

# The Long and Winding Road to Carbon Neutrality: Can California’s Zero Emission Vehicle Survive the Twists and Turns of the Legal System?†

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† Author’s Note: This Article was written and submitted to JCEL before the California Air Resources Board (“CARB”) adopted a final regulation on the electric vehicle mandate. Many of the scenarios described in this paper are hypothetical and may not align with the final rule. CARB filed the proposed regulations with the Office of Administrative Law (“OAL”) on October 14, 2022, and OAL had until November 30, 2022, to make a final determination. See Proposed Advanced Clean Cars II (ACC II) Regulations, California Air Resources Board (last visited Nov. 13, 2022), <https://ww2.arb.ca.gov/rulemaking/2022/advanced-clean-cars-ii> [<https://perma.cc/V4NY-ZY6Z>].

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## ABSTRACT

*The effects of climate change are becoming more and more obvious every year, evidenced by extreme weather events, rising sea levels, and increased global temperature. In an effort to mitigate the damage caused by greenhouse gases, California Governor Gavin Newsom announced a goal to have all new passenger vehicles sold in California be Zero-Emission Vehicles (“ZEVs”) by 2035. This Article explores the possible legal issues that California’s ZEV mandate faces now and may face in the*

*future. First, California will likely face a federal preemption challenge under the Clean Air Act. Second, the California Air Resources Board's authority to mandate ZEVs may be challenged under California administrative law. Third, assuming the ZEV mandate passes both federal and state scrutiny, the ancillary building codes associated with ZEV charging may lead to legal challenges at the municipal level. This Article explores the legal arguments that will likely be presented by both opponents and proponents of the ZEV mandate if any of these issues are brought to court.*

## I. INTRODUCTION: CALIFORNIA'S ZERO EMISSION VEHICLE GOALS

On September 23, 2020, California Governor Gavin Newsom signed Executive Order N-79-20 ordering a set of actions “necessary to combat the climate crisis.”<sup>1</sup> The Governor emphasized the need for climate change mitigation in the wake of the COVID-19 pandemic, which had adverse effects on California’s economy and reduced demand for public transportation.<sup>2</sup> The goals of Governor Newsom’s EO-N-79-20 plan were to increase clean transportation accessibility, reduce greenhouse gas (“GHG”) and toxic pollutant emissions, and create and retain high-quality jobs by decarbonizing the transportation sector.<sup>3</sup>

Governor Newsom created goals for the state to transition to zero-emission passenger, medium, heavy duty, and off-road vehicles. Notably, EO-N-79-20 contains the goal that “100 percent of in-state sales of new passenger cars and trucks will be zero-emission by 2035.”<sup>4</sup> The California Department of Transportation (“Caltrans”) defines Zero Emission Vehicles (“ZEVs”) as “vehicles that do not produce exhaust emissions of any criteria pollutant under any and all possible operational modes and conditions.”<sup>5</sup> Implementing widespread adoption of ZEVs is critical to addressing California’s emission reduction goals because California’s transportation sector accounts for half of all in-state greenhouse gas emissions.<sup>6</sup>

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1. CAL. EXEC. ORDER NO. N-79-20 (2020).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Advancing Zero-Emission Vehicles*, CALTRANS, <https://dot.ca.gov/programs/sustainability/zero-emission-vehicles> [<https://perma.cc/9R98-8FZR>] (last visited Sept. 24, 2022).

6. *Id.*

The governor directed the California Air Resource Board (“CARB”)<sup>7</sup> to develop and propose regulations to increase the number of ZEVs and work towards the one hundred percent goal by 2035.<sup>8</sup> Additionally, CARB was directed to create strategies alongside other state agencies, the United States Environmental Protection Agency (“EPA”), and local air districts to achieve this goal.<sup>9</sup> In doing so, CARB must “act consistently with technological feasibility and cost-effectiveness.”<sup>10</sup> The executive order further directs the relevant transportation agencies to develop strategies and infrastructure for zero emission transportation,<sup>11</sup> the labor agencies to develop strategies to increase ZEV related job opportunities, and the California Energy Commission to assess ZEV infrastructure to support the levels of ZEV adoption required by the order.<sup>12</sup>

To track these goals, the Governor’s Office of Business and Economic Development (“GO-Biz”) will work with relevant state agencies to develop a Zero-Emissions Vehicle Market Development Strategy to be updated every three years.<sup>13</sup> The first of these strategies, published in February of 2021, established four pillars of ZEV Market Development: (1) vehicles, (2) infrastructure, (3) end users, and (4) workforce.<sup>14</sup> These pillars will be used to meet the state’s climate goals of improved air quality, reduced GHG emissions, improved access to clean transportation, economic development, and job creation.<sup>15</sup> In addition to the goals of EO-N-70-20, the ZEV Market Development Strategy lays out an intermediate goal of “5 million ZEVs on California roads by 2030 and 250,000 public and shared charging stations . . . by 2025.”<sup>16</sup>

California’s lofty plan for ZEVs, especially the idea of a ZEV mandate, raises the obvious question: is this legal? Given the current outrage over

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7. CARB is California’s lead agency for air pollution control that works to protect human health from toxic air pollutants and reduce greenhouse gas emissions to fight climate change. The Board consists of sixteen members, including local air district board members, experts on air quality fields, and representatives of environmental justice communities. ABOUT, CALIFORNIA AIR RESOURCES BOARD, <https://ww2.arb.ca.gov/about> [<https://perma.cc/772Q-QB3A>] (last visited Nov. 4, 2021).

8. CAL. EXEC. ORDER NO. N-79-20 (2020).

9. *Id.*

10. *Id.*

11. In addition to zero-emission vehicles, the executive order encourages rail and transit development and infrastructure to support biking, walking and micro-mobility options. *Id.*

12. *Id.*

13. *Id.*

14. *California Zero-Emission Vehicle Market Development Strategy*, CAL. GOVERNOR’S OFF. OF BUS. AND ECON. DEV. at 6 (Feb. 2021), [https://static.business.ca.gov/wp-content/uploads/2021/02/ZEV\\_Strategy\\_Feb2021.pdf](https://static.business.ca.gov/wp-content/uploads/2021/02/ZEV_Strategy_Feb2021.pdf) [<https://perma.cc/XLE7-E6VH>].

15. *Id.*

16. *Id.* at 14.

mask and vaccine “mandates” as part of California’s COVID-19 policies, it is unlikely that a ZEV mandate will be implemented without first facing a series of legal challenges.<sup>17</sup>

## II. FEDERAL PREEMPTION UNDER THE CLEAN AIR ACT

California may only create a ZEV mandate if the EPA grants a waiver to preemption under the federal Clean Air Act (“CAA”).<sup>18</sup> The CAA, passed in 1970, is a federal law that authorizes the EPA to create National Ambient Air Quality Standards (“NAAQS”).<sup>19</sup> Section 209(a) of the CAA prohibits states from adopting or enforcing any emission standards for new motor vehicles or new motor vehicle engines, but section 209(b) allows the EPA to waive this preemption for states that had adopted emission standards prior to March 30, 1966.<sup>20</sup> California is the only state that meets this requirement and is eligible to receive a waiver.<sup>21</sup> Since the enactment of the CAA in 2005, the EPA has regularly approved waivers for California’s emission standards.<sup>22</sup>

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17. See Haley Branson-Potts, *‘The mood is grim’: Death threats, violence, intimidation mark another pandemic school year*, L.A. TIMES, Oct. 5, 2021, <https://www.latimes.com/california/story/2021-10-05/covid-vaccine-mask-fury-shakes-up-california-schools> [<https://perma.cc/A7VV-89KH>] (giving examples of extreme reactions to mask and vaccine requirements in California including a child punching her teacher in the face and teachers vowing to quit if vaccines were mandated); see also Howard Blume and Kristin Taketa, L.A., *San Diego school districts are sued over student vaccination mandate*, L.A. TIMES, Oct. 14, 2021, <https://www.latimes.com/california/story/2021-10-14/a-san-diego-school-districts-are-sued-over-student-vaccination-mandate> [<https://perma.cc/23JF-UZ EJ>] (describing lawsuits against two California school districts challenging COVID-19 vaccine mandates for students).

