COMMENT

THE PROMISE AND PERIL OF STATE CORPORATE CLIMATE DISCLOSURE LAWS

by Anne E. Kettler

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On October 7, 2023, California Gov. Gavin Newsom signed the most far-reaching corporate climate disclosure (CCD) requirements in the United States.[1] This so-called California Climate Accountability Package[2] consists of the Climate Corporate Data Accountability Act (Senate Bill (SB) 253), which requires certain companies to disclose greenhouse gas (GHG) emission data, and the Climate-Related Financial Risk Act (SB 261), which requires certain companies to disclose climate-related financial risks.[3] SB 253 and SB 261 will require thousands of companies to develop monitoring and reporting infrastructure to comply with their respective disclosure requirements at significant corporate expense[4]; but with the worthy aim of enhancing corporate transparency and galvanizing corporate action to address climate change.[5]

On January 30, 2024, a coalition of business organizations, including the U.S. Chamber of Commerce, California Chamber of Commerce, American Farm Bureau Federation, Los Angeles County Business Federation, Central Valley Business Federation, and Western Growers Association, filed suit in the Central District of California against SB 253 and SB 261.[6] Among other challenges, these organizations argue that the court should declare SB 253 and SB 261 null and void, and that California should be enjoined from implementing or enforcing the Acts on the grounds that they violate the First Amendment.[7] This Comment addresses the uneasy relationship between state CCD laws and the ambiguous "compelled speech" doctrine, and assesses SB 253 and SB 261 in the context of this First Amendment challenge.

Part I provides background information on SB 253 and SB 261, discusses the inadequate CCD regime in the United States, and explains the benefits of state CCD mandates for both increasing corporate transparency and enhancing climate policy. Part II analyzes SB 253 and SB 261 under modern First Amendment doctrine, and argues that these laws should not be invalidated on First Amendment grounds. Part II further contends that even if they are struck down, SB 253 and SB 261 may nevertheless succeed in increasing CCDs. Part III concludes by reiterating that, regardless of the ongoing First Amendment challenge and the possibility of being struck down, enacting state CCD laws like SB 253 and SB 261 is a valuable legislative tool for advancing policies at the intersection of corporate transparency and climate change.

I. Background

Part 1 provides a background overview of SB 253 and SB 261, asserts that these state CCD laws are necessary due to an inadequate federal CCD regime, and explains how state CCD mandates improve both corporate transparency and climate change policy.

Author's Note: This Comment benefited from feedback and conversations with Lisa Heinzerling and Donald Langevoort. All errors are my own.

1. *See, e.g.*, Aliza R. Cinamon & Adrianna Vallee, *California—First State to Enact Climate Reporting Legislation*, Proskauer (Oct. 13, 2023), https://www.proskauer.com/alert/california-enacts-climate-reporting-legislation.
2. *See, e.g.*, News Release, Office of California Sen. Scott Wiener, California Senators Announce Climate Accountability Package to Raise the Bar for Corporate Climate Action (Jan. 30, 2023), https://sd11.senate.ca.gov/news/20230206-california-senators-announce-climate-accountability-package-raise-bar-corporate.
3. *See, e.g.*, *id.*
4. *See, e.g.*, Brady Van Engelen, *CalChamber-Opposed Climate Reporting Bills Create Challenges for Businesses*, CalChamber Advocacy (Aug. 1, 2023), https://advocacy.calchamber.com/2023/08/01/calchamber-opposed-climate-reporting-bills-create-challenges-for-businesses/.
5. *See, e.g.*, News Release, Office of California Sen. Scott Wiener, *supra* note 2.
6. Complaint for Declaratory and Injunctive Relief, Chamber of Com. of the United States v. California Air Res. Bd., No. 2:24-cv-00801 (C.D. Cal. filed Jan. 30, 2024).
7. *Id.*

A. *SB 253 and SB 261: The First State CCD Laws in the United States*

1. SB 253: The Climate Corporate Data Accountability Act

SB 253 requires that by 2025, the California State Air Resources Board (CARB) will have developed and adopted regulations requiring "reporting entities," defined as companies that are (1) organized in the United States; (2) have annual revenues above $1 billion; and (3) "do business in California,"[8] to measure, verify, and publicly disclose scope 1, 2, and 3 GHG emissions.[9] While the U.S. Environmental Protection Agency's (EPA's) Greenhouse Gas Reporting Program (GHGRP) requires approximately 8,000 facilities to report GHG emissions data, the GHGRP is not as broadly applicable a CCD mandate because it only requires emissions disclosure for 41 specified categories of reporters, namely large emission sources, industrial gas suppliers, and carbon dioxide injection sites, rather than from corporate entities broadly.[10] SB 253, by contrast, applies to all companies based on annual revenues rather than a type of industrial operation or emission levels.[11]

