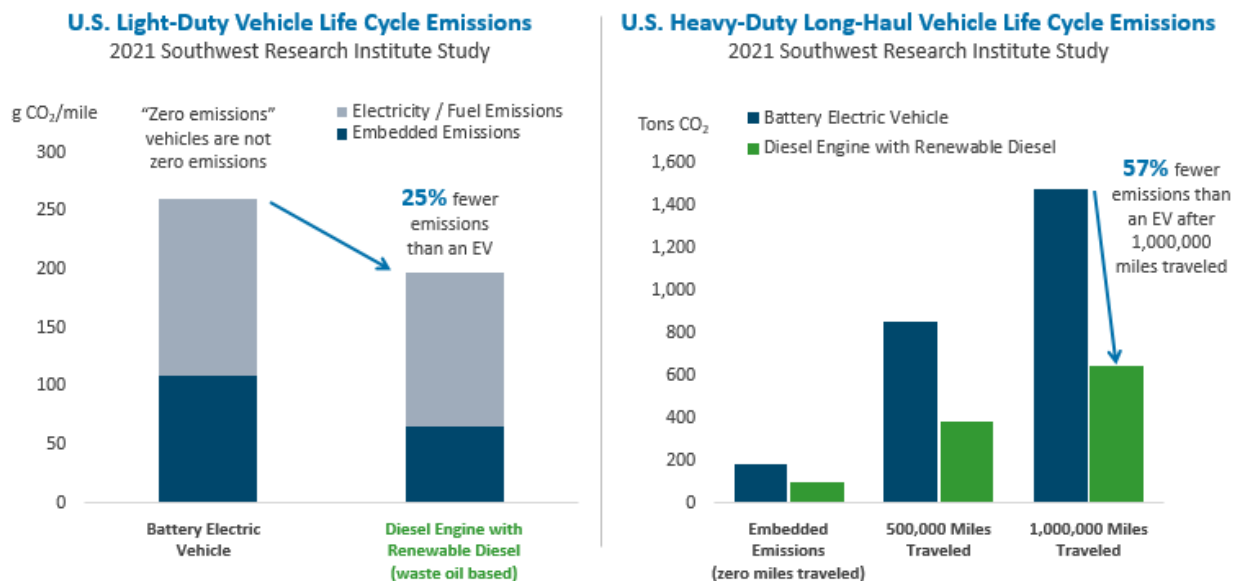
²⁹ *See id.*

³⁰ Behr, Peter and Plautz, Jason, *Grid monitor warns of U.S. blackouts in 'sobering report'*, E&E News (May 19, 2022) and North American Electric Reliability Corporation 2022 *Summary Reliability Assessment* (May 2022)

³¹ CARB similarly does not consider the magnitude of out-of-state emission increased from increased electricity generation. In 2021, California was the fourth-largest electricity producer in the nation, but the state was also the nation's second-largest consumer of electricity, and in 2020, it received about 30% of its electricity supply from generating facilities outside of California, including imports from Mexico. *See* U.S. Energy Administration, *State Profile and Energy Estimates*, available at: <https://www.eia.gov/state/?sid=CA>. As recently as 2020, WECC included 30 gigawatts of coal-fired generation resources, and is expected to continue to contain 16 gigawatts by 2030. WECC, *The Western Assessment of Resource Adequacy Report*, 23 (Dec. 18, 2020), <https://www.wecc.org/Administrative/Western%20Assessment%20of%20Resource%20Adequacy%20Report%20201218.pdf>. Given California's reliance on imported power, CARB must evaluate the emission impact from increased demand for electricity generated out of state.

fails to meet its duty to fairly and accurately consider benefits of the regulation³² and less costly but equally effective alternatives.³³ CARB's analysis arbitrarily overlooks the lifecycle impacts associated with electric vehicles, including the significant emissions, social, and national security impacts associated with battery production.³⁴

Moreover, CARB also fails to consider whether emissions reductions from fuels used for ICE vehicles may be achieved in a shorter time frame and at a lower cost than would be required to force electrification of the light-duty fleet. Significantly, the life cycle GHG emissions associated with light- and heavy-duty vehicles that run on renewable diesel can be *lower* than the life cycle GHG emissions emitted by EVs. GREET analysis conducted by Southwest Research Institute³⁵ has indicated that GHG emissions from a light-duty vehicle that runs on renewable diesel with a carbon intensity of 25 g/Mj resulted in 25% lower life cycle GHG emissions when compared to an EV, as illustrated below and set forth in detail in Attachment A to these comments.³⁶



Additionally, there are emerging innovative approaches and new technologies to enable new modes of carbon reduction from fuels used in ICEV, such as carbon sequestration and on-

³² Cal. Health and Safety Code § 43018.5.

