CIVIL JUSTICE
ASSOCIATION OF CALIFORNIA

March 21, 2025

Sent Via Email

California Air Resources Board
Attn: Climate Disclosure
climatedisclosure@arb.ca.gov

Re: *Comments by the Civil Justice Association of California on The California Air Resources Board Rulemaking Implementing SB 253 and 261*

Dear California Air Resources Board and Staff:

Thank you for the opportunity to provide comment on the proposed rulemaking regarding implementation of SB 253 and 261. Founded in 1979, the Civil Justice Association of California (CJAC) is the only statewide association dedicated solely to improving California's civil liability system, in the legislature, the regulatory arena, and the courts. Our membership consists of businesses and associations from a broad cross-section of California industries.

Below we highlight our general concerns with the proposed rulemaking, especially as it concerns the constitutionality of the laws which is currently being litigated. We respectfully request that you address these concerns by holding off on rulemaking until the litigation has come to a close.

The disclosures SB 253 and 261 compel are too costly without an articulated reciprocal benefit to the state

As an initial matter, the laws are overly broad and impose significant costs on businesses. They disproportionately impact small and medium-sized businesses, many of which lack the resources to measure or report emissions accurately. This burden is not alleviated by the revenue thresholds in SB 253; rather, to the contrary, this impact is made particularly acute through the imposition of Scope 3 emissions reporting requirements, which will likely necessitate larger companies subject to SB 253 to solicit information from smaller supply-chain participants who do not themselves meet the revenue thresholds.

We are concerned that implementation will force companies to disclose wide-ranging climate-related information, including Scope 3 emissions which are particularly difficult to estimate accurately, without material evidence of the benefits of doing so.

The laws vaguely refer to their intended purpose as being to hold companies accountable for their greenhouse gas (GHG) emissions, but do not describe how the disclosure of this information would concretely benefit consumers or otherwise address climate change.

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Implementation of SB 253 and 261 will lead to a spike in litigation

We urge this agency to give strong consideration to impacts of any potential rulemaking on California's civil liability system, which is already viewed as one of the most burdensome in the country by businesses.[1] At a time when California is experiencing significant budgetary challenges and unprecedented numbers of departures by businesses, policymakers should be hyper-focused on promoting positive economic activity.[2]

We are very concerned that rulemaking by this agency will instead do the opposite – increase unfair litigation burdens on businesses and in turn negatively impact California's economy and the consumers that businesses serve.

Last year, business groups sued this Board challenging SB 253 and 261 as unconstitutional. That lawsuit is still pending and the constitutionality cause of action has not been decided.

The state is already on the hook for the significant cost of litigating the constitutionality of these laws in court, the result of which is yet to be seen. It is thus in the state's best interest to hold off on rulemaking to prevent additional wasted resources.

SB 253 and 261 are unconstitutional

Below we discuss why SB 253 and 261 violate the First Amendment and thus should not be implemented at this time.

The First Amendment protects both the freedom to speak and the freedom to not speak, meaning forced disclosures fall within the scope of the First Amendment. *NetChoice, LLC v. Bonta*, 143 S. Ct. 1101, 1117 (9th Cir. 2024).

As with most First Amendment challenges, the threshold question courts must determine is which level of scrutiny will apply – strict scrutiny, intermediate, or rational basis.

Laws subject to strict scrutiny "are presumptively unconstitutional." *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2372 (2018). To survive this level of scrutiny, the government must prove the law is narrowly tailored to serve compelling state interest.

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[1] American Tort Reform Association Judicial Hellholes Report 2023-2024 (California 3rd worst "judicial hellhole"); U.S. Chamber Institute for Legal Reform Harris Study 2019 (California legal climate in bottom 3) https://instituteforlegalreform.com/2019-lawsuit-climate-survey/.

[2] See, e.g., The Exodus Begins: Tech Companies Leaving California in Droves (tms-outsource.com); https://lachamber.com/news/2023/06/05/press-release/a-recently-released-report-finds-that businesses-continue-to-relocate-to-more-business-friendly-states-but-offers-recommendations-to help-california-stem-the-tide/.

A. SB 253 and 261 are subject to strict scrutiny because they compel controversial speech.

In order to determine whether strict scrutiny applies, courts first decide if a law is content-based. *Vidal v. Elster*, 602 U.S. 286, 292 (2024). Content-based laws apply to particular speech because of the topic, idea, or message expressed. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Forced disclosures may be considered content-based if they compel the speaker to convey a particular message. *NIFLA*, *138 S. Ct. at 2372*.