Additionally, SB 253 requires reporting of a broader amount of a company's associated emissions because the GHGRP only requires reporting of scope 1 emissions and scope 3 upstream supplier emissions, while omiting any reporting requirements for scope 3 downstream emissions or any scope 2 emissions.[12] Scope 1 emissions are all direct GHG emissions stemming from sources owned or directly controlled by a reporting entity.[13] Scope 2 emissions are all indirect emissions from consumed electricity, steam, heating, or cooling purchased by a reporting entity.[14] Scope 3 emissions are all non-scope 2 indirect upstream and downstream GHG emissions from sources that the reporting entity does not own or directly control, including the processing and use of sold products.[15]

Recognizing the greater compliance difficulty in calculating scope 3 emissions,[16] SB 253 requires that reporting entities begin disclosing scope 1 and scope 2 emissions in 2026 and disclosing scope 3 emissions in 2027.[17] SB 253 requires that emissions data be measured and reported under the Greenhouse Gas Protocol standards, a globally recognized emissions accounting and reporting standard developed by the World Resources Institute and the World Business Council for Sustainable Development.[18] Additionally, reporting entities must have emissions disclosures verified by an independent third party.[19]

SB 253 compels CARB to contract with a nonprofit emissions reporting organization[20] to create a publicly accessible digital platform featuring individual reporting entity disclosures and aggregated data, and to contract an academic institution to prepare a report on the public disclosures by 2027.[21] CARB must also adopt regulations regarding administrative penalties for noncompliance of up to $500,000 per reporting entity per year; however, penalties assessed on scope 3 emissions reporting between 2027 and 2030 will only occur for nonfiling, and reporting entities will not be subject to penalties for misstatement regarding scope 3 emissions made in good faith.[22] CARB will have until 2025 to adopt implementing regulations.[23]

2. SB 261: The Climate-Related Financial Risk Act

SB 261 requires companies, excluding insurance companies, that "do business in California"[24] and have more than $500 million in annual revenues to disclose their climate-related financial risks.[25] Specifically, SB 261 requires that by 2026 and biannually thereafter, these entities prepare a climate-related financial-risk report that discloses both

8. SB 253 does not define the term "do business in California," but other California statutes define this term very broadly. SB 253's Senate floor analysis memorandum references these broad definitions in other state statutes. For example, California's Corporations Code defines "doing business in California" as "entering into repeated and successive transactions of its business in [the] state, other than interstate or foreign commerce," and California's Revenue and Taxation Code defines this as "actively engaging in any transaction for the purpose of financial or pecuniary gain or profit." Cal. Corp. Code §191(a); Cal. Rev. & Tax. Code §23101(a); *see also, e.g.*, Beth Sasfai et al., *California GHG Emissions and Climate Risk Bills Near Finalization*, Cooley (Sept. 19, 2023), https://www.cooley.com/news/insight/2023/2023-09-19-california-ghg-emissions-and-climate-risk-bills-near-finalization; Brent W. Thompson, *California's Climate Disclosure Requirements: An Overview of Senate Bills 253 and SB 261*, Cal. Laws. Ass'n (Nov. 2023), https://calawyers.org/business-law/californias-climate-disclosure-requirements-an-overview-of-senate-bills-253-and-261/; *Major California Climate-Related Disclosure Bills Poised to Become Law*, Davis Polk (Sept. 27, 2023), https://www.davispolk.com/insights/client-update/major-california-climate-related-disclosure-bills-poised-become-law.
9. S.B. 253, 2022-2023 Leg., Reg. Sess. (Cal. 2023).
10. U.S. EPA, *Greenhouse Gas Reporting Program (GHGRP)*, https://www.epa.gov/ghgreporting (last updated Feb. 5, 2024) [hereinafter *GHGRP*]; U.S. EPA, *Learn About the Greenhouse Gas Reporting Program (GHGRP)*, https://www.epa.gov/ghgreporting/learn-about-greenhouse-gas-reporting-program-ghgrp (last updated June 20, 2023).
11. S.B. 253, 2022-2023 Leg., Reg. Sess. (Cal. 2023).
12. *See GHGRP*, *supra* note 10.
13. S.B. 253, 2022-2023 Leg., Reg. Sess. (Cal. 2023).
14. *Id.*
15. *Id.*
16. Calculating scope 3 emissions requires engagement with suppliers, customers, and additional data quality management. *See, e.g.*, *California Emissions Bills: What Your Company Needs to Know*, Jones Day (Sept. 2023), https://www.jonesday.com/en/insights/2023/09/california-emissions-bills-what-your-company-needs-to-know.
17. S.B. 253, 2022-2023 Leg., Reg. Sess. (Cal. 2023).
18. *Id.*
19. *Id.*
20. Under SB 253, the contracted nonprofit emissions reporting organization must "[c]urrently operate[ ] a greenhouse gas emission reporting organization for organizations operating in the United States" and have "experience with greenhouse gas emissions disclosure by entities operating in California." *Id.*
21. *Id.*
22. *Id.*
23. *Id.* While SB 253 specifies that CARB will have until 2025 to adopt implementing regulations, Governor Newsom indicated that his administration may seek to work with the California State Legislature to modify the bill prior to 2025. *See* California Office of the Governor, SB 253 Signing Statement (Oct. 7, 2023), https://www.gov.ca.gov/wp-content/uploads/2023/10/SB-253-Signing.pdf.
24. Like SB 253, SB 261 does not define the term "doing business in California." Legal experts similarly expect this term to be defined broadly and similarly as the term is applied in SB 253. *See, e.g.*, Sasfai et al., *supra* note 8.
25. *Id.*