³³ Cal. Health and Safety Code § 57005.

³⁴ ³⁴ See, e.g., <https://www.reuters.com/business/autos-transportation/china-frictions-steer-electric-automakers-away-rare-earth-magnets-2021-07-19/>; <https://news.bloomberglaw.com/privacy-and-data-security/electric-vehicle-infrastructure-push-brings-cyber-concerns/>; <https://insideevs.com/features/448888/electromobility-a-critical-national-security-issue/>.

³⁵ Southwest Research Institute 2022, *Life Cycle Analysis Report* (Attachment A).

³⁶ <https://investorvalero.com/events-and-presentations/presentations>.

board CO₂ capture.³⁷ It is unreasonable for CARB to foreclose any opportunity for such technologies to provide an alternative to the mandates proposed in the ACC II rule.

In order for CARB to conduct a reasonable assessment of significant economic impacts and to consider less costly and equally effective alternatives, as required by the Health and Safety Code, CARB cannot arbitrarily overlook lifecycle emissions impacts from ZEV while also overlooking opportunities for emission reductions involving ICEV fuels. CARB needs to fairly present the true carbon footprint and costs associated with electrification. CARB also should provide for highly efficient low emission vehicles and account for low-carbon fuels in the ACC II program. To do so would be cost-effective and equally, if not more, effective in meeting CARB's regulatory goals.

V. CARB Lacks the Legal Authority to Unilaterally Ban Entire Industries.

CARB's ACC II Program centers around achieving 100% ZEV or PHEV sales in California by model year 2035. This target necessitates the complete electrification of the transportation sector, forcing the phase-out of oil and gas production, refining, and most renewable fuel production. Attempting to unilaterally ban entire industries would exceed CARB's authority under California's Constitution and violates due process.

A. The Forced Phase-Out of Internal Combustion Engines Intrudes on the Constitutional Guarantee of Substantive Due Process.

In proposing ACC II, CARB would render obsolete all businesses that operate in support of the internal combustion engine. CARB's stated policy goal is the elimination of fossil fuels and renewable transportation fuels.³⁸ While CARB is not directly banning automotive supply, service, and support businesses, its ACC II proposal would have the same effect on these businesses as well. Ultimately ACC II would eliminate an entire industrial sector by displacing demand for oil production, petroleum pipelines and terminals, refineries, ethanol plants, renewable fuels production facilities, tanker trucks, oil change shops, and fuel service stations. Such a taking interferes with liberty interests protected under the California Constitution.

The California Supreme Court has held that "the constitutional guaranties of liberty include the privilege of every citizen to select those tradesmen he desires to patronize."³⁹ ACC II will intrude on this liberty interest by preventing Californians from using ICEVs and effectively banning the infrastructure to support these vehicles. Under the California Constitution, substantive due process "requires legislation not to be 'unreasonable, arbitrary or capricious' but to have 'a real and substantial relation to the object sought to be attained.'"⁴⁰ While California has an interest

³⁷ <https://pubs.acs.org/doi/10.1021/acsenergylett.1c01426>; Southwest Research Institute 2019, *A Gas Separation Membrane Highly Selective to CO₂ in the Exhaust of Internal Combustion Engines*, SAE 2019-01-2265.

³⁸ California Air Resources Board, *Draft 2022 Scoping Plan*, <https://ww2.arb.ca.gov/sites/default/files/2022-05/2022-draft-sp-appendix-i-nwl-modeling.pdf>

³⁹ *New Method Laundry Co. v. MacCann*, 174 Cal. 26, 32 (1916).

⁴⁰ *Coleman v. Department of Personnel Administration*, 52 Cal.3d 1102, 1125 (1991) (internal citations omitted).

in limiting GHG emissions, ACC II's arbitrary and exclusive selection of ZEVs is neither necessary nor rationally tailored to achieve this goal.

CARB lacks authority to ban oil and gas production and refinery industries because ACC II is not rationally related to CARB's goal of reducing GHG emissions from vehicles. Low-carbon fuels and highly efficient ICEVs can achieve comparable GHG emissions reductions as ZEVs on a shorter timeline. Low-carbon fuels like renewable diesel and ethanol are compatible with existing vehicle infrastructure, from light- to heavy-duty long-haul vehicles. These fuels can *immediately* reduce transportation GHG emissions without waiting for the time and expenses it will take to build out EV infrastructure. Further, when viewed from a lifecycle perspective, these fuels achieve similar or greater emissions reductions without impairing liberty interests. As noted above, GHG emissions from a light-duty vehicle that runs on soybean-based renewable diesel has 25% less life cycle GHG emissions when compared to an EV, and this percentage is even greater for a vehicle that runs on waste-oil-based renewable diesel.

