

# Holland & Knight

50 California Street, Suite 2800 | San Francisco, CA 94111 | T 415.743.6900 | F 415.743.6910  
Holland & Knight LLP | [www.hklaw.com](http://www.hklaw.com)

Jennifer L. Hernandez  
+1 415-743-6927  
[Jennifer.Hernandez@hklaw.com](mailto:Jennifer.Hernandez@hklaw.com)

August 16, 2022

*Via Email: <https://www.arb.ca.gov/lispub/comm/bclist.php>*

Chair Liane M. Randolph and Members of the Board  
c/o Clerk's Office  
California Air Resources Board  
1001 I Street  
Sacramento, CA 95814

*Via Email: [staff@oal.ca.gov](mailto:staff@oal.ca.gov)*

Office of Administrative Law  
300 Capitol Mall, Suite 1250  
Sacramento, CA 95814-4339

**Re: Civil Rights and Green Jim Crow: Advanced Clean Cars II Regulations  
Requiring All New Passenger Vehicles Sold in California to be Zero Emissions  
by 2035**

Dear Chair Randolph and Members of the Board:

I am honored to represent The Two Hundred for Homeownership: civil rights leaders committed to closing the wealth gap by restoring attainable homeownership to California's hard-working families and individuals, the majority of whom are now comprised of communities of color. The Two Hundred was founded a decade ago by leaders, including former Senate and Assembly members and leaders, a retired California Supreme Court Justice and distinguished law professor, the founders and co-founders of national civil rights organizations, and former cabinet Secretaries. All have a lifetime commitment to civil rights and equity, all share a commitment to the environment and effective and equitable climate change leadership, and all remain committed to attainable homeownership for median income families including many of our organized labor colleagues, and to affordable, reliable, effective transportation, energy, and water - and to education and employment opportunities that allow each generation the upward mobility that is the cornerstone of the American, and California, Dream.

We raise six objections to the ACC II regulation in this letter, to supplement the objections raised in our prior letter that were not addressed by any ACC II regulatory proposal change.

**First**, we provided two sets of timely Civil Rights comments on the above-referenced regulations, which your website confirms were received. <https://www.arb.ca.gov/lists/com-attach/429-accii2022-UydcMIA0BQIVYVJi.pdf> ; <https://www.arb.ca.gov/lists/com-attach/434-accii2022-UDMHaAdwU2kGbARb.pdf> There has been no CARB Staff Report or other response to our comments, or other comments. There should be no further progress on this rulemaking until CARB has published a comprehensive response to comments if CARB's vows to respect racial equity are sincere, and not an empty bureaucratic slogan.

**Second**, we received a second 15-day Notice of the Availability of Additional Documents, but were shocked and saddened to learn that your agency's commitment to racial equity was again thrown under the bus as some of these additional documents were available solely for in-person review at your office in Sacramento if and to the extent a designated staff member agreed to accommodate an in-person request. As your second 15-day Notice states, after listing TWENTY-FOUR entirely new documents as additions to this rulemaking record, that:

These documents are available for inspection at the California Air Resources Board, 1001 I Street, Sacramento, California, 95814, between the hours of 9:00am to 4:00pm, Monday through Friday (excluding holidays). To inspect these documents please contact Bradley Bechtold, Regulations Coordinator, at [Bradley.Bechtold@arb.ca.gov](mailto:Bradley.Bechtold@arb.ca.gov) or (279) 208-7266.

Many of these documents can instantly be posted on the CARB website, alongside other documents in this rulemaking record, and made available for actual public review by people who work at real jobs - and cannot take the time to travel to Sacramento for likely more than work day to review these documents. This reversion to an in-person, appointment-only, weekday review is also deeply disrespectful of those at heightened risk of COVID - and this August-only period also ignores the twin chaos of summer vacations and school starts that further impair extended weekday visits to the CARB office. The second 15-day notice process must restart, following online posting and brief content descriptions, of the TWENTY-FOUR new documents that CARB staff has concluded are critical to the defensibility of the proposed ACC II regulation.

**Third**, as described in our comments, and in our civil rights lawsuit against CARB's 2017 Scoping Plan (the Petition for which was included with our comments), access to reliable, affordable passenger vehicle ownership is a major civil rights issue. It is critical in the vast majority of the state (where transit/walking/biking options don't exist), that transit ridership has dropped pre- and post-COVID especially among lower income commuters as confirmed by UCLA's comprehensive transit utilization reports, and the necessity of driving was recognized as a civil right - by the Legislature in authorizing undocumented immigrants to receive Drivers' Licenses (and more than a million have done so), and by the California and United States Supreme Court which have both held that driving is so critical to modern living that depriving someone of a Driver's License triggers the due process protections of the state and federal Constitutions.