climate-related financial risks[26] and measures adopted to reduce or adapt to these risks.[27] In addition to preparing this report, covered entities must publish this report on their company website.[28]

This report must be prepared following recommendations by the Task Force on Climate-Related Financial Disclosures (TCFD), a global organization created at the request of the Group of 20 Finance Ministers and Central Bank Governors, which assesses how effective climate-related disclosures can promote informed investments and enable stakeholders to better understand climate-related risks.[29] Companies can consolidate their reports at the parent company level, such that subsidiaries that meet the definition of a "covered entity" do not have to prepare a separate report.[30] SB 261 also explains the reporting requirement is satisfied if a company prepares a report pursuant to law by another government.[31] Additionally, CARB must contract with a nonprofit climate reporting organization[32] to write a report reviewing risks by industry, reviewing sectorwide risks facing California, and identifying inadequate reports.[33]

B. State Laws Are Needed in Light of Inadequate Federal Requirements

SB 253 and SB 261 can fill the void left by the inadequate federal CCD laws and catalyze the development of a CCD regime in the United States.[34] As effects of climate change are increasingly felt across geographies and sectors of the economy, environmental considerations are becoming an increasing concern for investors and other corporate stakeholders. Accordingly, climate-related information and consideration of corporate climate risks and corporate emissions data are becoming increasingly essential components for investors in evaluating a company's long-term prospects.

According to Bank of America Securities, nearly 90% of millennial investors set "impact investing" as their first investment criterion.[35] Additionally, among institutional investors, according to a report by Ernst & Young, 99% of institutional investors surveyed said that sustainability reporting is a crucial part of their investment decisionmaking.[36]

Similarly, a joint study by professors from the McCombs School of Business, National University of Singapore, University of Geneva, and Frankfurt School of Finance & Management found that nearly 80% of institutional investors consider climate risk disclosure to be at least as important as financial disclosure.[37] As EY Global Climate Change and Sustainability Services Leader explained, in the absence of reliable sustainability reporting, this "disconnect [ ] poses a real threat to the smooth running of capital markets and ultimately the fight against climate change."[38]

This increased investor demand, coupled with a growing political impetus to act on climate change, has driven a growing number of countries to implement CCD laws. In 2021, New Zealand passed the first national climate-related financial-risk disclosure law analogous to SB 261.[39] Many other countries have subsequently adopted climate-related financial-risk disclosure laws requiring climate-risk disclosure under TCFD.[40] Similarly, an increasing number of countries have passed corporate emissions disclosure laws analogous to SB 253. In July 2023, the European Commission adopted the European Sustainability Reporting Standards (ESRS) to impose standardized emissions disclosure requirements for the European Union.[41] ESRS goes beyond SB 253 in many respects because, in addition to requiring emissions disclosure, it requires other environmental disclosures including biodiversity and ecosystem impacts.[42]

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26. SB 261 defines "climate-related financial risk" as

> material risk of harm to immediate and long-term financial outcomes due to physical and transition risks, including, but not limited to, risks to corporate operations, provision of goods and services, supply chains, employee health and safety, capital and financial investments, institutional investments, financial standing of loan recipients and borrowers, shareholder value, consumer demand, and financial markets and economic health.

S.B. 261, 2022-2023 Leg., Reg. Sess. (Cal. 2023).