18. 42 U.S.C.S. § 7401 (1970).

19. *Id.*

20. 42 U.S.C.S. § 7543 (1990).

21. Notice of Decision Granting a Waiver of Clean Air Act Preemption for California’s 2009 and Subsequent Model Year Emission Standards for New Motor Vehicles, 74 Fed. Reg. 32744, 32747 n.11 (July 8, 2009).

22. See Notice of Decision Granting a Waiver of Clean Air Act Preemption for California’s Advanced Clean Car Program for 2017 and Earlier Model Years, 78 Fed. Reg. 2112, 2113 (Jan. 9, 2013) (allowing California to enforce its Advance Clean Car regulations in 2013).

*A. The Trump Administration's Withdrawal of California's Waiver and the Biden Administration's Subsequent Reinstatement*

The Trump administration withdrew California's 2013 waiver to enforce vehicle GHG emission standards through 2026 in a series of climate change policy rollbacks.<sup>23</sup> Under the Trump administration's "One National Program Rule," only the federal government can create uniform national standards for automobile emissions.<sup>24</sup> Secretary of Transportation Elaine L. Chao explained that the rule "ensure[es] that no State has the authority to opt out of the Nation's rules, and no State has the right to impose its policies on the rest of the country."<sup>25</sup> The Rule both revoked California's current waiver, which applies to car models through 2026, and prevented California from applying for future waivers.<sup>26</sup> In the wake of this rule, California "does not currently have a waiver to enforce" its tailpipe GHG emission standards and ZEV mandate.<sup>27</sup>

Stuck in a game of policy ping pong, the EPA under the current Biden administration reconsidered the Trump administration's withdrawal of California's waiver.<sup>28</sup> President Biden issued an Executive Order calling for relevant agencies to propose rules for "suspending, revising, or rescinding" previous agency actions, including the One National Program Rule.<sup>29</sup> Additionally, a number of petitioners brought claims challenging the One National Program Rule's waiver withdrawal and interpretation of section 209 of the CAA.<sup>30</sup> However, following President Biden's Executive Order, the District of Columbia Circuit Court of Appeals granted a motion

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23. *Trump Administration Announces One National Program Rule on Federal Preemption of State Fuel Economy Standards*, EPA (Sept. 19, 2019), <https://www.epa.gov/newsreleases/trump-administration-announces-one-national-program-rule-federal-preemption-state-fuel> [<https://perma.cc/B5N5-7YSX>].

24. *Id.*

25. *Id.*

26. *Id.*

27. Revised 2023 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions Standards, 86 Fed. Reg. 43726, 43770 (proposed Aug. 10, 2021) (to be codified at 40 C.F.R. pts. 86, 300).

28. *EPA Reconsiders Previous Administration's Withdrawal of California's Waiver to Enforce Greenhouse Gas Standards for Cars and Light Trucks*, EPA (Apr. 26, 2021), <https://www.epa.gov/newsreleases/epa-reconsiders-previous-administrations-withdrawal-californias-waiver-enforce> [<https://perma.cc/26M7-VREW>].

29. President Joseph Biden Jr., Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, THE WHITE HOUSE (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-protecting-public-health-and-environment-and-restoring-science-to-tackle-climate-crisis/> [<https://perma.cc/EX7U-VQ2R>].

30. *See Union of Concerned Scientists v. Nat'l Highway Traffic Safety Admin.*, No. 19-1230 (D.C. Cir. Feb. 8, 2021).

to hold the cases in abeyance while the EPA and other relevant agencies review the One National Program Rule.<sup>31</sup>

The EPA issued a Notice of Reconsideration on April 28, 2021 and held a public hearing on June 2, 2021 to address this topic.<sup>32</sup> Ultimately, on March 14, 2022, the EPA honored President Biden's order and rescinded its previous waiver withdrawal to reinstate the 2013 California Advanced Clean Car program waiver, including the ZEV sales mandate.<sup>33</sup> With this revision to the EPA's regulations, analysis next turns to whether the EPA will grant a waiver to California for its new one hundred percent ZEV mandate. However, the courts never decided on whether the Trump administration EPA had authority to revoke the waiver in the first place. This leaves the door open for a future administration to potentially overturn future EPA waiver decisions.

### *B. EPA's Requirements to Grant California's Waiver*

Under section 209 of the Clean Air Act, the EPA shall grant a waiver to California if "the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards."<sup>34</sup> The EPA will not grant the waiver if: (1) "the determination of the State is arbitrary and capricious"; (2) "such State does not need such State standards to meet compelling and extraordinary conditions"; or (3) "such State standards and accompanying enforcement procedures are not consistent with section 7521(a) of this title."<sup>35</sup> According to the EPA Administrator, "Congress intentionally structured this waiver provision to restrict and limit EPA's ability to deny a waiver, and did this to ensure

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31. Order Granting Motion to Hold Cases in Abeyance, *Union of Concerned Scientists v. Nat'l Highway Traffic Safety Admin.*, No. 19-1230 (D.C. Cir. Feb. 8, 2021).

32. California State Motor Vehicle Pollution Control Standards; Advanced Clean Car Program; Reconsideration of a Previous Withdrawal of a Waiver of Preemption; Opportunity for Public Hearing and Public Comment, 86 Fed. Reg. 22421, 22421, 22427-28 (Apr. 28, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-04-28/pdf/2021-08826.pdf> [<https://perma.cc/53WL-BMSC>].

33. California State Motor Vehicle Pollution Control Standards; Advanced Clean Car Program; Reconsideration of a Previous Withdrawal of a Waiver of Preemption; Notice of Decision, 87 Fed. Reg. 14332, 14332 (Mar. 14, 2022), <https://www.govinfo.gov/content/pkg/FR-2022-03-14/pdf/2022-05227.pdf> [<https://perma.cc/3PJ6-28S2>].

34. 42 U.S.C. § 7524(b); Clean Air Act § 209(b).

35. 42 U.S.C. § 7543.

that California had broad discretion in selecting the means it determined best to protect the health and welfare of its citizens.”<sup>36</sup>

*1. The EPA Will Likely Find That California Meets the First and Third Prong of the Waiver Requirements*

For the first prong, a standard for zero-emissions will almost certainly be more protective than any federal emission standards, as it is highly unlikely that there will be a federal ZEV mandate by 2035. Even if the standards are obviously more protective, California will likely have to show studies, hearings, and other administrative procedures to show the decision was not made arbitrarily and capriciously.<sup>37</sup> For the third prong, California can likely avoid conflict with emission standards relating to technical feasibility and lead time to manufacturers through careful drafting of the ZEV mandate.<sup>38</sup>

*2. The EPA Will Likely Find That California Meets the Second Prong’s “Compelling and Ordinary Circumstances” Requirement*

The second prong of the EPA waiver may be the most difficult for California to prove. The EPA has only denied California’s request for a waiver once, in 2008, because California did not meet the “compelling and extraordinary conditions” requirement of the CAA.<sup>39</sup> However, the EPA quickly reversed this denial<sup>40</sup> after newly instated President Obama directed it to reconsider.<sup>41</sup>

California will likely argue that it can satisfy “compelling and extraordinary conditions” because it suffers from what the EPA called “the worst air quality in the United States.”<sup>42</sup> Seven of the ten most smog-polluted cities

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36. Notice of Decision Granting a Waiver of Clean Air Act Preemption, 74 Fed. Reg. 32744, 32745 (EPA, July 8, 2009).