The ACC II Rule violates civil rights laws, as well as the State and Federal Constitution unless it is modified to include the concurrent approval of an effective, equitable, and fully-funded program to continue to provide for private vehicle ownership in our communities. Bureaucratic mismanagement and racial blindness (or bias) in the "cash for clunkers" program in Southern California caused the initial program rollout to simply strip affordable used cars from poor working families; the ACC II Rule follows this precisely racist pathway in mandating the phase-

out of the source of the state's affordable used car supply.

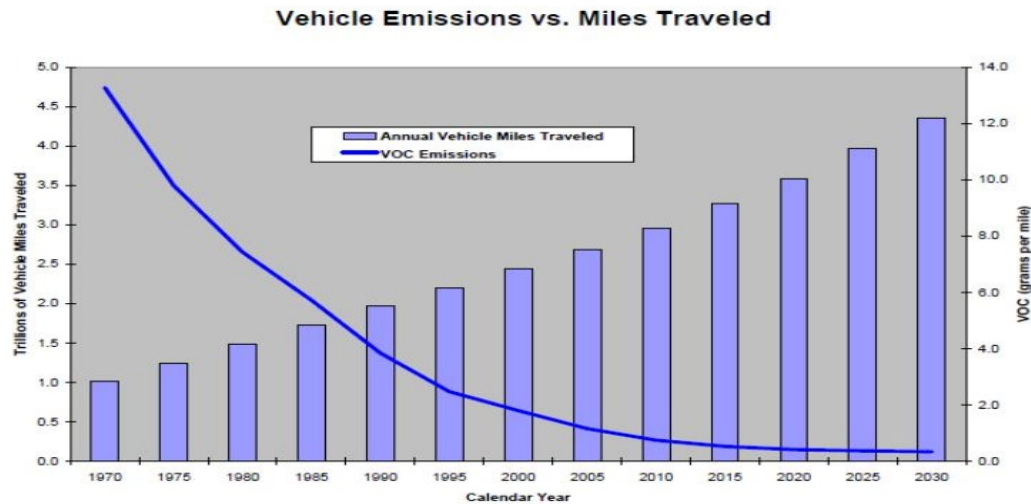
- As reported by United Way of California, 97% of California's poor households include at least one working adult; while there are poor people of all races, Latinos have the highest poverty rate (52%), followed by Blacks (41%) and Native Americans (39%). <https://www.unitedwaysca.org/realcost> Climate programs such as ACC II that impose higher economic costs on the poor also cause racially disparate harms to communities of color.
- CARB's own data acknowledges car commutes (single occupancy and carpools) are by far the dominant transit mode, that notwithstanding decades of effort and billions in transit funding, transit ridership has decreased, transit commuters spend twice as long as car commuters getting to work. [https://ww2.arb.ca.gov/sites/default/files/2022-07/2022\\_SB\\_150\\_Main\\_Report\\_Draft\\_ADA.pdf](https://ww2.arb.ca.gov/sites/default/files/2022-07/2022_SB_150_Main_Report_Draft_ADA.pdf) And, as Dr. Sperling forcefully reminded CARB and informed the public at the CARB June Board meeting, vehicle miles travelled ("VMT") mandates have not and will not work. Pipe dreams about fixed route public transit serving the needs of the working poor steal 20 hours per month from workers who use transit instead of driving: hours that can be spent caring for children, or on improving health and education outcomes.
- Car ownership needs to be combined with housing for families to succeed, as demonstrated by two Housing and Urban Development demonstration programs (Moving to Opportunity for Fair Housing and Welfare to Work Vouchers). As UCLA scholars who examined the data concluded: "Housing voucher recipients with cars tended to live and remain in higher-opportunity neighborhoods—places with lower poverty rates, higher social status, stronger housing markets, and lower health risks. . . . Cars are also associated with improved neighborhood satisfaction and better employment outcomes. Among Moving to Opportunity families, those with cars were twice as likely to find a job and four times as likely to remain employed." <https://www.urban.org/urban-wire/many-low-income-families-cars-may-be-key-greater-opportunity#:~:text=The%20results%3F,satisfaction%20and%20better%20employment%20outcomes>.
- Car ownership also massively expands employment opportunities even in transit served, higher density coastal regions. For example, in a San Diego study of job access via 30 minute transit v. car commutes, USC researchers found that 30 times more jobs can be accessed via car than transit. <https://priceschool.usc.edu/news/how-transit-affects-job-seekers/#:~:text=Job%20access%20by%20public%20transit%20and%20by%20car&text=Researchers%20found%20that%20driving%20or,in%20a%2030%2Dminute%20commute.ac>
- Only 20% of adults living below the national poverty line do not have access to a car. <https://www.governing.com/archive/gov-car-ownership-poverty.html>. Families that own a car worth more than \$4,650 lose access to key public assistance programs like CalWorks and food subsidies. *See also*, <https://www.governing.com/archive/gov-car-ownership-poverty.html>
- New electric cars cost far more than conventional vehicles, and unlike conventional vehicles cannot be maintained indefinitely. Once EV batteries wear out, they must be