27. *Id*.
28. *Id*.
29. *Id*.; TCFD, Task Force on Climate-Related Financial Disclosures Overview (2022), https://assets.bbhub.io/company/sites/60/2022/12/tcfd-2022-overview-booklet.pdf.
30. S.B. 261, 2022-2023 Leg., Reg. Sess. (Cal. 2023).
31. *Id*.
32. Similar to SB 253, pursuant to SB 261, the contracted nonprofit emissions reporting organization must "[c]urrently operate[ ] a greenhouse gas emission reporting organization for organizations operating in the United States" and have "experience with greenhouse gas emissions disclosure by entities operating in California." *Id*.
33. *Id*.
34. *See, e.g.*, Sadie Frank, *How Might California's New Climate Disclosure Law Impact Federal Rulemaking?*, Pub. Citizen (Oct. 26, 2023), https://www.citizen.org/article/california-sec-climate-disclosure-report/.
35. Patti Domm, *Climate Change Investing Catches on With Millennials Who Believe It's Pressing—and Profitable*, CNBC (Dec. 31, 2019), https://www.cnbc.com/2019/12/31/climate-change-investing-catches-on-with-millennials.html.
36. Emile Abu-Shakra, *Businesses and Investors at Odds Over Sustainability Efforts*, EY (Nov. 11, 2022), https://www.ey.com/en_gl/news/2022/11/businesses-and-investors-at-odds-over-sustainability-efforts.
37. *Investors Want Better Climate Risk Disclosure*, UT News (July 26, 2023), https://news.utexas.edu/2023/07/26/investors-want-better-climate-risk-disclosure/.
38. Abu-Shakra, *supra* note 36.
39. *New Zealand Passes Climate Change Disclosure Laws for Financial Firms in World First*, Reuters (Oct. 21, 2021), https://www.reuters.com/business/sustainable-business/new-zealand-passes-climate-change-disclosure-laws-financial-firms-world-first-2021-10-21/.
40. The European Union, the United Kingdom, Switzerland, and Singapore all passed climate-risk disclosure laws under the TCFD framework. *See, e.g.*, Duncan Grieve, *Disclosure: Switzerland to Require Climate Reporting for Public Companies and Financial Institutions*, Cadwalader (Dec. 2, 2022), https://www.cadwalader.com/cwt-climate/index.php?eid=73&nid=15.
41. *Commission Delegated Regulation Supplementing Directive 2013/34/EU of the European Parliament and of the Council as Regards Sustainability Reporting Standards*, COM(2023) 5303 final (July 31, 2023), https://eur-lex.europa.eu/resource.html?uri=cellar:a17f44bd-2f9c-11ee-9e98-01aa75ed71a1.0008.02/DOC_1&format=PDF; *see also, e.g.*, *EU Adopts Long-Awaited Mandatory ESG Reporting Standards*, Cooley (Aug. 11, 2023), https://www.cooley.com/news/insight/2023/2023-08-11-eu-adopts-long-awaited-mandatory-esg-reporting-standards; Peggy Otum & Shannon Morrissey, *First to the Finish Line: Governor Newsom Signs California's Emissions Disclosure Law*, WilmerHale (Oct. 11, 2023), https://www.wilmerhale.com/en/insights/blogs/esg-epicenter/20231011-first-to-the-finish-line-governor-newsom-signs-californias-emissions-disclosure-law.
42. *EU Adopts Long-Awaited Mandatory ESG Reporting Standards*, *supra* note 41.

Aligned with this international wave of CCD laws, on March 6, 2024, the U.S. Securities and Exchange Commission (SEC) adopted a long-awaited final rule requiring that registrants provide climate-related disclosures in public company registration statements and annual reports.[43] This rule requires reporting companies subject to the Securities Exchange Act of 1934 to disclose material climate-related risks; efforts to mitigate or adapt to these risks, information about the registrant's board of directors' oversight of climate-related risks and management's role in managing these risks, and information on any climate-related targets or goals that are material to the registrant's business, operations, or finances.[44]

The final SEC rule also requires large accelerated filers and non-exempt accelerated filers (as opposed to all reporting companies) to disclose material scope 1 and scope 2 GHG emissions.[45] Additionally, the final rule requires audited companies' financial statements to note the financial impacts of "severe weather events," including flooding, drought, wildfires, extreme temperatures, and sea-level rise.[46]

Prior to the promulgation of this final rule, the SEC did not require any climate-specific disclosures.[47] In 2010, the SEC issued an interpretive release providing "guidance to public companies regarding the Commission's existing disclosure requirements as they apply to climate change matters," and encouraging companies to disclose climate-related financial risks under the current federal reporting rules.[48] This interpretive guidance did not create any new climate-specific disclosure requirements, but rather highlighted how existing disclosure requirements apply to climate change matters[49] and had a limited impact on climate-related reporting.[50]