B. CARB Cannot Deprive California Businesses of Vested Rights or Commit an Unconstitutional Taking.

ACC II raises significant concerns over the vested economic interests of a variety of California businesses. California courts have held that businesses have “the right to continue operating an established business in which he has made a substantial investment.”⁴¹ ACC II would deprive a multitude of established large and small businesses of this right.

Vested rights are rights that are “already possessed” or “legitimately acquired.”⁴² California courts have recognized both vested rights in economic interests (ability to continue operation of a business) and the vested rights doctrine as it relates to land use development (ability to develop land in accordance with a valid government authorization).⁴³ In addition, where the real property is legitimately acquired, the business activity is “undertaken in accordance with applicable statutory mandates,” and the right has a “potentially massive economic aspect,” then, “[c]ertainly, a fundamental vested right is at issue.”⁴⁴ When these types of rights are at stake, they are considered too important to be relegated to “exclusive administrative extinction.”⁴⁵ Courts have been careful to require more than economic burden by way of increasing the cost of doing business and instead have looked to protect economic interests where a company will be driven out of business or “forced to operate at a loss and close.”⁴⁶

⁴¹ *Id.* at 1529.

⁴² *Harlow v. Carleson*, 16 Cal. 3d 731, 735 (1976).

⁴³ *Goat Hill Tavern v. City of Costa Mesa*, 6 Cal. App. 4th 1519, 1526 (1992).

⁴⁴ *The Termo Co. v. Luther*, 169 Cal. App. 4th 394, 407–08 (2008) (Finding a fundamental vested right where the Director of Conservation ordered the plugging of 28 oil wells that had been lawfully in operation for over 20 years).

⁴⁵ *Id.* at 406 (citing *Goat Hill Tavern*, 6 Cal. App. 4th at 1526).

⁴⁶ *Mobil Oil Corp. v. Superior Court*, 59 Cal. App. 3d 293, 305 (1976) (Determining a fundamental vested right was not impacted because “[w]e are not presented with the enforcement of a rule which effectively drives the Oil Companies out of business. At most it puts an economic burden on them increasing the cost of doing business”); *Standard Oil Co. v. Feldstein*, 105 Cal. App. 3d 590, 604 (1980) (Concluding that the action did not impact a fundamental vested right because “[t]here is no contention that Standard will be driven to financial ruin by the action

Similarly, the Takings Clause of the Fifth Amendment to the U.S. Constitution, made applicable to the states through the Fourteenth Amendment, provides: “[N]or shall private property be taken for public use, without just compensation.”

Here, the ACC II Program has the goal of limiting all vehicles sales to ZEVs and even establishes a timeline for ICEV extinction in order to eliminate use of fossil and renewable fuels for transportation. CARB acknowledges this outcome, as it expressly accounts for the “displacement of fossil fuel extraction, refinement, manufacture, distribution, and combustion” in the rulemaking support package. Notwithstanding efforts to diminish the devastating impact this would have on employees and small business owners by alluding to a “just transition,” it is evident that the proposed ACC II rule would foreclose opportunities for numerous large and small businesses that have lawfully operated within in the state of California for decades and have invested heavily in their operations within the state. The shutting down of these businesses will have a potentially massive economic impact and therefore represents an unconstitutional deprivation of vested rights under California law as well as an unconstitutional taking under the U.S. Constitution.

Likewise, the proposed ACC II program seeks to displace the entire renewable fuel industry in favor of electrification. Not only have renewable fuels businesses been conducting operations within the state, but the state and CARB have actively encouraged substantial investment and growth of such businesses in recent years through the LCFS. It would be an unconstitutional deprivation of their vested rights and unconstitutional taking of the substantial and unrealized investments made in response to the RFS and LCFS, as well as of the industry’s overall growth potential, to now drastically minimize and ultimately eliminate such businesses altogether.