replaced - or the car is worthless. EVs are not designed to allow battery replacements, and for the few for which battery replacement is an option, the battery replacement cost is over \$15,000 - over three times the amount allowed for our poorest families to own a car without losing food and cash assistance. Today, even in a post-pandemic supply chain constrained economy, one California used car website lists more than 1200 used cars for sale at prices at or below \$5,000. <https://www.carsforsale.com/cheap-cars-for-sale-in-california-P100006-L103772> and another lists almost 300 for less than \$4000. [https://www.cars.com/shopping/results/?stock\\_type=all&makes%5B%5D=&models%5B%5D=&list\\_price\\_max=4000&maximum\\_distance=150&zip=90220](https://www.cars.com/shopping/results/?stock_type=all&makes%5B%5D=&models%5B%5D=&list_price_max=4000&maximum_distance=150&zip=90220) These and similar very low cost cars are critical to the state's poor and lower income families.

- While the absence of sufficient EV charging infrastructure in disadvantaged communities has been acknowledged by CARB, electricity supply and distribution constraints for electric chargers have been largely to entirely ignored. These challenges are even more acute in higher density communities of color, which have multiple cars and adult workers per household. A further ignored challenge is the assumption that working families have a secure location to charge a car for 6+ hours, or that households where a car is in near-constant use by multiple adults working multiple jobs and caring for multiple kids can afford to lose access to a car for almost an entire workshift.

The ACC II rule ignores the real consequences to real people of banning the source of ongoing, reliable, cost-effective, and low emission cars that are affordable in the used car market for Californians who cannot afford a \$40,000 EV. The ACC II rule also ignores the fact that these consequences are both more acute and cause racially disparate harm to California's working families. Notwithstanding CARB's failed effort in our pending CARB lawsuit to argue that it was entirely Constitutional for CARB to adopt racially discriminatory climate policies (itself a shocking argument, which the court rejected), it remains illegal for CARB to adopt regulations that cause disparate harms to racial minorities. The ACC II rule does just that, and must be withdrawn pending the previously-promised, and now ignored, "just transition" to reducing reliance on fossil fuels.

**Fourth**, ACC II will worsen, not improve, local air quality and global GHG emissions. The Clean Air Act has a proven track record of reducing priority air pollutants without reducing car-dependent transportation to jobs, schools, hospitals, and other critical destinations. As reported by President Obama's EPA in 2016, and shown in the Figure below, tailpipe emissions of criteria pollutants were reduced by up to 99% even as VMT increased nationally - a massive win for air quality that did not condemn working families to increased poverty or worsens health and educational outcomes.



US EPA could have, in the early stages of the Clean Air Act, simply decided to ban internal combustion cars as well. Instead, it adopted technology-neutral emission reduction mandates that resulted in the elimination of lead in fuel, the invention and widespread success of catalytic converters, and an increasingly fuel-efficient (and thus lower GHG) of 99% less polluting vehicular fleet. And that was before GHG (CO<sub>2</sub>) reductions were even prioritized.

Reducing GHG is intended to combat global climate change, but, as CARB has itself acknowledged, GHG inventory emissions that occur within California's borders (as measured by CARB) comprise less than 1% of global anthropogenic emissions. These emissions can cease to exist entirely ("carbon neutrality") and global climate change outcomes will remain unchanged. Even if other states adopt California's internal combustion engine ban, global climate change outcomes will remain unchanged. What will certainly occur, however, is that instead of assuring the continued improvement of the fleet CARB will have created our own Havana, where higher emitting GHG cars are kept alive for decades to allow working families to continue to work and live, and more cost-efficient GHG technologies are stymied by CARB's top-down 2022 technology diktat.