While the SEC's adoption of a final climate disclosure rule is a significant improvement from its 2010 interpretive release and a strong step toward developing an adequate CCD regime in the United States, the final rule is significantly scaled back from the originally proposed rule in March 2022, and is inadequate to fully provide investors with necessary corporate transparency regarding climate change.[51] Notably, the final rule does not require any companies to disclose scope 3 GHG emissions, and only requires certain companies (large-accelerated and accelerated filers) to disclose material scope 1 and scope 2 GHG emissions. Under the final rule, small reporting companies and emerging growth companies are exempt from any GHG disclosure requirements.[52]

Stronger disclosure requirements beyond the SEC's final rule, particularly mandatory scope 1, 2, and 3 GHG emissions disclosures, are necessary. As SEC Commissioner Caroline Crenshaw described, the final rule is a "bare minimum" that despite being "better for investors than no rule at all" omits key disclosure requirements.[53] Specifically, Crenshaw noted that the final rule only requires certain companies to disclose scope 1 and 2 GHG emissions if the company determines that such emissions would be material to a reasonable investor, despite "clear support for mandatory reporting for all public issuers with no materiality qualifier"; and that the final rule "excludes requirements to disclose Scope 3 GHG emissions, despite comments making it abundantly clear that they represent a key metric for investors in understanding climate risk."[54]

Given the SEC's scaled-back final rule, including the materiality qualifier for scope 1 and 2 emissions and lack of scope 3 emissions disclosure requirements, along with the SEC's limited applicability to companies subject to the Securities Exchange Act, state CCD laws can further advance both corporate transparency and climate policy by mandating more disclosure than required by federal law.

SB 253 and SB 261 go beyond the SEC's final rule in two significant respects. First, the SEC's rule only requires disclosure for public companies subject to the Securities Exchange Act, while SB 253 and SB 261 apply to both public and private companies.[55] By including private companies, SB 253 and SB 261 mandate disclosure for many companies that are not covered by the SEC's rule.[56] SB

43. Enhancement and Standardization of Climate-Related Disclosures for Investors, Securities Act Release No. 33-11275, Exchange Act Release No. 34-99678 (Mar. 6, 2024), https://www.sec.gov/rules/2022/03/enhancement-and-standardization-climate-related-disclosures-investors.
44. Fact Sheet, SEC, Enhancement and Standardization of Climate-Related Disclosures: Final Rules, https://www.sec.gov/files/33-11275-fact-sheet.pdf.
45. Enhancement and Standardization of Climate-Related Disclosures for Investors, *supra* note 43.
46. *Id.*
47. The SEC requires many corporate disclosures, some of which can incorporate climate change, but none are specific to climate change. *See* Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6290 (Feb. 8, 2010).
48. *Id.*
49. *Id.*; *see also* Roshaan Wasim, *Corporate (Non)Disclosure of Climate Change Information*, 119 Colum. L. Rev. 1311, 1323 (2019).
50. *See, e.g.*, Marc Hafstead et al., *International Context of the Proposed Climate Disclosure Rule From the US Securities and Exchange Commission*, Resources (May 26, 2022), https://www.resources.org/special-series-sec/international-context-of-the-proposed-climate-disclosure-rule-from-the-us-securities-and-exchange-commission/.
51. *See, e.g.*, *Seeking Compromise, the SEC Finalizes Controversial Climate Rule*, Covington (Mar. 7, 2024), https://www.cov.com/en/news-and-insights/insights/2024/03/seeking-compromise-the-sec-finalizes-controversial-climate-rules; Erin E. Martin & Celia A. Soehner, *SEC Adopts Climate-Related Disclosure Rules*, Morgan Lewis (Mar. 6, 2024), https://www.morganlewis.com/pubs/2024/03/sec-adopts-climate-related-disclosure-rules; *Sierra Club, Earthjustice Lawsuit Challenges SEC's Weakened Climate Risk Disclosure Rule*, Sierra Club (Mar. 13, 2024), https://www.sierraclub.org/press-releases/2024/03/sierra-club-earthjustice-lawsuit-challenges-sec-s-weakened-climate-risk.
52. Statement, Caroline A. Crenshaw, Commissioner, SEC, A Risk by Any Other Name: Statement on the Enhancement and Standardization of Climate-Related Disclosures (Mar. 6, 2024), https://www.sec.gov/news/statement/cresnshaw-statement-mandatory-climate-risk-disclosures-030624.
53. *Id.*
54. *Id.*
55. *See, e.g.*, Alexa Gamble et al., *California's Climate Accountability Package: What You Need to Know*, Fox Rothschild (Oct. 24, 2023), https://www.foxrothschild.com/publications/californias-climate-accountability-package-what-you-need-to-know; *California Governor Signs Climate Disclosure Bills With Significant Impact for Entities of All Forms Doing Business in the State*, Dechert (Oct. 9, 2023), https://www.dechert.com/knowledge/onpoint/2023/10/california-governor-signs-climate-disclosure-bills-with-signific.html.
56. *See, e.g.*, Gamble et al., *supra* note 55; *California Governor Signs Climate Disclosure Bills With Significant Impact for Entities of All Forms Doing Business in the State*, *supra* note 55.

