



## California's Compelled Greenhouse-Gas Disclosure Laws Are Constitutionally Infirm

by James M. Sullivan and Sarah A. Haddon

Several business and trade associations recently filed a lawsuit challenging the constitutionality of California's newest climate-related laws, Senate Bills 253 and 261 ("the Laws").<sup>1</sup> S.B. 253 requires thousands of U.S. companies doing business in California to evaluate and publicly state their own greenhouse gas emissions and those of companies in their supply and distribution chains. S.B. 261 requires those those same companies and thousands more to create a public report about potential impacts of their greenhouse gas emissions, which California is calling a "climate-related financial risk report."

The impacts of these laws reach far beyond California's borders and its business and consumer interests. Even California governor, Gavin Newsom, expressed concern over the "financial impact" of S.B. 253 on businesses, "infeasible" implementation deadlines, and how "the reporting protocol specified could result in inconsistent reporting."<sup>2</sup> Despite revenue thresholds, the Laws do not impact only large corporations. Reporting entities are required to report the greenhouse gas emissions of even their smallest suppliers and distributors. If those smaller entities do not have the resources to deliver this information, they may not survive.

Foreign corporations doing business in California are not subject to the Laws. A Mexico-based manufacturer located only 200 miles from San Diego would not be burdened, but a U.S.-based company operating 3,200 miles away in heavily forested Maine would face increased costs from these regulations impacting its competitive market position. In 2022, over 18,000 foreign-owned enterprises operated in California,<sup>3</sup> and none of these companies are required to report greenhouse gas emissions or risks under the Laws.<sup>4</sup>

S.B. 253 requires California to post information from the disclosures on a state board-created website while S.B. 261 requires businesses to post to their own websites in addition to anything that California posts.<sup>5</sup> California imposes the costs of administering the Laws on the businesses.<sup>6</sup>

Given the novel and expansive nature of these state laws, the recently filed lawsuit came as no surprise. The lawsuit alleges that the Laws violate the First Amendment, the Supremacy Clause, and the Commerce Clause of the U.S. Constitution. Under the First Amendment, the Plaintiffs are challenging

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<sup>1</sup> *Chamber of Com. v. Cal. Air Res. Bd.*, No. 2:24-cv-00801 (C.D. Cal. filed Jan. 30, 2024) ("Plaintiffs' Complaint"), <https://www.uschamber.com/assets/documents/FILED-Chamber-v.-CARB-Complaint.pdf>.

<sup>2</sup> Signing Statement of Gov. Newsom, S.B. 253 (Oct. 7, 2023), <http://tinyurl.com/4mz6by3p>.

<sup>3</sup> *Foreign Direct Investment in California*, L.A. BUS. J., Apr. 24, 2023, at 34, <https://laedc.org/wp-content/uploads/2023/04/WTCLA-2023-FDI-REPORT.pdf>.

<sup>4</sup> S.B. 253 § 2(b)(2); S.B. 261 § 2(a)(4).

<sup>5</sup> S.B. 253 § 2(c)(1)(G); S.B. 251 § 2(C)(1)-(2).

<sup>6</sup> *Id.*

the Laws' disclosure requirements as non-commercial compelled speech, requiring strict scrutiny review. Even if a lower level of scrutiny applies, Plaintiffs assert that the Laws unduly burden businesses with no evidence that the compelled disclosures will alleviate California's climate concerns. Plaintiffs' Supremacy Clause claims contend that the California Laws conflict with the federal Clean Air Act, which regulates greenhouse gases and limits states' regulation of pollution beyond their borders. Plaintiffs also allege violation of the Commerce Clause because of the California Laws' regulatory reach and burdens on business outside of California. The remainder of this *Legal Opinion Letter* focuses on just a few of the significant constitutional issues these claims raise.

Pleading in the alternative, the Plaintiffs' Complaint acknowledges uncertainty regarding what standard of review will be applied to the First Amendment claim. The threshold inquiry will be whether the Laws compel *commercial* speech, which receives less First Amendment protection than other types of expression.<sup>7</sup> Supreme Court "precedents define commercial speech as 'speech that does no more than propose a commercial transaction.'"<sup>8</sup> The Laws' disclosures and required reports are not linked to product sales or commercial transactions in any way. The Laws apply to entities "doing business in California," not just to those selling products or services in California.<sup>9</sup> To the extent the businesses do sell in California, the Laws are not limited to greenhouse gases associated with manufacturing those products. Thus, strict scrutiny may apply here because the Laws are not tailored to focus on commercial transactions involving California consumers.

If a court characterizes the Laws as compelling commercial speech, the court will have to determine whether the Laws are subject to *Central Hudson's* intermediate scrutiny or *Zauderer's* relaxed standard.<sup>10</sup> Since the *Zauderer* decision in 1985, we found only one other application of its relaxed standard by the Supreme Court. That case, like *Zauderer*, concerned a disclosure requirement in advertisements "intended to combat the problem of inherently misleading commercial advertisements."<sup>11</sup> We found only four published cases where the Ninth Circuit applied *Zauderer*; each case involved review of laws compelling speech in advertisements, solicitations, or notices at the point of sale.<sup>12</sup> Unlike these cases, S.B. 253 and S.B. 261 are not tailored to focus on speech surrounding a sale or commercial transaction.