37. 42 U.S.C. § 7543.

38. 42 U.S.C. § 7521(i)(2)(A) (“The Administrator shall . . . examine the availability of technology . . . for meeting more stringent emission standards . . . including the lead time and safety and energy impacts”).

39. *California’s Greenhouse Gas Vehicle Emission Standards Under Assembly Bill 1493 of 2002 (Pavley)*, CAL. AIR RES. BD., <https://ww2.arb.ca.gov/californias-greenhouse-gas-vehicle-emission-standards-under-assembly-bill-1493-2002-pavley> [<https://perma.cc/E4LU-ZU7U>].

40. *California & the waiver: The facts*, CAL. AIR RES. BD. (Sept. 17, 2019), <https://ww2.arb.ca.gov/resources/fact-sheets/california-waiver-facts> [<https://perma.cc/VY4S-3EVZ>].

41. Memorandum on the State of California Request for Waiver Under 42 U.S.C. 7543(b), the Clean Air Act, 2009 DAILY COMP. PRES. DOC. 1 (Jan. 26, 2009).

42. *Trump Administration Announces One National Program Rule on Federal Preemption of State Fuel Economy Standards*, EPA (Sept. 19, 2019), <https://www.epa.gov>.



in the United States are in California, due to the state's unique geography.<sup>43</sup> Climate change is also burdening California with "compelling and extraordinary impacts,"<sup>44</sup> including catastrophic wildfires and damage to coastlines from rising sea levels. For example, eighteen out of twenty of the largest wildfires in California history have occurred since 2007, and nine of those fires were in 2020 and 2021 alone.<sup>45</sup> California Department of Forestry and Fire Protection ("Cal Fire") has stated that climate change is a "key driver" in the trend towards larger and more destructive fires.<sup>46</sup>

California will further argue that the ZEV standards are needed to meet these conditions because the transportation sector accounts for nearly half of the state's GHG emissions.<sup>47</sup> In contrast, transportation only accounts for twenty-seven percent of national greenhouse gas emissions.<sup>48</sup> The ZEV Market Development Strategy states that ZEVs are "a critical and necessary answer to a series of stubborn problems including but not limited to greenhouse gas emissions, toxic air contaminants and criteria pollutants from California's more than 30 million vehicles."<sup>49</sup> To combat California's extraordinary GHG pollution, the state will need to make drastic changes to the transportation sector to reduce emissions. Accordingly, the EPA will likely find that the second prong is satisfied.

However, one hundred percent zero-emission vehicles could be seen as an extreme measure and will likely be met with opposition from the fossil fuel industry and others. Opponents will argue that California fails to meet the "compelling and extraordinary conditions" requirement. Climate change is an international phenomenon, so objectors will argue that California's conditions are no more compelling than the rest of the country's climate

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gov/newsreleases/trump-administration-announces-one-national-program-rule-federal-preemption-state-fuel [https://perma.cc/B5N5-7YSX].

43. CAL. AIR RES. BD., *supra* note 39.

44. See Cal. Assemb. B. No. 1493 § 200 (July 22, 2022) (listing six "compelling and extraordinary impacts" particular to California).

45. CALFIRE, *Top 20 Largest California Wildfires*, [https://www.fire.ca.gov/media/4jandlh/top20\\_acres.pdf](https://www.fire.ca.gov/media/4jandlh/top20_acres.pdf) (last visited Sept. 9, 2021).

46. Alexandra Meeks, et al., *Wildfires in California this year have scorched 3 times more land in same period of last year's record season*, CNN (July 13, 2021), <https://www.cnn.com/2021/07/13/weather/california-wildfires-record-season/index.html> [https://perma.cc/9RR4-H9A8].

47. CAL. GOVERNOR'S OFF. OF BUS. AND ECON. DEV., *supra* note 14, at 4.

48. *Sources Of Greenhouse Gas Emissions*, EPA, <https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions> [https://perma.cc/6YQ5-D7NL] (last visited Sept. 21, 2022).

49. *Id.*

conditions. Fifteen other states have adopted California’s emission standards, showing that California is not extraordinary.<sup>50</sup> Considering a significant number of states carry the same standards, objectors will argue that a simple solution for the EPA is to adopt one set of national standards.

Opponents may alternatively argue that California “does not *need* such standards”<sup>51</sup> to meet its extraordinary conditions. California already reduced GHG emissions “from a 2001 peak of 14.0 tonnes per person to 10.5 tonnes per person in 2019, a 25 percent decrease.”<sup>52</sup> Opponents will argue that GHG emissions are decreasing without imposing a ZEV mandate. Therefore, California can continue to reduce emissions from other sectors without requiring 100% in-state ZEV sales. Additionally, the ZEV mandate could be ineffectual in reducing emissions because people will purchase vehicles from other states. In either case, the ZEV mandate would not be *necessary* to address California’s “compelling and extraordinary conditions.”

The EPA will likely not be persuaded by arguments that the ZEV standards are unnecessary for California to meet its compelling and extraordinary conditions. California has made significant improvements to air quality and reduced emissions *because* California enforces restrictive rules. Removing California’s ability to enact such rules would be counterproductive. Accordingly, the EPA will likely approve California’s waiver request.

### C. Conclusion

California’s ambitious ZEV mandate is in a precarious position, dependent upon both political leaders and administrative review by the EPA. For the EPA to grant California a waiver to the Clean Air Act, California will need to meet all three prongs of the CAA section 209(a) requirements. To do so, CARB will need to carefully draft the ZEV mandate to comply with the CAA and show that the decision to mandate one hundred percent ZEV sales was not made arbitrarily and capriciously. CARB will also need to demonstrate that California has the compelling and extraordinary conditions that initially prompted Congress to include a waiver process exclusively for that state.

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50. See CAL. AIR RES. BD., STATES THAT HAVE ADOPTED CALIFORNIA’S VEHICLE STANDARDS UNDER SECTION 177 OF THE FEDERAL CLEAN AIR ACT (Nov. 3, 2021), <https://ww2.arb.ca.gov/resources/documents/states-have-adopted-californias-vehicle-standards-under-section-177-federal> [<https://perma.cc/A2AE-KK69>].

51. 42 U.S.C. § 7543 (emphasis added).

52. CAL. AIR RES. BD., CALIFORNIA GREENHOUSE GAS EMISSIONS FOR 2000 TO 2019 TRENDS OF EMISSIONS AND OTHER INDICATORS, at 4 (July 28, 2021), [https://ww2.arb.ca.gov/sites/default/files/classic/cc/ca\\_ghg\\_inventory\\_trends\\_2000-2019.pdf](https://ww2.arb.ca.gov/sites/default/files/classic/cc/ca_ghg_inventory_trends_2000-2019.pdf) [<https://perma.cc/6BVS-NHUR>].

### III. CARB'S AUTHORITY UNDER CALIFORNIA LAW

Assuming the waiver is granted, CARB will likely have the authority to mandate ZEVs under California law. Assembly Bill 1493 (2002) directed CARB to “develop and adopt regulations that achieve the maximum feasible and cost-effective reduction of greenhouse gas emissions from motor vehicles.”<sup>53</sup> Assembly Bill 32 (2006) and Senate Bill 32 (2016) require California to reduce emissions and direct CARB to be the “agency charged with monitoring and regulating sources of emissions of greenhouse gases that cause global warming . . . .”<sup>54</sup> Assembly Bill 32 required California to reduce GHG emission to 1990 levels by 2020, and Senate Bill 32 extended this requirement to 40% below 1990 levels by 2030.<sup>55</sup> Under these state laws, CARB, along with relevant state agencies, must take measures to reduce GHG emissions, and CARB may do so through regulation of motor vehicles.