261's Assembly and Senate floor analyses estimated that SB 261 will mandate disclosure for 10,000 companies, and only 20% of those companies are publicly traded and thus covered by the SEC's rule.[57] Second, SB 253 requires significantly more GHG emissions disclosure than the SEC's rule. SB 253 requires disclosure of scope 1, 2, and 3 GHG emissions for *all* covered companies, while the SEC's rule only requires certain companies to disclose material scope 1 and scope 2 GHG emissions and does not require scope 3 emissions disclosure for any companies.

Even in light of the SEC's final rule, by applying to public and private companies that "do business" in California, the world's fifth-largest economy,[58] SB 253 and SB 261 will significantly increase CCDs at the national level and require key disclosures that were omitted by the SEC's final rule. As one professor of economics and public policy explained, "California is in effect exercising its immense market leverage to establish climate disclosures as standard practice in the U.S. and beyond."[59] At a 2023 U.S. House of Representatives oversight hearing, SEC Chair Gary Gensler remarked that SB 253 and SB 261 could "change the baseline" of a federal climate disclosure rule by the SEC because "if those companies were reporting to California, then it would be in essence less costly because they'd already be producing that information."[60]

In addition to the direct impact of increasing CCDs from covered companies, and complementing the SEC's final rule, SB 253 and SB 261 may pave the way for additional CCD laws in other states. The New York Legislature is considering mirror CCD legislation, and some politicians are looking to the California Climate Accountability Package and arguing that "New York must follow suit."[61] Similarly, in January 2024, a state representative in Illinois introduced mirror legislation to require U.S. entities doing business in Illinois with total annual revenues over $1 billion to annually disclose and verify their scope 1, 2, and 3 GHG emissions.[62]

On March 15, in response to several challenges to the SEC's rule, the U.S. Court of Appeals for the Fifth Circuit granted a temporary administrative stay of the rule pending further judicial review.[63] In light of the stay, and in the event that the SEC's rule is struck down on merits unrelated to the First Amendment, state CCD laws like SB 253 and SB 261 will be even more crucial in filling the void left by the absence of a federal CCD requirement.

C. *Mandating Corporate Disclosures Is One Tool to Increase Corporate Transparency and Advance Effective Climate Policy*

As a growing number of jurisdictions have recognized, because the current approach to corporate disclosure of climate-related financial risks and emissions data is largely voluntary,[64] it is inadequate to address climate change and to provide full transparency to investors and consumers in understanding those risks and related emissions.[65] Mandatory CCD laws generate corporate information that a growing number of investors demand, provide crucial data needed to develop effective climate policies, and incentivize voluntary emissions reductions.

First, mandatory CCDs are needed to provide investors with transparent corporate climate-related data. While many companies voluntarily disclose some climate-related information, others will not disclose this information in the absence of a government mandate, either because they lack adequate incentives to invest in data collection and reporting mechanisms or because they would prefer not to share this climate-related information with investors. In one report, 88% of institutional investors surveyed believe that companies only disclose climate- and sustainability-related information when they are legally forced to do so.[66] In another study, nearly three-quarters of institutional investors reported that standardized and mandatory climate risk reporting is necessary.[67] When the approach to climate risks and emissions disclosures is largely voluntary, it fails to provide full transparency to investors and financial markets to understand climate risks and emissions.[68]

Second, formulating effective climate change policies requires a foundation of reliable data. When CCDs are required by law, the disclosures generated provide invalu-