VI. ACC II Undermines the California Low-Carbon Fuel Standard.

CARB has authority to prescribe standards for new motor vehicles, but CARB should take caution in establishing standards that undermine other critical statutorily-authorized programs such as the LCFS. The LCFS is a proven GHG reduction program. CARB should seek to harmonize the continued success of the LCFS with a mobile source program that incentivizes investment in a broad range of low-emission technologies rather than limit innovation in a manner that stifles the progress made by other programs.⁴⁷

The LCFS is a critical piece of CARB’s GHG reduction strategy, boasting over 15 million metric tons of GHG reductions and displacing approximately 2.5 billion gallons of petroleum fuel in 2019.⁴⁸ Originally adopted in 2009, the LCFS aims to reduce the carbon intensity of California’s transportation fuel pool by incentivizing fuels that have a lower carbon intensity for the complete

of the District; there is not even a contention that this particular facility will be forced to operate at a loss and close.”); *San Marcos Mobilehome Park Owners’ Ass’n v. City of San Marcos*, 192 Cal. App. 3d 1492, 1502 (Holding that “there is no contention, nor does the evidence suggest, that if the Commission denied the requested rent increases, the park owners would be in such an unfavorable economic position they would go out of business.”).

⁴⁷ An “‘unexplained inconsistency’ in agency policy is ‘a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.’” *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016) (internal citations omitted).

⁴⁸ See California Air Resources Board, *LCFS Workshop CARB Presentation Day 1*, at 5 (Oct. 14, 2020).

life cycle of the fuel. This holistic approach is driven by incentivizing producers of both traditional and renewable fuels to reduce their carbon intensity throughout the entire life cycle. For example, traditional fuel producers are incentivized to reduce the carbon intensity of their fuels through carbon capture or refinery investment projects, or through the production of hard-to-decarbonize jet fuel for which producers can generate LCFS credits. Renewable fuel producers are driven to achieve the lowest carbon intensity score possible in order to maximize their investment.

The EO acknowledged the need for an extension to the LCFS program beyond 2030 as the transition of California's light-duty fleet is implemented.⁴⁹ Moreover, the EO does not mandate, as CARB proposes, a specific zero-emission technology at the expense of others. By prescribing specific zero-emission technologies, CARB unreasonably ignores and frustrates the vast emission reduction framework achieved via the LCFS.

VII. CARB Does Not Adequately Consider Feasible Alternatives or the Full Range of Environmental Impacts.

CARB's Draft Environmental Analysis ("EA") does not meet requirements under the California Environmental Quality Act ("CEQA") because it (1) fails to consider low-carbon fuel and engine technologies as feasible alternatives and (2) ignores a number of potentially significant environmental impacts.

A. The Environmental Analysis Must Consider Low-Carbon Fuel and Engine Technologies as Alternatives.

In the EA, CARB has failed to consider further supporting the production of low-carbon fuel and engine technologies as an alternative that can immediately reduce GHG emissions today.⁵⁰ Valero urges CARB to recognize the proven value of low-carbon liquid fuel technologies and present a scientifically credible alternatives analysis in its Final EA that compares the costs and benefits of these feasible technologies to the costs and benefits of electric vehicles.

While CARB has previously asserted that considering low-carbon alternative fuel and engine technologies is outside the scope of the ACC II rulemaking, this does not appear to be correct from a legal or policy standpoint. According to the Draft EA, the "primary objectives" of the ACC II Program include goals to "[m]aintain and continue reductions in emissions of GHGs beyond 2020" and "[c]omplement existing programs and plans to ensure, to the extent feasible, that activities undertaken pursuant to the measures complement, and do not interfere with, existing planning efforts to reduce GHG emissions..."⁵¹ Low-carbon fuel and engine technologies align

⁴⁹ Executive Order N-79-20 ("WHEREAS California is already working to decarbonize the transportation fuel sector through the Low Carbon Fuel Standard, which recognizes the full life cycle of carbon transportation emissions including transport into the State; and WHEREAS clean renewable fuels play a role as California transitions to a decarbonized sector...").

⁵⁰ See CARB, *Appendix E – Draft Environmental Analysis for the Proposed Advanced Cleans Cars II Program*, (Apr. 12, 2022), <https://ww2.arb.ca.gov/sites/default/files/barcu/regact/2022/accii/appel.pdf>.

⁵¹ *Id.* at 7–8. While CARB is responsible for regulating emissions from transportation fuels, CARB has provided no authority for its premise that reducing petroleum-based transportation fuels is a legitimate objective for the agency. As noted throughout these comments, carbon capture and other innovative technologies offer opportunities for

with these primary objectives, and thus, CARB should consider how these technologies can achieve more immediate environmental benefits while mitigating any cost burdens the ACC II Program may impose, especially with regard to low-income communities. Indeed, not doing so would conflict and “interfere with existing planning efforts to reduce GHG emissions [and] criteria pollutants”—namely, the LCFS and RFS.