#### A. California State Court's Standard of Review

If the ZEV mandate is challenged under state law, the court may defer to CARB's rule if it meets the requirements under the *Yamaha Doctrine*.<sup>56</sup> In *Yamaha Corp. of Am. v. State Bd. of Equalization*, the Supreme Court of California held that quasi-legislative acts by an agency “bind this and other courts as firmly as the statutes themselves.”<sup>57</sup> For quasi-legislative acts, the court must first determine if the action is “within the bounds of the statutory mandate.”<sup>58</sup> If so, the court must then determine if the plan is “reasonably necessary to effectuate the purpose of the statute,” which the court must find unless the agency made the decision arbitrarily and capriciously.<sup>59</sup> However, an agency's interpretation of a statute is “contextual”

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53. CAL. HEALTH & SAFETY CODE § 43018.5 (Deering through 175 of the 2022 Reg. Sess.).

54. CAL. HEALTH & SAFETY CODE § 38562 (Deering through ch. 175 of the 2022 Reg. Sess.); CAL. HEALTH & SAFETY CODE § 38566 (Deering through ch. 175 of the 2022 Reg. Sess.).

55. CAL. HEALTH & SAFETY CODE § 38562 (Deering through ch. 175 of the 2022 Reg. Sess.); CAL. HEALTH & SAFETY CODE § 38566 (Deering through ch.175 of the 2022 Reg. Sess.).

56. See *Yamaha Corp. of Am. v. State Bd. of Equalization*, 19 Cal. 4th 1, 7–8 (1998).

57. *Id.* at 7.

58. *Id.* at 16.

59. *Id.* at 19.

and dependent on the circumstances, and the court has a less deferential standard of review.<sup>60</sup>

The First District Court of Appeal applied the *Yamaha* Doctrine to determine that CARB's 2009 Climate Change Scoping Plan complied with AB 32 in *Ass'n of Irrigated Residents v. State Air Resources Bd.*<sup>61</sup> The court determined that the scoping plan was a "quasi-legislative" act because AB 32 gave CARB explicit direction to develop a scoping plan.<sup>62</sup> Thus, the court reviewed the quasi-legislative act under the "more deferential arbitrary and capricious standard."<sup>63</sup> The court countered three arguments from the Association of Irrigated Residents ("AIR") to hold that CARB did not act arbitrarily or capriciously in adopting the scoping plan.<sup>64</sup> First, the scoping plan "put California on a path towards" meeting the AB 32 goals of achieving "'the maximum technologically feasible and cost-effective reductions' by 2020."<sup>65</sup> Second, CARB considered, and submitted to peer reviewers for independent review, the feasibility and cost effectiveness of the scoping plan.<sup>66</sup> Third, CARB considered directly reducing emissions from other sectors, like industry and agriculture, and decided on the cap-and-trade program only after going to "exceptional lengths to obtain informed and scholarly input on the complex scientific and economic issues."<sup>67</sup>

### *B. California State Court's Review of the ZEV Mandate*

#### *1. The ZEV Mandate is Likely a Quasi-Legislative Act Under the Yamaha Doctrine*

If CARB's ZEV mandate is challenged, the court will first determine if the mandate qualifies as a "quasi-legislative" act under the *Yamaha* Doctrine.<sup>68</sup> AB 32 directs CARB to "adopt rules and regulations . . . to achieve the maximum technologically feasible and cost-effective greenhouse gas reductions . . . ."<sup>69</sup> SB 32 extends this requirement, stating that CARB "shall

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60. *Yamaha Corp. of Am.*, 19 Cal. 4th at 7.

61. *Ass'n of Irrigated Residents*, 206 Cal. App. 4th at 1487.

62. *Id.* at 1495. CAL. HEALTH & SAFETY CODE § 38561 (Deering through ch. 175 of the 2022 Reg. Sess.) states "[o]n or before January 1, 2009, [CARB] shall prepare and approve a scoping plan . . . for achieving the maximum technologically feasible and cost-effective reduction in greenhouse gas emissions . . . by 2020...."

63. *Ass'n of Irrigated Residents*, 206 Cal. App. 4th at 1495.

64. *Id.* at 1496.

65. *Id.* at 1496–97 (quoting CAL. HEALTH & SAFETY CODE § 38562 (Deering through ch. 175 of the 2022 Regular Session)).

66. *Id.* at 1496–97.

67. *Id.* at 1497.

68. *See Yamaha Corp. of Am. v. State Bd. of Equalization*, 19 Cal. 4th 1, 16 (1998).

69. CAL. HEALTH & SAFETY CODE § 38562 (Deering through ch. 175 of the 2022 Reg. Sess.).

ensure that statewide greenhouse gas emissions are reduced to at least 40 percent below the statewide greenhouse gas limit” by 2030.<sup>70</sup> Finally, AB 1493 explicitly requires CARB to adopt regulations to reduce GHG emissions from motor vehicles.<sup>71</sup> CARB will argue that this broad direction from the California legislature authorizes CARB to adopt a ZEV mandate to reduce greenhouse gas emissions and, together with the specific authority in AB 1493, meet California’s climate change goals.

However, opponents will argue that the ZEV mandate is an agency interpretation because there is no explicit statutory mandate to regulate ZEV sales. In *Ass’n of Irrigated Residents*, CARB was explicitly directed in AB 32 to “prepare and approve a scoping plan.”<sup>72</sup> In contrast, AB 32, SB 32, and AB 1493 contain no explicit direction for CARB to create a ZEV mandate. Moreover, AB 1493 contains a provision that CARB may not implement “a ban on the sale of any vehicle category in the state, specifically including, but not limited to, sport utility vehicles and light-duty trucks.”<sup>73</sup> Opponents will argue that CARB’s ZEV mandate is in direct conflict with this statute because the mandate will ban the sale of all gas-powered vehicles. If CARB then argues that “vehicle category” refers to the size and model of the vehicle (SUV or truck), not fuel source, opponents will say that CARB is interpreting AB 1493, rather than working within the bounds of the statutory mandate.<sup>74</sup>

CARB’s argument that its actions are within the statutory mandates will likely be more persuasive. The California legislature set a clear intent to reduce GHG emissions and gave CARB the power to decide how to do so.<sup>75</sup> Mandating ZEV sales is the logical, although ambitious, next step for limiting vehicle emissions to combat climate change. If the court determines that CARB’s ZEV mandate is a quasi-legislative act, the court will give

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70. CAL. HEALTH & SAFETY CODE § 38566 (Deering through ch. 175 of the 2022 Reg. Sess.).

71. CAL. HEALTH & SAFETY CODE § 43018.5 (Deering through ch. 175 of the 2022 Reg. Sess.).

72. *Ass’n of Irrigated Residents v. State Air Res. Bd.*, 206 Cal. App. 4th 1487, 1495 (2012); CAL. HEALTH & SAFETY CODE § 38561 (Deering through ch. 175 of the 2022 Reg. Sess.).

73. CAL. HEALTH & SAFETY CODE § 43018.5(d)(2) (Deering through ch. 175 of the 2022 Reg. Sess.).

74. *See Yamaha Corp. of Am. v. State Bd. of Equalization*, 19 Cal. 4th 1, 16 (1998).