57. California Senate Rule Committee, Senate Floor Analysis, S.B. 261, 2022-2023 Leg., Reg. Sess. (2023) (amended Sept. 8, 2023).
58. S.B. 253, 2022-2023 Leg., Reg. Sess. (Cal. 2023).
59. Lily Hsueh, *Analysis: The Potential Global Impact of California's New Corporate Climate Disclosure Laws*, PBS (Oct. 15, 2023), https://www.pbs.org/newshour/nation/analysis-the-potential-global-impact-of-californias-new-corporate-climate-disclosure-laws.
60. *See, e.g.*, Jonathan D. Brightbill et al., *Newly Enacted California Climate Bills Create Sweeping Disclosure Requirements for Companies Across the Country*, Winston & Strawn (Oct. 17, 2023), https://www.winston.com/en/blogs-and-podcasts/winston-and-the-legal-environment/newly-enacted-california-climate-bills-create-sweeping-disclosure-requirements-for-companies-across-the-country.
61. *See, e.g.*, Brad Hoylman-Sigal et al., *Opinion: New York Must Require Companies to Disclose Greenhouse Gas Emissions*, City & State N.Y. (Oct. 25,2023),https://www.cityandstateny.com/opinion/2023/10/opinion-new-york-must-require-companies-disclose-greenhouse-gas-emissions/391504/.
62. H.B. 4268, 103d Gen. Assemb. (Ill. 2024), https://ilga.gov/legislation/103/HB/PDF/10300HB4268lv.pdf.
63. Liberty Energy v. SEC, Docket No. 24-60109 (5th Cir. Mar 15, 2024), https://www.bloomberglaw.com/product/blaw/document/X2UH79VLUNF9Q1BSSML2SQABE5S
64. *See* S.B. 253, 2022-2023 Leg., Reg. Sess. (Cal. 2023); S.B. 261, 2022-2023 Leg., Reg. Sess. (Cal. 2023).
65. *See* S.B. 253, 2022-2023 Leg., Reg. Sess. (Cal. 2023); S.B. 261, 2022-2023 Leg., Reg. Sess. (Cal. 2023).
66. Abu-Shakra, *supra* note 36.
67. *Investors Want Better Climate Risk Disclosure*, *supra* note 37.
68. "The current approach for disclosure of climate emissions from public and private corporate enterprises relies largely on voluntary reporting of GHG inventories, goals, commitments, and agreements, and lacks the full transparency and consistency needed by residents and financial markets to fully understand these climate risks." S.B. 253, 2022-2023 Leg., Reg. Sess. (Cal. 2023).

> Though a precedent has been set to address climate risk to businesses, corporations, and financial institutions nationwide, current disclosure standards are voluntary, and thus inadequate, for meeting rapidly accelerating climate risks. In order to begin to address the climate crisis, consistent, higher level, and mandatory disclosures are needed from all major economic actors, and California has an opportunity to set mandatory and comprehensive risk disclosure requirements for public and private entities to ensure a sustainable, resilient, and prosperous future for our state.

S.B. 261, 2022-2023 Leg., Reg. Sess. (Cal. 2023).

able data necessary to develop effective climate change mitigation and adaptation policies.[69] For example, EPA relies on data generated from the GHGRP to assess trends in emissions over time and to evaluate and implement GHG mitigation policies.[70] Similarly, data derived from EPA's Toxics Release Inventory influenced the Agency's regulatory and enforcement priorities and facilitated the development of pollution-reduction programs.[71]

Recognizing the need to track corporate emissions, many large companies have expressed adamant support for the SEC's proposed rule, SB 253, and SB 261.[72] As one comment by a group of large technology companies to the SEC's 2022 proposed climate rule, "[c]limate disclosures are a critical component of tracking companies' efforts to achieve stated climate goals and to assess progress towards addressing global warming and building a prosperous, resilient zero-carbon economy."[73] The need for climate-related financial-risk data is just as crucial.[74] Recognizing the dearth of data and the need to implement policies to manage these risks, in 2021, President Joseph Biden issued an Executive Order on climate-related financial risk, seeking a whole-of-government approach to assessing and addressing climate-related financial risks as they relate to the stability of the federal government and financial system.[75]

Third, requiring companies to disclose their emissions data creates an incentive to voluntarily reduce emissions.[76] Because a large and increasing percentage of investors prioritize environmentally conscious investing,[77] when faced with emissions disclosure requirements, companies will be incentivized to seek to reduce their emissions to maintain and attract the growing number of climate-conscious shareholders.[78] One study found that firms affected by a CCD mandate reduced their emissions by 8% and experienced no significant changes in their gross margins.[79] Historically, mandated disclosure requirements regarding other pollutants have led to corporate behavioral changes and significant pollution reductions.[80] For example, after California enacted the Safe Drinking Water and Toxic Enforcement Act, which required businesses to disclose when products contain carcinogens, numerous companies reformulated their products to remove carcinogens, thus avoiding the need to publicly disclose that their products contained cancer-causing agents.[81]

In sum, mandatory CCD laws can both increase corporate transparency and advance climate change mitigation and adaptation efforts by providing crucial corporate climate data and incentivizing emissions reductions. Because there is no adequate federal CCD mandate, state laws like SB 253 and SB 261 are needed to fill the regulatory void by imposing their own CCD requirements.

II. State CCD Laws and the First Amendment

Part II explores the evolving compelled commercial speech doctrine, and highlights significant ambiguities that make it uncertain whether SB 253 and SB 261 will survive this First Amendment challenge or even what level of scrutiny wil apply. Accepting this doctrinal ambiguity, this Comment argues that SB 253 and SB 261 should survive the ongoing First Amendment threat, but even if they are struck down, they may still succeed in increasing CCDs.