In the ACC II rulemaking, CARB is required to consider a reasonable range of alternatives, including “*alternatives that are proposed as less burdensome and equally effective* in achieving the purposes of the regulation in a manner that ensures full compliance with the authorizing statute or other law being implemented or made specific by the proposed regulation.”⁵² This aligns with the California Environmental Quality Act (“CEQA”) Guidelines, which also specify that CARB must consider a reasonable range of alternatives that “shall include those that could feasibly accomplish most of the basic objectives of the project and could avoid or substantially lessen one or more of the significant effects.”⁵³ The CEQA Guidelines define “feasible” as “capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors.”⁵⁴ Specifically, when considering the feasibility of alternatives, the CEQA Guidelines provide the following factors to consider: “economic viability, availability of infrastructure, general plan consistency, other plans, or regulatory limitations, [and] jurisdictional boundaries.”⁵⁵

Importantly, CARB is prohibited from predetermining a particular method in order to narrow the alternatives it considers for achieving the agency’s ultimate policy goals. When examining whether or not alternatives or particular features have been foreclosed by the agency, courts look “to the surrounding circumstances to determine whether, as a practical matter, the agency has committed itself to the project as a whole or to any particular features, so as to effectively preclude any alternatives or mitigation measures that CEQA would otherwise require to be considered.”⁵⁶ By deeming ZEVs as the only acceptable technologies and not even considering in this rulemaking how other low-carbon technologies could provide less costly and more timely reductions in GHG emissions, CARB is effectively predetermining the outcome of this proceeding. This predetermined outcome is not only arbitrary and capricious but also a violation of CARB’s statutory obligations.

B. The Draft EA Fails to Consider Potentially Significant Environmental Impacts.

CEQA requires that the Draft EA and Final EA contain “[a] discussion and consideration of environmental impacts, adverse or beneficial, and feasible mitigation measures which could minimize significant adverse impacts identified,” as well as “[a] discussion of cumulative and

petroleum-derived fuels to achieve carbon reductions equivalent to or superior to those offered by ZEVs on a lifecycle basis. It is arbitrary to seek to reduce the use of these fuels categorically without regard to their lifecycle emissions.

⁵² California Government Code § 11346.2(b)(4)(A).

⁵³ Cal. Code Regs. tit. 14, § 15126.6(c).

⁵⁴ *Id.* § 21061.1; *Bay Area Citizens v. Ass’n of Bay Area Governments*, 248 Cal. App. 4th 966, 1018 (2016).

⁵⁵ Cal. Code Regs. tit. 14, § 15126.6(f)(1).

⁵⁶ *Save Tara v. City of W. Hollywood*, 45 Cal. 4th 116, 139 (2008), *as modified* (Dec. 10, 2008).

growth-inducing impacts.”⁵⁷ The Draft EA for the Proposed Regulation fails to consider the following potentially significant environmental impacts:

- In view of the devastating wildfires in recent years that have been ignited due to failures of strained and poorly maintained electrical infrastructure, CARB must evaluate how the increased demand for electricity resulting from the proposed rule will increase the risk of wildfires, and CARB must further evaluate the potential impacts more frequent wildfires will have on public health and the environment. Wildfire smoke substantially contributes to PM_{2.5} emission. A recent study by researchers from Stanford found that “the contribution of wildfire smoke to PM_{2.5} concentrations in the US has grown substantially since the mid-2000s, and in recent years has accounted for *up to half of the overall PM_{2.5} exposure in western regions.*”⁵⁸ Exposure to wildfire smoke can contribute to “a range of negative health consequence[s],” and increased emissions from wildfires can “erode gains from efforts aimed at reducing PM_{2.5} from other pollution sources.”⁵⁹ ACC II worsens existing wildfire risks to the additional detriment of air quality and public health, undermining not only clear legislative priorities but also CARB’s responsibility to “coordinate, encourage, and review the efforts of all levels of government as they affect air quality.”⁶⁰ As the agency charged with overseeing attainment for state criteria pollutant standards, CARB cannot overlook these impacts and the significant risk that increased wildfires will exacerbate existing nonattainment issues.
- Regarding aesthetics, the Draft EA does not consider the unpleasing aesthetic of businesses that will close as a result of the Proposed Regulation. Because millions of businesses depend upon transportation as a factor, the ZEV mandate will likely result in the closure of not only gas stations, but many other kinds of businesses as well, including refining, maintenance, distribution, and construction companies. This could cause many gas stations and buildings within the state to become unoccupied and fall into a state of disrepair.
- CARB does not consider how the Proposed Regulation could cause businesses to relocate to other states. The act of relocating to another state involves GHG emissions from transportation, as well as the potential construction of new business sites. Such transportation and construction could also injure wildlife.
- CARB does not consider how California residents will likely drive to other states to purchase more affordable, traditional vehicles. This will result in additional GHG emissions and also poses a threat to wildlife.
- CARB does not adequately consider how, because the Proposed Regulation will likely increase vehicle costs, many Californians may choose to keep their cars for longer than they otherwise would have, thereby forgoing opportunities to replace their vehicles with