75. CAL. HEALTH & SAFETY CODE § 43018.5 (Deering through ch. 175 of the 2022 Reg. Sess.).

greater deference to the agency's rule.<sup>76</sup> However, if the court determines that this is a question of CARB's interpretation of AB 1493, rather than an authority granted within the statutory mandate, the court will then follow the less deferential standard of review.<sup>77</sup> In that case, CARB will have a higher burden to prove its authority to mandate one hundred percent of in-state sales be ZEVs.<sup>78</sup>

2. *If Reviewed Under the More Deferential Standard, the Court Will Likely Uphold the ZEV Mandate Because CARB Did Not Act Arbitrarily or Capriciously*

If the court finds that CARB's ZEV mandate is within the statutory mandate, it must next determine if CARB acted arbitrarily and capriciously in determining that the ZEV mandate was "reasonably necessary to effectuate the purpose of the statute."<sup>79</sup> CARB will likely be able to meet this standard under the *Ass'n of Irrigated Residents* analysis.<sup>80</sup> First, a ZEV mandate will certainly "put California on a path towards" meeting the SB 32 GHG emission reduction goals. CARB determined the AB 32 emissions limit to be 431 MMT CO<sub>2</sub>e by 2020,<sup>81</sup> and the proposed 2022 Scoping Plan Update calls for carbon neutrality by 2045 under SB 32.<sup>82</sup> A study funded by the California EPA found that California will likely only reach one-third of the 2045 goal under a business-as-usual scenario, and determined that accelerated ZEV sales were one of the policies required for California to reach carbon neutrality by 2045.<sup>83</sup>

Opponents may argue that the ZEV mandate for in-state sales is not ambitious enough to meet these goals. However, the court's reasoning in *Ass'n of Irrigated Residents* shows that AB 32 does not call for "maximum reductions without qualification, but for maximum reductions that are both feasible and cost-effective."<sup>84</sup> CARB can likely prove that it is not

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76. See *Yamaha Corp. of Am. v. State Bd. of Equalization*, 19 Cal. 4th 1, 19 (1998).

77. See *id.* at 7.

78. See *id.*

79. See *id.* at 17–19.

80. See *Ass'n of Irrigated Residents v. State Air Res. Bd.*, 206 Cal. App. 4th 1487, 1495 (2012).

81. See CAL. AIR RES. BD., GHG 1990 EMISSIONS LEVEL & 2020 LIMIT, <https://ww2.arb.ca.gov/ghg-2020-limit> [<https://perma.cc/NC3Q-SWFP>], (last visited Nov. 8, 2021).

82. CAL. AIR RES. BD., AB 32 CLIMATE CHANGE SCOPING PLAN, <https://ww2.arb.ca.gov/our-work/programs/ab-32-climate-change-scoping-plan> [<https://perma.cc/2CVY-P293>] (last visited Nov. 8, 2021).

83. Austin Brown et al., *Driving California's Transportation Emissions to Zero*, UNIV. OF CAL. INST. TRANSP. STUD. at 2–6 (Apr. 2021), <https://escholarship.org/uc/item/3np3p2t0> [<https://perma.cc/WM6L-DEG>].

84. *Ass'n of Irrigated Residents*, 206 Cal. App. 4th at 1497.

feasible to require all cars driven in the state to be ZEVs; this would demonstrate that the in-state-sales requirement is the next best *feasible* option. Requiring ZEVs for all California drivers would have a discriminatory effect on out-of-state goods (assuming most vehicles sold outside of California will not be ZEVs) and therefore would place an unconstitutional burden on interstate commerce. Focusing only on in-state sales allows California to avoid a constitutional challenge under the dormant commerce clause.<sup>85</sup>

Additionally, CARB will likely need to show that significant research and peer reviews went into its final ZEV mandate—considering cost-effectiveness and alternative measures—to satisfy the second and third prongs of the *Ass'n of Irrigated Residents* analysis.<sup>86</sup> If CARB can meet this burden, the court will likely uphold the agency's ZEV mandate.

*3. If the ZEV Mandate is Reviewed Under a Less Deferential Standard, the Court Will Likely Find CARB Overstepped Its Authority*

If the court finds that the ZEV mandate was an agency interpretation, the court will review CARB's actions under a less deferential standard of review. CARB's interpretation of a statute is "contextual" and dependent on the circumstances, so opponents will bring up any possible argument to show that CARB overstepped its authority.<sup>87</sup> Opponents will argue that the ZEV mandate will have negative repercussions on the economy, that CARB's plan is not feasible because of the lack of infrastructure, and that the state will suffer terrible consequences from the ZEV plan. This opposition may come from corporations like car manufacturers, petroleum refiners, and gas station owners whose businesses depends on gas powered automobiles. They will argue that CARB effectively killed their industries, or forced them to relocate out-of-state, which took away California jobs and revenue streams. Average citizens such as hobby car enthusiasts, those who do not have time or resources to charge an electric vehicle, or those who fundamentally disagree with government intervention and mandated change in their everyday lives, may also join the opposition. Under this less deferential standard of review, the court will likely find that CARB overstepped its

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85. See 8 Witkin, SUMMARY CALIFORNIA LAW, Constitutional Law § 1439 (discussing the limitation that states cannot impose an unreasonable burden on interstate commerce under the dormant commerce clause).

86. See *Ass'n of Irrigated Residents v. State Air Res. Bd.*, 206 Cal. App. 4th 1487, 1497 (2012).

87. See *id.*

authority in mandating ZEV sales, and find that a decision of this magnitude should be made by the legislature.

### C. Conclusion

When drafting the ZEV mandate, CARB will need to carefully construe the regulation to avoid overstepping its authority under California law. The Governor directed CARB to develop and propose regulation for one hundred percent in-state ZEV sales by 2035, but there is no statutory authority explicitly directing CARB to do so.<sup>88</sup> Therefore, any ZEV mandate by CARB may be examined under a less deferential standard when challenged in court. Even if examined under the arbitrary and capricious standard, CARB will likely need to show that significant research and development went into the plan to comply with the statutory requirements of technological feasibility and cost-effectiveness.

## IV. ZEV MANDATE AND CALIFORNIA BUILDING CODES

Even if California has authority under Federal and State law to mandate ZEVs, there will likely be additional legal challenges from local municipalities and concerned individuals. California is notorious for heavy traffic and packed highways. With a population of 39.5 million, California was home to 27 million licensed drivers and 26 million automobiles in 2019.<sup>89</sup> At the end of 2020, only 653,602 of California's light-duty vehicles were ZEVs.<sup>90</sup> This means California will need to increase the number of ZEVs by 765% in the next 10 years to reach the goal of 5 million ZEVs on the road by 2030. Additionally, California will need to increase the percentage of ZEV sales from 11.5% in 2021 to 100% by 2035.<sup>91</sup> The transition to 100% ZEVs will require significant changes to infrastructure and daily life for many Californians. Gone will be the days where apartment dwellers can park their cars on the street overnight and quickly stop for gas on the way to work. Electric vehicles take hours to charge and require that the driver park at a charging station.<sup>92</sup>

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88. Cal. Exec. Order No. N-79-20.

89. DEP'T OF MOTOR VEHICLES, *2019 Statistics for Publication* (2020), <https://www.dmv.ca.gov/portal/uploads/2020/06/2019-Statistic-for-Publication-1.pdf> [<https://perma.cc/TY4V-5ZQ9>].

90. CAL. ENERGY COMM'N, *Zero Emission Vehicle and Infrastructure Statistics* (Apr. 2021), <https://www.energy.ca.gov/data-reports/energy-almanac/zero-emission-vehicle-and-infrastructure-statistics/new-zev-sales> [<https://perma.cc/39TP-UDPK>].