*Zauderer* also does not apply where the compelled disclosure is not focused on "purely factual and uncontroversial information."<sup>13</sup> For example, amidst a humanitarian crisis in the Democratic Republic of the Congo ("DRC"), Congress passed a law requiring manufacturers to disclose whether their products used certain precious minerals obtained from the DRC, speculating that avoiding the use of these "Conflict Minerals" would alleviate the DRC's crisis.<sup>14</sup> The D.C. Circuit held that *Zauderer* did not apply because, even though there was no dispute about the factual accuracy of the statements, the disclosure effectively required manufacturers "to tell consumers that its products are ethically tainted" and "publicly condemn itself" for the DRC's humanitarian crisis.<sup>15</sup> Last year, the Ninth Circuit likewise applied *Central Hudson* instead of *Zauderer* because California sought to compel controversial

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<sup>7</sup> See *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 563 (1980); *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 637 (1985).

<sup>8</sup> *Harris v. Quinn*, 573 U.S. 616, 648 (2014).

<sup>9</sup> S.B. 253 § 2(b)(2); S.B. 261 § 2(a)(4).

<sup>10</sup> See *Cent. Hudson*, 447 U.S. at 563-66; *Zauderer*, 471 U.S. at 650-53.

<sup>11</sup> *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250 (2010).

<sup>12</sup> See *CTIA v. City of Berkeley*, 928 F.3d 832, 847-48 (9th Cir. 2019); *Am. Beverage Ass'n v. City of S.F.*, 916 F.3d 749, 756-57 (9th Cir. 2019); *S.F. Apartment Ass'n v. City of S.F.*, 881 F.3d 1169, 1174-78 (9th Cir. 2018); *Nationwide Biweekly Admin., Inc. v. Owen*, 873 F.3d 716, 732-35 (9th Cir. 2017).

<sup>13</sup> *Zauderer*, 471 U.S. at 651.

<sup>14</sup> See *Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 520-30 (D.C. Cir. 2015).

<sup>15</sup> *Id.* at 528-30.

commercial speech.<sup>16</sup> The Ninth Circuit also observed that “commandeering speech may seem expedient, [but] it is seldom constitutionally permissible.”<sup>17</sup>

A stated goal driving the proponents of S.B. 253 was identification of “who is at the forefront of the pollution” harming the state.<sup>18</sup> The mandatory disclosures of S.B. 261 likewise aim “to begin to address the climate crisis.”<sup>19</sup> In a First Amendment case, the Supreme Court already noted “climate change” was a “controversial subject” and “sensitive political topic[.]”<sup>20</sup> The Laws effectively force companies to label themselves as bad actors when it comes to greenhouse gas emissions. Many factors impact greenhouse gas emissions and related risks including different geographies. Multiple sources have identified the Laws’ contemplated means of measuring greenhouse gas contributions and risks as not yet capable of producing reliable results, and they are at the very least controversial.<sup>21</sup> Thus, the Laws are not focused on purely factual and uncontroversial information. The Laws should be subject to a heightened standard of review.

Finally, as pertains to the Commerce Clause claim, we note the significant distinctions between this case and the Supreme Court’s recent decision in *National Pork Producers*, which has caused some to doubt the viability of a Commerce Clause claim in a case like this where the laws do not facially discriminate against other states.<sup>22</sup> Unlike *National Pork Producers*, which focused on a California law barring the sale of pork meat coming from pigs raised in certain conditions, the Laws involved here are not tied to specific products being sold in California. By failing to limit the disclosure requirements to a reporting entity’s business with California, the Laws’ reach affects entirely extraterritorial business. For example, a reporting entity’s suppliers, who may be outside the supply chain of the products the reporting entity sells in California, would be included in the reporting entity’s greenhouse gas emissions. *National Pork Producers* also differs from this case because Congress has not adopted any laws regulating pork production, but it has enacted the Clean Air Act, regulating major pollution in the U.S. Thus, *National Pork Producers* does not foreclose the Commerce Clause claim as to S.B. 253 and 261.

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<sup>16</sup> *Nat’l Ass’n of Wheat Growers v. Bonta*, 85 F.4th 1263, 1277-80 (9th Cir. 2023).

<sup>17</sup> *Id.* at 1282.

<sup>18</sup> STAFF OF S. RULES COMM., ANALYSIS ON CLIMATE CORP. DATA ACCOUNTABILITY ACT, at 5 (Comm. Print 2023) (prepared by Eric Walters), <https://trackbill.com/s3/bills/CA/2023/SB/253/analyses/senate-environmental-quality.pdf>.

<sup>19</sup> S.B. 261 § 1(j).

<sup>20</sup> *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2476 (2018).

<sup>21</sup> See Plaintiffs’ Complaint at ¶¶ 31-32, 51-52.

<sup>22</sup> *Nat’l Pork Producers Council v. Ross*, 598 U.S. 356, 363-64, 368, 375-76, 379 (2023).