⁵⁷ Cal Code. Regs. tit. 17 § 60004.2(a).

⁵⁸ M. Burke, et al., *The Changing Risk & Burden of Wildfire in the United States*, PROCEEDINGS NTL. ACADEMY SCI. (Jan. 11, 2021), <https://www.pnas.org/doi/10.1073/pnas.2011048118>.

⁵⁹ *Id.*

⁶⁰ HSC § 39500.

more efficient models. This would also result in greater GHG emissions and criteria pollutants.

- CARB does not adequately consider how increased demand on the electric grid due to significantly increased ZEV use will require additional increases in electric utility construction, which will likely include gas units to make up for the intermittency of renewable resources such as wind and solar. The construction of these facilities, as well as the use of gas facilities, may have negative environmental impacts, including impacts on biological resources and increased GHG emissions.
- CARB does not consider how the negative economic impact this Proposed Regulation will have on the petroleum industry could result in the abandonment of carbon capture, utilization, and storage technology already being developed, thereby increasing GHG emissions.
- CARB does not consider how the negative economic impact this Proposed Regulation will have on the renewable fuels industry could result in the abandonment of further technological advancements in fuels that already outperform ZEVs from a GHG emission and cost perspective.
- CARB does not consider how requiring ZEVs will necessitate accessible residential charging stations, which will drive up the costs of housing in the state and could result in housing displacement.
- CARB does not consider the additional GHG emissions over the life cycle of ZEVs beyond the narrow snapshot in time of emissions at the tailpipe. The local air quality benefits of ZEVs' tailpipe emissions in California, if any, are thus offset and surpassed by these additional life cycle emissions, which exacerbate the global issue of climate change that ACC II is intended to address.
- CARB has not considered how increased demand for critical minerals and the resulting mining and smelting in potentially sensitive environments may adversely impact critical habitat, watershed impacts, endangered species, and indigenous people.
- CARB has not adequately addressed increased potential for human rights and labor abuses resulting from the significant increase in demand for minerals necessary for large-scale forced electrification.
- CARB does not consider the cumulative effects of the factors mentioned above that could result in increases of GHG and criteria pollutant emissions.

Valero asks that CARB fully consider and provide mitigation measures for these factors, as it must do under CEQA.⁶¹ Notably, supporting low-carbon fuels and efficient ICE technologies would be a potential mitigation measure, as demonstrated above.

⁶¹ *Id.* § 60004.2(b).

VIII. ACC II Exceeds the Scope of CARB’s Authority because the CARB Cannot Demonstrate that it Would Qualify for a Clean Air Act Preemption Waiver.

ACC II is *ultra vires* because CARB has not crafted the regulation such that it is eligible for a waiver under § 209 of the federal Clean Air Act. California HSC § 43013(a) authorizes CARB to “adopt and implement motor vehicle emission standards...unless preempted by federal law.” Section 209 of the federal Clean Air Act expressly preempts California from adopting or attempting to enforce “any standard related to the control of emissions from new motor vehicles,” unless the State receives a preemption waiver from EPA. No such waiver may be granted if the standards fail to meet any one of the following three criteria:

(A) the determination of the State [that the standards are at least as protective of public health and welfare as Federal standards] is arbitrary and capricious,

(B) such State does not need such State standards to meet compelling and extraordinary conditions, or

(C) such State standards and accompanying enforcement procedures are not consistent with section 7521(a) of this title.⁶²

ACC II cannot satisfy at least two of these criteria.