The Clean Air Act (and California's equivalent) does not authorize an agency to ban the affordable, reliable, and ever more efficient transportation mode that almost all Californians rely on, and that working families earning lower wages and living in or near poverty - the highest proportion of whom are members of communities of color, depend on. It is also a policy determination that the Legislature - representatives of the people in our democratic system - declined to enact, after hearing from scores of interested parties and members of the public. ACC II's radical curtailment of the transportation mobility for working families and communities of color for any reason, including climate, suffers from the same foundational Constitutional flaw identified by the Supreme Court in *West Virginia v. EPA*, 142 S. Ct. 2578 (June 30, 2022): CARB is an administrative agency charged with implementing the law, not with inventing it.

As recently observed by the co-founder of [Democratic-Party Aligned] New American Foundation, the nation needs to address both infrastructure and climate change needs, but not through "[p]rogressive technocracy" that is "reformist and elitists" in which "social engineers, insulated from democratic accountability and wielding vast authority, are empowered to devise long-range plans to promote social and environmental goals, which are handed over to deferential elected officials to implement with few changes - against the opposition of ignorant masses if

necessary." <https://thebreakthrough.org/journal/no-15-winter-2022/green-new-deal-social-engineering> Lind goes on to note that "Wilsonian progressivism favored institutions like the civil service and city-manager government to insulate government decision-making from voters and elected representatives."

Lind's 2021 observations are aligned, across party lines, with Justice Gorsuch's 2022 concurrence in *West Virginia*, where he quotes from the progressive Wilson that "the mass of the people were 'selfish, ignorant, timid, stubborn, or foolish' and defended 'the white men of the South for 'rid[ding] themselves, by fair means or foul, of the intolerable burden of governments sustained by the votes of ignorant [African Americans].'" *West Virginia, Id.*, Gorsuch concurrence, FN 1.

CARB's ACC II rule, along with the four anti-housing measures we challenged in the 2017 Scoping Plan, and the far more extensive and foundational flaws we have commented on for the Draft 2022 Scoping Plan, is another "progressive" Wilsonian triumph: it makes the poor poorer, and singles out communities of color and working families for disparate and massive harms to plow past the Legislature's rejection of CARB's ACC II diktat.

Unlike Congress, however, California's Legislature consists overwhelmingly of Democrats who share CARB's climate concerns, but are also accountable to far more economically, geographically, and racially diverse voters who did not vote to make life even more expensive and time-consuming, or eliminate access to affordable, reliable cars in favor of an aging Havana fleet model.

**Fifth and Finally**, in addition to all of the reasons set forth in this and our two prior comment letters, ACC II is a regulation, and as such is subject to, but has failed to comply with the requirements of:

**A. The Administrative Procedure Act ("APA")** substantive regulatory content criteria, which prohibits the approval of new regulations unless they satisfy six discrete criteria, as defined in full below (Gov't Code § 11349)

(a) "Necessity" means the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific, taking into account the totality of the record. For purposes of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion.

(b) "Authority" means the provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation.

(c) "Clarity" means written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them.

(d) "Consistency" means being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law.

(e) "Reference" means the statute, court decision, or other provision of law which the agency implements, interprets, or makes specific by adopting, amending, or repealing a regulation.

(f) "Nonduplication" means that a regulation does not serve the same purpose as a state or federal statute or another regulation. This standard requires that an agency proposing to amend or adopt a regulation must identify any state or federal statute or regulation which is overlapped or duplicated by the proposed regulation and justify any overlap or duplication. This standard is not intended to prohibit state agencies from printing relevant portions of enabling legislation in

regulations when the duplication is necessary to satisfy the clarity standard in paragraph (3) of subdivision (a) of Section 11349.1. This standard is intended to prevent the indiscriminate incorporation of statutory language in a regulation.

For the reasons set forth in this letter, and our two prior comment letters, inclusive of attachments and reference materials, ACC II violates the "necessity" prong because CARB has not independently verified the necessity of this regulation to comply with the Legislature's SB 32 target of 40% lower GHG emissions by 2030. ACC II violates the "authority" prong because CARB has acted directly contrary to the Legislature's rejection of an internal combustion engine vehicle sale phase-out, and neither CARB nor the Governor (via Executive Order) have the independent authority to impose a policy by regulation that has been expressly rejected by the people's elected representatives in the Legislature. ACC II violates the "consistency" prong because it is not at all in harmony with, and in fact in conflict with, Constitutional and statutory protections of the right to travel, the right to drive, and the right to not be deprived of an effective mobility option shown to be required to protect the health, welfare, economic security, educational attainment, and upward mobility of working families, including low income families from communities of color.