Where a state seeks to compel a business to speak noncommercially on controversial political matters, strict scrutiny applies. *NIFLA*, *138 S. Ct. at 2372*. Only "purely factual and uncontroversial information" is subject to a lower standard than strict scrutiny. NIFLA, 138 S. Ct. at 2372 (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985)).

Here, SB 253 and 261 force companies to disclose their opinion on the risks associated with the controversial topic of climate change.[3] Thus, strict scrutiny applies.

B. SB 253 and 261 are subject to strict scrutiny because the speech compelled is not commercial.

Commercial speech is "'usually defined as speech that does no more than propose a commercial transaction.'" *Ariix, LLC v. NutriSearch Corp.*, 985 F.3d 1107, 1115 (9th Cir. 2021) (quoting *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001)).

Here, the speech compelled by SB 253 and 261 is not commercial. Instead, it requires disclosure of topics that are not tied to a specific product or service for the purpose of generating a transaction.

C. SB 253 and 261 are not narrowly tailored to serve a compelling government purpose.

Given strict scrutiny applies here, the government must show that SB 253 and 261 are narrowly tailored to serve a compelling government interest.

The speech compelled by SB. 253 and 261 does not further a compelling government interest. There is no established evidence that requiring disclosures would lead to significant changes in companies' emissions, or that any such changes would meaningfully affect climate change.

The legislation is not "narrowly tailored" as it imposes far greater restrictions on speech than necessary to advance the government's interests. *McCullen v. Coakley*, 573 U.S. 464, 486 (2014).

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[3] The Supreme Court has acknowledged that climate change is a controversial topic. *See Janus*, 138 S. Ct. at 2476. 65.

And it fails to meet the "narrow tailoring" standard because it excessively restricts speech and jeopardizes small businesses.

D. SB 253 and 261 also do not satisfy lesser levels of scrutiny.

Even if the speech regulated is considered commercial, and intermediate scrutiny is applied, the compelled disclosures are unconstitutional because they are unduly burdensome.

Generally, commercial speech is subject to intermediate scrutiny. *NetChoice*, 113 F.4th at 1119; *accord X Corp.*, 116 F.4th at 900. But compelled disclosures cannot be "unjustified or "unduly burdensome." NIFLA, 138 S. Ct. at 2377 (citing Zauderer, 471 U.S. at 651). SB 253 and 261 are both unjustified and unduly burdensome.

Here, estimating greenhouse gas emissions is a tremendously burdensome task. Calculating and reporting Scope 3 emissions alone will cost many companies over $1 million per year. *See*, *e.g.*, Comment of The Williams Companies, Inc. 14, SEC File No. S7-10-22 (June 17, 2022). This estimate may well be a conservative one.

The burden of these bills would fall disproportionately on small and medium-sized businesses. Many of these businesses lack the ability to accurately measure their greenhouse gas emissions.

Because the laws cannot satisfy even the lowest levels of scrutiny, they are likely unconstitutional.

To the extent the rulemaking proceeds, this agency should optimize interoperability with other disclosure frameworks and existing voluntary reporting platforms

If this agency does move forward with rulemaking, it should be mindful of existing disclosure frameworks to make compliance feasible.

The existing voluntary platform many businesses use to report GHG emissions is CDP. Further, some companies are subject to the EU's Corporate Sustainability Reporting Directive (CSRD), which includes both GHG emissions and climate impacts, risks, and opportunities, among many other topics. Deeming CSRD reporting as compliant with SB 253 and 261 requirements, or at least acknowledging equivalence, would be incredibly beneficial not only for the reporting companies, but also for enhancing comparability for stakeholders.

Companies also report under other countries' adoptions of the International Sustainability Standards Board's (ISSB's) sustainability disclosure standards. The TCFD framework for climate risk and opportunity disclosures, which is referenced in SB 261, was folded into ISSB's standards a year or two ago so it would be helpful for the ISSB standards to also be referenced or at least recognized as equivalent and comparable.

Conclusion

For the foregoing reasons, CJAC respectfully asks that the rulemaking not proceed until the issue of constitutionality is resolved. However, should rulemaking proceed, we ask that this agency consider existing frameworks in establishing disclosure requirements to ensure compliance is feasible. Please do not hesitate to contact me at 916-217-5863 if you should have additional questions.

Respectfully submitted,

Lucy Chinkezian
Counsel