First, ACC II is not consistent with Section 7521(a) of the Clean Air Act. While EPA has described its review under this criterion as narrow,⁶³ EPA has previously stated that the determination is based on whether “California’s standards are technologically infeasible.” [MEMA I, 627 F.2d at 1126]. In prior evaluations, EPA relied on CARB demonstrations that “the necessary technologies presently exist to meet the established standards,” but that is not the case here. ACC II requires 100% ZEV sales by 2035—an absolute ban on internal combustion engine vehicles as an alternative even if insufficient ZEV are available. Given this total removal of alternatives from the market, it is not enough for CARB to demonstrate that vehicle manufacturers have the technology (and, inherent in this question, the resources) to produce a single electric vehicle. Rather, examining the technological feasibility of ACC II standards must include asking whether vehicle manufacturers have the technology and resources to rapidly shift to producing only electric vehicles—a relatively new technology category that requires different resources than traditional vehicles—by the millions, as well as whether there is a reliable supply of electricity to charge them. For the reasons detailed above—including insufficient global supply of lithium and other rare earth minerals that already are hampering electric vehicle deliveries⁶⁴ and insufficient electricity supply—the answer is no.

⁶² 42 U.S.C. § 7543(b).

⁶³ See *California State Motor Vehicle Pollution Control Standards; Notice of Decision Granting a Waiver of Clean Air Act Preemption for California’s 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles*, 74 Fed. Reg. 32,744, 32,747 (Jul. 8, 2009).

⁶⁴ See e.g., S&P Global, *Graphite supply a concern in meeting battery demand*, Feb. 16, 2022, available at <https://www.spglobal.com/commodityinsights/en/market-insights/latest-news/energy-transition/021622-feature-graphite-supply-a-concern-in-meeting-growing-battery-demand>; CNBC, *Stellantis CEO warns of electric vehicle battery shortage, followed by lack of raw materials*, May 24, 2022, available at <https://www.cnbc.com/2022/05/24/stellantis-ceo-warns-of-ev-battery-shortage-lack-of-raw-materials.html>.

Second, the California waiver from federal preemption is an exception that was intended by Congress to give added flexibility in addressing unique conventional pollution issues in limited areas of California. It was not contemplated by Congress that this exemption would be used decades later to allow CARB to ban the use of the ICEV for California and elsewhere in states that adopt the rule. The proposed ACC II rule would force a significant portion of the domestic transportation sector to be dependent on electric vehicle batteries. The widespread economic implications, policy consequences for energy independence, and geopolitical risks are simply too significant to be approved by a state executive agency under an exception to federal preemption that was never contemplated for this purpose.

The legal standard for determining whether California suffers from “compelling and extraordinary conditions” is currently being litigated. Even if the court finds that compelling and extraordinary conditions justify allowing California to set GHG standards and a ZEV sales mandate *for California*, it is unclear how CARB can justify proposed measures in ACC II to allow the “pooling” of out-of-state sales (sales in states that have adopted California’s standards, referred to as Section 177 states) to demonstrate compliance with the California sales requirements. Allowing manufacturers to sell qualifying vehicles in other Section 177 states as far away as New York, and allowing those credits to demonstrate compliance with California’s standards, does not assist California in addressing its “compelling and extraordinary conditions.” Put in Section 209 terms: California does not *need* an emission reduction in New York to *meet* a compelling and extraordinary condition in California. By designing its program to allow its own requirements to be met by measures taken in other states anywhere in the United States, CARB tacitly acknowledges that it does not need the proposed ZEV mandate to meet compelling and extraordinary conditions in California.

The fact that CARB appears to consider the sales of qualifying vehicles in Section 177 States as a basis for California’s own rulemaking shows that this rulemaking is more about a broad policy objective to eliminate the use of ICEV and liquid fuels, regardless of their carbon contribution, than about addressing compelling and extraordinary circumstances in California. Given the sweeping national implications of forced electrification of a substantial portion of the United States’ light-duty vehicle fleet, California is and should be federally preempted from unilateral action. Further, setting federal GHG tailpipe emission standards in a manner that would force electrification is beyond even the U.S. Environmental Protection Agency’s statutory authority. Forced electrification of a significant share of the U.S. light-duty transportation fleet is a major question with tremendous potential economic, environmental, and social consequences that is properly placed with the United States Congress.

IX. ACC II Is Preempted by the Federal Statutory Mandates of EPCA, the CAA, and the EISA.

CARB lacks authority to approve the proposed ACC II rule because it is inconsistent with, and is preempted by, the statutory mandates of federal legislation including the Energy Policy and Conservation Act (“EPCA”), the CAA, and the Energy Independence and Security Act (“EISA”), including the Renewable Fuel Standard (“RFS”).