91. *Id.*

92. See U.S. DEP'T OF TRANSPORTATION, *Electric Vehicle Charging Speeds* (Feb. 2, 2022), <https://www.transportation.gov/rural/ev/toolkit/ev-basics/charging-speeds#:~:text=>



To address this charging dilemma, GO-Biz included infrastructure as one of its four pillars in its ZEV strategy.<sup>93</sup> As of 2020, there were 67,343 shared charging stations in California.<sup>94</sup> The ZEV Strategy includes a goal of creating 250,000 public and shared charging stations and 200 hydrogen fueling stations by 2025.<sup>95</sup> However, many people will want to park, and therefore charge, their cars at their own homes. Although house-owners with garages can pay for charger installation, apartment renters will have no control over the infrastructure available at their buildings. Thus, renters may find themselves stuck in a position where it is no longer convenient, or even feasible, to own an electric car when forced to charge it at shared charging stations.

#### A. California Energy Commission's Building Standards

California will likely try to bridge the difference between people living in single-family houses and those in multi-family homes by requiring charging infrastructure as part of the building code. The California Department of Housing and Community Development (HCD) releases new Green Building Standards Code every three years to “promote those principles which have a positive environmental impact and encourage sustainable construction practices.”<sup>96</sup> Under the current 2019 standards, ten percent of the total parking spaces in multifamily dwellings must be equipped as electric vehicle charging spaces.<sup>97</sup> However, buildings with no residential parking are not required to have any electric vehicle charging capabilities. The ZEV Market Strategy charges the Building Standards Commission (BSC) to work with the HCD and other relevant state agencies to “advance building standards that prepare California for a 100% ZEV fleet.”<sup>98</sup> As a result, future building standards will likely require even more electric vehicle charging spaces, perhaps calculated by a mandatory minimum number of spaces, rather than by percentage. However, as current construction must follow the current building standards, requiring little to no EV charging

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=Level%201%20chargers%20can%20take,vehicle%20(PHEV)%20from%20empty [https://perma.cc/64LZ-LME4].

93. CAL. GOVERNOR'S OFF. OF BUS. AND ECON. DEV., *supra* note 14, at 7.

94. *Id.* at 14.

95. *Id.*

96. *CalGreen*, CAL. DEP'T OF HOUS. & CMTY. DEV., <https://www.hcd.ca.gov/calgreen> (last visited Dec. 11, 2021).

97. CAL. CODE OF REGS. tit. 24, § 4.106.4.2 (2019).

98. CAL. GOVERNOR'S OFF. OF BUS. AND ECON. DEV., *supra* note 14, at 44.

infrastructure, issues are bound to arise when California changes the code. The proposed 2022 California Green Building Standards Code, if approved, will go into effect starting in 2023, and requires only ten percent of spaces to accommodate EVs.<sup>99</sup> These standards will remain in effect until 2026, during which time California will likely need to put thousands of new ZEVs on the roads to meet the 2035 goal. To compound this issue, California will likely also ramp up the number of new homes built in the next few years. Governor Newsom signed a series of legislation in September 2021 to increase housing construction of over 84,000 new affordable homes in California.<sup>100</sup> Developers will only be required to install EV charging infrastructure for ten percent of the homes' parking spaces if the homes are built according to the current standards.<sup>101</sup>

From an economic perspective, it may seem like the market will reach a balance because tenants who want an electric vehicle will move to new buildings with better charging infrastructure. Then, if enough tenants leave, existing building owners will invest in charging infrastructure to remain competitive even though they are not required to do so by the building code. However, this argument ignores the current state of the housing market in California. California is in the middle of a housing and homelessness crisis, dramatically worsened by recent economic changes and the COVID-19 pandemic.<sup>102</sup> The average home in California costs over \$800,000, and in San Francisco, the median price is \$1,850,000.<sup>103</sup> With prices so high, many people are left with no choice but to rent a home, for which they spend a significant portion of their monthly income. Seventy-six percent of extremely low-income Californians spend over half their income on housing.<sup>104</sup> Renters

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99. Cal. Dep't. of Hous. & Cmty. Dev., Final Express Terms for Proposed Building Standards of the California Department of Housing and Community Development Regarding the 2022 California Green Building Standards Code, at 6 (Mar. 2021).

100. *Governor Newsom Signs Historic Legislation to Boost California's Housing Supply and Fight the Housing Crisis*, OFFICE OF GOVERNOR NEWSOM (Sept. 16, 2021), <https://www.gov.ca.gov/2021/09/16/governor-newsom-signs-historic-legislation-to-boost-californias-housing-supply-and-fight-the-housing-crisis/> [<https://perma.cc/CMZ7-E6LM>]; S.B. 8, 2021 Leg., Reg. Sess. (Cal. 2021); S.B. 9, 2021 Leg., Reg. Sess. (Cal. 2021); S.B. 10, 2021 Leg., Reg. Sess. (Cal. 2021).

101. Cal. Dep't. of Hous. & Cmty. Dev., Final Express Terms for Proposed Building Standards of the California Department of Housing and Community Development Regarding the 2022 California Green Building Standards Code, at 6 (Mar. 2021).

102. See Emily Hoeven, *California's Homeless Population Increased – Again*, CAL MATTERS (Oct. 6, 2022), <https://calmatters.org/newsletters/whatmatters/2022/10/california-homeless-population-covid/> [<https://perma.cc/TEA8-F5ZM>].

103. Richard McGahey, *New California Laws Attack The State's Housing Crisis*, FORBES (Sept. 27, 2021), <https://www.forbes.com/sites/richardmogahey/2021/09/27/new-california-laws-attack-the-states-housing-crisis/?sh=5209d79b3166> [<https://perma.cc/35EA-RR79>].

104. *Id.*

are not in the position to have any bargaining power when it comes to housing choices, and many do not have the option to move to a different home because they want to purchase an electric vehicle. Instead, they may seek redress in court.

*B. San Diego's Zero Minimum Parking Standards as a Case Study*

San Diego has attempted to find a solution to both climate change and the housing crisis by passing the Mayor's Housing SD Initiative in 2019.<sup>105</sup> After conducting a parking study, the city found that removing minimum parking requirements could "allow developers flexibility to provide parking based on market demand" and, therefore, reduce the cost of housing.<sup>106</sup> San Diego then updated the municipal code to remove any requirements for parking in multiple dwelling units built within a "Transit Priority Area," defined as an area within one-half mile of a major transit stop.<sup>107</sup> If developers build off-street parking spaces, the parking spaces must be leased or sold separately from the dwelling units.<sup>108</sup> Additionally, the ordinance specifies that "the number of off-street electric vehicle charging spaces shall be provided in accordance with the California Green Building Standards Code."<sup>109</sup> This zero minimum parking rule means that not only will buildings built between 2019 and at least 2026 have only a minimum of ten percent EV charging facilities, but many will have no parking spaces at all.<sup>110</sup>

If California updates the Energy Code to require a minimum number of EV charging spaces, rather than just a percentage of existing parking spaces, San Diego will be stuck between a rock and a hard place. The city can update its municipal code to match the California code, but this would likely be met with significant pushback from building owners. The new building code will likely apply only to new construction because California policymakers will likely recognize the difficulty of requiring major additions to existing buildings. Therefore, new buildings will have the required EV charging facilities, while many buildings constructed during the zero minimum

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105. San Diego, Cal. Ordinance 21057 (Mar. 25, 2019).

106. *Id.*

107. *Id.* at § 142.0528.

108. *Id.* at § 113.0103.

109. *Id.* at § 142.0528.

110. Cal. Dep't. of Hous. & Cmty. Dev., Final Express Terms for Proposed Building Standards of the California Department of Housing and Community Development Regarding the 2022 California Green Building Standards Code, at 6 (Mar. 2021).

parking regime will have little to no parking. With no parking and no feasible way to add EV charging spaces, the zero minimum parking building owners will likely object to the city's adoption of California's building code out of fear that it will be impossible to remain competitive with the new buildings. To prevent inflated housing prices and encourage people to remain in the zero parking buildings, the city may decide to keep the zero minimum parking standards.