**B. The APA's Standardized Regulatory Impact Analysis ("SRIA")**(Gov't Code §11346.3), which requires an assessment of the economic impact of a regulation on California businesses and individuals. CARB's SRIA fails to analyze the harms caused by ACC II to individuals in working families, rural areas, and communities of color, but it fails even more dramatically to assess the harms caused to the small businesses owned and operated in these communities. Independent truckers, contractors and other essential workers who must transport tools or goods in personal vehicles to do their jobs and be paid, food service owners reliant on food trucks and customers reliant on cars, delivery services, drivers for rideshare services, ministers and counsellors, medical personnel and first responders, labor organizers, entertainers and athletes - all require access to affordable, reliable, personal vehicles - as well as ample supplies of electricity, safe and secure EV charging infrastructure, and (for the many essential workers forced to travel 100 miles or more each day, and for the households where vehicular use is shared by multiple workers on consecutive shifts) much more extended ranges.

**C. The California Environmental Quality Act ("CEQA") (Pub. Res. Code § 21000 et seq.)** which requires an assessment of ALL reasonably foreseeable direct, indirect and cumulative environmental impacts of the regulation. Based on the trajectory of vehicular tailpipe emission reductions achieved by 2016 as shown in the Figure (above), and ongoing continued fleet-level vehicular efficiencies from petroleum, hydrogen, and EV vehicles, and the extremely perverse and racist CARB metric of assuming that people and jobs that leave California result in GHG "reductions" that address climate change instead of what actually happens (increased global GHG from higher per capita states and countries), CARB's CEQA compliance failures are staggering in scope. Construction-phase impacts of massive EV charging infrastructure installations, as well as substation and distribution equipment improvements required to bring far more power into each home, and transmission and generation expansions at an even larger scale, are obvious and clear consequences of ACC II implementation that are ignored. The comments filed by The 200 on the Draft 2022 Scoping Plan, which include detailed CEQA comments and the CEQA violations described in the 2017 Scoping Plan lawsuit, are hereby incorporated into this ACC II comment letter. (It should be noted that all such comments, inclusive of The 200's lawsuits, are already in the possession of CARB and all comments inclusive of copies of the lawsuits are included on the CARB 2022 Scoping Plan website, so full re-transmittal of this content in this ACC II comment letter is not warranted.)

D. CARB's commitment to Racial Equity and Social Justice (Resolution 20-33) expressly acknowledged that "institutional and structural racism continues to threaten CARB's ability to equitably fulfill its charge so that all people of color - both inside the organization, and those outside the organization for whom CARB serves and work with as constituents and stakeholder - are treated without prejudice, bias and derision." This Resolution also acknowledged that ending racial equity was "vital work" and acknowledged that CARB itself "must actively participate in changing processes, protocols, and policies within its control to ensure racial equity and social justice remains a key objective in the reduction of air pollutants and greenhouse gas emissions." The ACC II rule blinks past this Resolution. Low income communities will be stuck with Havana's aging fleet of cars while the market continues to chase high income households with high cost EV vehicles and infrastructure. Any low income household foolish enough to accept an EV will automatically lose access to public assistance programs prohibiting ownership of cars worth more than \$4,650. CARB has treated with derision and bias the "intersectional" consequences of the ACC II rule, along with the concerns of scores of already-stressed workers who have taken the time - waiting in many cases hours and hours for the opportunity to speak for just one minute - to beg CARB to respect their need for affordable, reliable, personal vehicles. CARB has already formally admitted to its ongoing racism and bias, but this rulemaking package (except for the secret set of 24 new rulemaking documents added in the second 15-day notice by CARB staff, some of which we have no practical means of accessing) shows zero regard for racial equity - or impacts.

CARB should not be lured by the progressivism philosophy into - again - inflicting racially disparate harms on communities of color based on prejudice and bias of unrepresentative bureaucrats enjoying the equivalent of lifetime employment, and pensions and benefits that most Californians can only imagine.

Of course it's fun to drive an EV. It's also fun to drive a Corvette. EVs play an important role in the transportation technology of the future. Banning far less costly, reliable, and ubiquitous vehicles used by the vast majority of Californians exceeds CARB's legal authority, and its own moral commitment to ending racial injustice.

The ACC II rule should be rejected, and a technology-neutral fleet efficiency rule should be developed to reduce GHG - the model used so successfully to reduce smog and other vehicular emissions. That model worked; CARB's top-down EV mandate does not.

Our clients live in a democracy, not a progressive autocracy. Our clients have spent decades fighting for civil rights, including voting rights. CARB should implement, not thwart, the decisions of the Legislators elected by the people.

Respectfully submitted,

HOLLAND & KNIGHT LLP



Jennifer L. Hernandez