As an initial matter, Congress has authorized the Department of Transportation and NHTSA to establish fuel economy standards under EPCA. These average standards are known as

“corporate average fuel economy” or “CAFE” standards. The CAFE standard is “a performance standard specifying a minimum level of average fuel economy applicable to a manufacturer in a model year.”⁶⁵ Under EPCA, “When an average fuel economy standard prescribed under this chapter is in effect, a State or a political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard.”⁶⁶ Through ACC II, however, CARB seeks to do precisely that by virtue of its 100% EV and PHEV mandate. More specifically, the motor vehicle emissions standards underlying this mandate are “related to” fuel economy standards because regulating fuel economy controls the amount of motor vehicle emissions and, in turn, regulating motor vehicle emissions controls fuel economy.⁶⁷ Indeed, the GHG emissions targeted by ACC II relate directly to combustion or the actual consumption of fuel, the rate of which is determinative of a vehicle’s fuel economy. Accordingly, ACC II is indeed related to fuel economy standards and, therefore, expressly preempted by EPCA.

Moreover, any authority that CARB might otherwise claim with regard to ACC II’s regulation of GHG emissions necessarily stems from the CAA, under which EPA is authorized by Congress to regulate motor vehicle emissions. Similar to EPCA, however, the CAA generally preempts state adoption or enforcement of “any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines subject to [the CAA].”⁶⁸ The only exception to this prohibition is if EPA grants a preemption waiver to impose standards more stringent than those imposed by the CAA, following notice and opportunity for public hearing and provided certain criteria are met.⁶⁹ For the reasons stated above, however, the ACC II program does not meet the criteria for a preemption waiver under the CAA and is, therefore, preempted by the CAA, as well as EPCA.

Further, because the proposed ACC II rule would decrease and ultimately eliminate the volume of renewable fuel used for transportation, it frustrates Federal mandates under the Renewable Fuel Standard. Congress created the RFS to “move the United States toward greater energy independence and to reduce greenhouse gas emissions.”⁷⁰ Congress intended the program “to be a ‘market forcing policy’ that would create ‘demand pressure to increase consumption’ of renewable fuel.”⁷¹ Because Congress directed EPA to comply with the RFS, EPA cannot—either on its own or by virtue of a Section 209 waiver of the ACC II Program—promote the substantial or exclusive use of a technology (electrification) that will frustrate its goals. By extension, CARB cannot do what EPA cannot do on its own, yet that is precisely what ACC II would do by decreasing or eliminating consumption of renewable fuel and arbitrarily promoting a replacement technology to achieve the very same objectives. Therefore, ACC II’s mandate of electrification at the expense of renewable fuels both decreases volumes of renewable fuels in transportation and creates even greater energy security risks through dependence on minerals sourced almost entirely

⁶⁵ 49 U.S.C. § 32901(a)(6).

⁶⁶ *Id.* § 32919(a).

⁶⁷ *See, e.g., California By and Through Brown v. EPA*, 940 F.3d 1342, 1345 (D.C. Cir. 2019) (providing that “the technologies to control CO₂ emissions and to improve fuel economy overlap to a great degree”).

⁶⁸ 42 U.S.C. § 7543(a).

⁶⁹ *See id.* § 7543(b)(1).

⁷⁰ *Americans for Clean Energy v. EPA*, 864 F.3d 691, 696 (D.C. Cir. 2017).

⁷¹ *Id.* at 705 (quoting Final Rule, 80 Fed. Reg. at 77,423) (emphasis added).

outside the United States.⁷² Thus, ACC II frustrates the goals of EISA and the RFS, and goes beyond the authority of CARB.

Finally, the proposed ACC II rule may violate other Constitutional provisions. These include, but likely are not limited to, the dormant Commerce Clause, which prohibits state regulations that improperly discriminate against out-of-state commercial interests or that unduly burden interstate commerce as well as the dormant foreign affairs preemption doctrine under the Supremacy Clause, which preempts state laws that intrude on the exclusive federal power to conduct foreign affairs.⁷³ Because the proposed ACC II rule is unprecedented in its scope and reach, CARB should pause further rule development pending legal review to confirm that its actions are authorized under state law and that they are not preempted or precluded as a matter of Federal law.

⁷² See the State of California's Memorandum of Understanding with China, setting climate policies that would increase dependency on China's near-monopoly power over transition minerals; *see also* International Energy Agency, *The Role of Critical Minerals in Clean Energy Transitions*, available at <https://www.iea.org/reports/the-role-of-critical-minerals-in-clean-energy-transitions>.

⁷³ See *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067 (9th Cir. 2012).