### *C. State Preemption of San Diego's Building Code*

#### *1. A City May Adopt Building Standards That Differ From the California Code if They Are "Reasonably Necessary Because of Local Climatic, Geological, or Topographical Conditions"*

Political pressure may drive San Diego to try to keep its zero minimum parking requirements, but the legal question will be whether the California building code preempts the San Diego municipal code. Previously, municipalities were authorized to enact laws that had "equal to or greater" restrictions than the state housing code, but a 1970 amendment directs municipalities to adopt "the same requirements" as the state housing code.<sup>111</sup> Under California Health & Safety Code section 17958.5, a city may only adopt standards that differ from "provisions published in the California Building Standards Code and other regulations . . . including . . . green building standards, as it determines . . . are reasonably necessary because of local climatic, geological, or topographical conditions."<sup>112</sup>

For example, in *Building Industry Ass'n v. City of Livermore*, the California Court of Appeal addressed whether California's standards preempted the city of Livermore's standards concerning residential fire sprinkler systems.<sup>113</sup> In 1992, Livermore enacted an ordinance that required automatic fire-extinguishing systems in all new constructions.<sup>114</sup> However, California's building code did not require automatic fire sprinkler systems in new single-family homes.<sup>115</sup> The court reasoned that California state law "has generally preempted the field of residential building standards," and it is the Legislature's "intent to fully occupy the field of building standards relating

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111. *Baum Electric Co. v. City of Huntington Beach*, 33 Cal. App. 3d 573, 577 (1973).

112. CAL. HEALTH & SAFETY CODE § 17958.5.

113. *Bldg. Indus. Ass'n v. City of Livermore*, 45 Cal. App. 4th 719, 722 (1996).

114. *Id.* at 722.

115. *Id.* at 723.

to housing.”<sup>116</sup> Therefore, a municipality may adopt its own standards with specific statutory authorization.<sup>117</sup>

The city of Livermore argued that under section 17958.7, the fire sprinkler standard was “reasonably necessary because of local climatic, geological or topographical conditions.”<sup>118</sup> Livermore had a hot, dry, and windy climate that led to frequent fires in the grassland surrounding the city.<sup>119</sup> These conditions “greatly increased the fire risk to residences, especially new residences being built in the grassland area.”<sup>120</sup> Further, Livermore had “an unusual number of topographical features which hinder fire suppression services,” and had a high risk of earthquakes, which could have created a “demand for fire suppression services that the City Fire Department could not meet.”<sup>121</sup> Based on the finding that the fire sprinkler ordinance was reasonably necessary, the court affirmed the District Court’s dismissal of the Building Association’s complaint.<sup>122</sup>

## 2. The Zero Minimum Parking Standard is “Reasonably Necessary” Due to San Diego’s Unique Local Conditions

San Diego will likely argue that it has “local climatic, geological or topographical conditions” that led it to adopt the zero minimum parking standards. San Diego has a mild climate and is generally sunny and warm.<sup>123</sup> The average person can walk or bike to work, or if they commute, they can walk or bike to a transit stop or to their car that is parked in a shared lot. Yet, 76% of San Diego residents drive to work alone (without carpooling) and only 2.8% take public transportation.<sup>124</sup> From 2000 to 2016, the vehicle ownership rate in San Diego increased, and the number of households without

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116. *Id.* at 724, 726.

117. *Id.* at 727.

118. *Id.* (quoting CAL. HEALTH & SAFETY CODE § 17958).

119. *Id.*

120. *Id.*

121. *Id.* at 727–28.

122. *Id.* at 724. The opinion also contains significant discussion of whether or not § 17958 applies to standards adopted by the Fire Marshal, omitted here for relevance.

123. See *climate and monthly weather forecast San Diego, CA*, WEATHER ATLAS, <https://www.weather-us.com/en/california-usa/san-diego-climate> [<https://perma.cc/ZK73-CYYN>] (last visited Sept. 21, 2022).

124. *Transportation Choices*, UNIVERSITY OF SAN DIEGO, <https://www.sandiego.edu/soles/hub-nonprofit/initiatives/dashboard/transportation.php> [<https://perma.cc/WD7L-MUDN>] (last visited Sept. 21, 2022).

vehicles decreased.<sup>125</sup> As of 2017, only 8% of San Diego’s 3.3 million metro residents used public transit.<sup>126</sup>

Therefore, San Diego will argue that these conditions make the zero minimum parking standards “reasonably necessary.” People in San Diego drive not out of necessity, but out of convenience. Reducing the number of parking spaces will make driving less convenient, therefore encouraging people to choose public transit, biking, or walking.<sup>127</sup> California has goals to reduce vehicle miles traveled<sup>128</sup> and reduce GHG emissions.<sup>129</sup> San Diego will argue the city cannot meet these goals without the zero minimum parking standards.

To prove that zero minimum parking standards are necessary to reach San Diego’s climate goals, the city conducted a survey of other cities that implemented the policy and achieved the desired results.<sup>130</sup> For example, the city of Seattle, Washington removed parking minimums in certain areas of the city in 2004.<sup>131</sup> For buildings developed between 2012 to 2016, 13% of units had parking, while 87% had no parking.<sup>132</sup> This resulted in the number of households without vehicles increasing to 17.1%, compared to 16.3% in 2000, and a decrease in the number of cars per household to 1.37, compared to 1.4 in 2000.<sup>133</sup> Additionally, Sacramento reported an acceleration of infill development and Minneapolis reported a measurable decrease in rent after implementing zero minimum parking requirements in their downtown areas.<sup>134</sup>

### *3. San Diego Does Not Have Unique Local Conditions, and the Zero Minimum Parking Standard is Not Reasonably Necessary*

Objectors to the zero minimum parking standards will argue that San Diego does not have unique “local climatic, geological or topographical conditions” compared to the rest of California. Warm temperatures and

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125. *Transit Priority Areas Multifamily Residential Parking Standards*, CHEN RYAN ASSOCIATES 1, 4 (Jan. 16, 2019), [https://www.sandiego.gov/sites/default/files/tpa\\_multi\\_family\\_residential\\_parking\\_standards\\_study.pdf](https://www.sandiego.gov/sites/default/files/tpa_multi_family_residential_parking_standards_study.pdf) [<https://perma.cc/N2ZK-NK8E>].

126. *Id.* at 6.

127. *See id.* at 2.

128. *See* S.B. 743, 2013 Leg., Reg. Sess. (Cal. 2013).

129. *See* S.B. 32, 2016 Leg., Reg. Sess. (Cal. 2016).

130. *Transit Priority Areas Multifamily Residential Parking Standards*, CHEN RYAN ASSOCIATES 3 (Jan. 16, 2019), [https://www.sandiego.gov/sites/default/files/tpa\\_multi\\_family\\_residential\\_parking\\_standards\\_study.pdf](https://www.sandiego.gov/sites/default/files/tpa_multi_family_residential_parking_standards_study.pdf) [<https://perma.cc/VMX8-8NHX>].

131. *Id.* at 3.

132. *Id.* at 4.

133. *Id.*

134. *Id.* at 6.

low precipitation exist all along coastal Southern California.<sup>135</sup> San Diego can hardly argue that its local climate makes the city any more walkable than cities in Orange County, for example. Further, the high rates of vehicle ownership and the low rates of transit use are consistent with the rest of the Western states.<sup>136</sup> Opponents will argue that allowing San Diego to create its own standards based on conditions that exist in most of California would contradict the legislature's "intent to fully occupy the field of building standards relating to housing."<sup>137</sup>

Objectors will also argue that the zero minimum parking standards are not "reasonably necessary" to reach San Diego's climate goals. The vehicle miles traveled goals under SB 743 and GHG reduction goals under SB 32 are state-wide goals. California has made the policy decision to pursue these goals through the ZEV mandate and accompanying charging requirements under the building code. California's "intent to fully occupy the field of building standards relating to housing"<sup>138</sup> shows that the state will implement zero minimum parking requirements if the state legislature determines they are necessary to meet the California goals. Objectors will therefore argue that San Diego does not meet the limited statutory exception to preemption under section 17958.7, and it does not have the authority to retain the zero minimum parking standards that conflict with California law.

Alternatively, objectors will argue that San Diego failed to consider alternative, more equitable measures, such as encouraging transit use, walking, and biking. If unbundling parking has the expected cost reductions that San Diego anticipates, then residents with low incomes will move into the Transit Priority Area to save money on rent. In 2021, a family of four was considered "low income" in San Diego if their annual household income was less than \$97,000,<sup>139</sup> and the average wait time for federal rental assistance

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135. See *Weather & Timing Your Visit*, VISIT CALIFORNIA, <https://www.visitcalifornia.com/experience/weather-timing-your-visit/> [<https://perma.cc/7YBN-TZ3L>].

136. A 2019 study found that only 4.4 percent of workers in the West commuted by public transportation. Further driving alone and carpooling are the two most common means of transportation for all Americans. Michael Burrows, et. Al, *Commuting by Public Transportation in the United States: 2019*, AMERICAN COMMUNITY SURVEY REPORTS at 1–5 (Apr. 2021), <https://www.census.gov/content/dam/Census/library/publications/2021/acs/acs-48.pdf> [<https://perma.cc/Q4SE-WQ5N>].

137. *Bldg. Indus. Ass'n v. City of Livermore*, 45 Cal. App. 4th 719, 724 (1996).

138. *Id.*

139. *SDHC Fiscal Year 2021 Annual Report*, SAN DIEGO HOUSING COMMISSION 123 (2021), <https://online.fliphtml5.com/swlmv/qesi/#p=1> [<https://perma.cc/B5WF-DMBK>].

is 10 years.<sup>140</sup> It is reasonable to assume San Diego developers will have no incentive to build apartments with parking spaces when most residents cannot afford to rent them.<sup>141</sup> Objectors will argue that San Diego’s zero minimum parking solution failed to consider the fact that many low-income San Diegans work outside the Transit Priority Area and will need to spend far more time commuting using transit than they could by driving. Further, many San Diegans have family that live across the nearby Mexican border, and visiting family without a car will be more challenging.

#### 4. *San Diego Considered Alternatives to Zero Minimum Parking and Wove These Policy Considerations into the Standards*

To counter these equity arguments, San Diego will likely argue that the zero minimum parking standards account for policy considerations that make the standards reasonably necessary. San Diego will point to the additional stipulations included in the Parking Standards to increase transportation accessibility. Multi-unit dwellings within the Transit Priority Area are assigned a Transportation Amenity Score, determined by adding the (1) Bedroom Ratio Score, (2) Jobs-Housing Score, (3) Environmental Priority Index Score, and (4) Transit Commute Score.<sup>142</sup> Based on this score, buildings must provide a certain number of amenities to “encourage alternative modes of transportation and facilitate non-vehicular access to everyday activities.”<sup>143</sup> These amenities include subsidized transit passes, pedestrian scale lighting and sidewalk widening, and on-site bicycle fleets.<sup>144</sup> This would help further encourage the use of transit, which runs through most of San Diego

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140. *Help With Your Rent*, SAN DIEGO HOUSING COMMISSION, <https://www.sdhc.org/housing-opportunities/help-with-your-rent> [<https://perma.cc/8Y95-8Y5U>] (last visited Oct. 9, 2022).

141. In Seattle’s market-based approach, discussed *supra*, 87 percent of new units had no parking. *Transit Priority Areas Multifamily Residential Parking Standards*, CHEN RYAN ASSOCIATES 4 (Jan. 16, 2019), [https://www.sandiego.gov/sites/default/files/tpa\\_multifamily\\_residential\\_parking\\_standards\\_study.pdf](https://www.sandiego.gov/sites/default/files/tpa_multifamily_residential_parking_standards_study.pdf) [<https://perma.cc/VMX8-8NHX>].

142. San Diego Muni. Cod § 142.0528(c); *Land Development Manual Appendix Q*, CITY OF SAN DIEGO 3 (Mar. 25, 2019), [https://www.sandiego.gov/sites/default/files/ldm\\_appendix\\_q\\_03092020.pdf](https://www.sandiego.gov/sites/default/files/ldm_appendix_q_03092020.pdf) [<https://perma.cc/436P-A4VM>] (“The Transportation Amenity Score shall be calculated using the Planning Department’s Transportation Amenity Score Calculator. The Planning Department developed this Calculator as a tool to easily calculate the Transportation Amenity Score by inputting (1) a project’s Assessor Parcel Number, (2) total number of project dwelling units, and (3) total number of project bedrooms. The methodology and formulas used for the Calculator are detailed in the Technical Background Report for the Transportation Amenity Score Calculator, as may be amended, on file in the Planning Department.”).

143. *Land Development Manual Appendix Q*, CITY OF SAN DIEGO 3 (Mar. 25, 2019), [https://www.sandiego.gov/sites/default/files/ldm\\_appendix\\_q\\_03092020.pdf](https://www.sandiego.gov/sites/default/files/ldm_appendix_q_03092020.pdf) [<https://perma.cc/436P-A4VM>].

144. *Id.* at 5–6.



and across the Mexican border. The amenity choices also include on-site childcare, healthy food retail, and indoor fitness circuits to give residents access to necessary services that may be less accessible without a car.<sup>145</sup>

San Diego has a strong argument that, rather than creating a plan that will abandon low-income San Diegans in the Transit Priority Area with no access to jobs or services, Ordinance Number 21057 was designed to create equitable solutions to the housing and climate change crisis. The inclusion of transportation accessibility measures allows the standards to address San Diego's various goals. San Diego will therefore argue that the Ordinance is "reasonably necessary" to meet the specific conditions and climate goals in San Diego.

#### *D. Conclusion*

After considering both arguments, the court may decide to allow San Diego to maintain the zero minimum parking standards under section 17958.5, or decide the standards are preempted by California's building code requiring parking for ZEVs. The zero minimum parking requirement is market-driven, so there is also a chance that new developments will be built with parking garages that can easily be converted to ZEV charging stations, which will diminish conflict. However, given the current housing market in San Diego and the rest of California, this seems unlikely. California can also likely avoid conflict by including an exception to ZEV parking requirements for buildings that meet certain transportation amenities standards. Cities now limiting parking may want to lobby to ensure inclusion of such legislative exemptions.

#### V. CONCLUSION

As California works to combat climate change, the state is likely to face significant backlash and legal challenges to any legislation that threatens to change people's way of life. Cars and driving are important parts of one's lifestyle and daily routine, and the switch to ZEVs and increased transit use seems foreboding. However, the devastating effects of climate change are even more daunting. California leads the charge towards the zero-emission future, and the results of the anticipated litigation over the ZEV mandate could make or break the United States' climate change mitigation efforts. Given the significant challenges ahead for California's ZEV mandate, it is very possible that the mandate will fail. Not only will the mandate face

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145. *Id.* at 7–8.

federal and state legal challenges, but it will also face practical challenges, including local ordinances and infrastructure development. Regardless of whether California can mandate one hundred percent of in-state sales to be ZEVs by 2035, the state will likely pursue other avenues to encourage electric vehicle adoption. If the mandate can survive, California will set the stage for the rest of the United States to follow suit and pave the way for electric cars to become the new normal.