A. The Evolving Doctrine of Compelled Commercial Speech Is Rife With Uncertainty

When assessing the government's right to compel speech, the U.S. Supreme Court has applied varying levels of scrutiny review under different factual contexts.[82] Under this tiered scrutiny framework, the more a law implicates significant free speech concerns, the more it must be carefully tailored to weighty government interests.[83] Noncommercial compelled speech regulations generally trigger strict scrutiny, under which the government must show that a law is narrowly tailored to achieve a compelling government interest such that no less-speech-restrictive alternatives would achieve the government's goal.[84]

It is so difficult to meet this strict scrutiny standard that courts consider laws presumptively unconstitutional under

69. *See* Michael Greenstone et al., *Mandatory Disclosure Would Reveal Corporate Carbon Damages: Accurate Reporting Is Critical for Markets and Climate Policies*, 381 Science 837 (2023).
70. *See, e.g.*, Angela C. Jones, Congressional Research Service, IF 11754, EPA's Greenhouse Gas Reporting Program (2023), https://crsreports.congress.gov/product/pdf/IF/IF11754.
71. Bradley C. Karkkainen, *Framing Rules: Breaking the Information Bottleneck*, 17 N.Y.U. Env't L.J. 75, 88-89 (2008).
72. *See, e.g.*, Daniela Pardo & Jackson Ellison, *Senate Bill 253, Supported by the Governor, Mandates Corporate Climate Accountability*, Spectrum News (Oct. 5, 2023), https://spectrumnews1.com/ca/la-west/inside-the-issues/2023/10/05/corporate-climate-accountability-bill.
73. Alphabet, Inc. et al., Public Comment on SEC Proposed Rule: The Enhancement and Standardization of Climate-Related Disclosures for Investors (June 17, 2022), https://www.sec.gov/comments/s7-10-22/s71022-20132086-302567.pdf.
74. *See* Exec. Order No. 14030, 86 C.F.R. 27967, 27968 (2021).
75. *Id.*
76. *See* Benedikt Downar et al., *The Impact of Carbon Disclosure Mandates on Emissions and Financial Operating Performance* (ZEW Discussion Paper No. 20-038, 2020), https://ssrn.com/abstract=3693670.
77. *See, e.g.*, William and Flora Hewlett Foundation, Public Comment on SEC Proposed Rule: The Enhancement and Standardization of Climate-Related Disclosures for Investors (June 8, 2022), https://www.sec.gov/comments/climate-disclosure/cll12-8897120-241350.pdf; Ryan Stanton, *Investors Continue to Prioritise Climate Action Despite Lacking Trusted Information*, PwC (June 12, 2022), https://www.pwc.com/gx/en/news-room/press-releases/2022/investors-continue-to-prioritise-climate-action-despite-lacking-trusted-information.html.
78. *See* Downar et al., *supra* note 76.
79. *Id.*
80. *See* Kathryn Douglass, *Add One to the Arsenal: Corporate Securities Laws in the Fight to Slow Global Warming*, 13 Lewis & Clark L. Rev. 1119, 1133-36 (2009).
81. *See id.* at 1135.
82. *See, e.g.*, Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. Rev. 1, 2 (2000); Valerie C. Brannon et al., Congressional Research Service, IF 12388, First Amendment Limitations on Disclosure Requirements (2023), https://crsreports.congress.gov/product/pdf/IF/IF12388.
83. *See* Post, *supra* note 82; Brannon et al., *supra* note 82.
84. *See* Post, *supra* note 82; Brannon et al., *supra* note 82.

strict scrutiny review.[85] However, the Supreme Court has held that regulations on commercial speech can be subject to either intermediate scrutiny or a less stringent, reasonable-relation standard of review.[86] While the Court has made clear that different forms of speech warrant different levels of protection and thus differing levels of scrutiny review, the application of these different tests is far from clear.[87] Accordingly, the doctrine of compelled commercial speech is rife with "flux and uncertainty," and "conflict in the circuits."[88]

For most of American legal history, there was no doctrine of commercial speech, let alone compelled commercial speech. In 1942, the Supreme Court first considered whether the First Amendment protected commercial speech in *Valentine v. Chrestensen*, and unanimously ruled that the First Amendment did not protect commercial advertising speech.[89] Thirty years later, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, the Supreme Court reversed its holding in *Chrestensen* and held that commercial speech falls under the protection of the First Amendment.[90] The Court explained that commercial speech was not "wholly undifferentiable from other forms" of speech, but that "common sense differences" between commercial speech and other types of speech, such as news reporting or political commentary, "suggest a different degree of protection is necessary to ensure that the flow of truthful and legitimate commercial information is unimpaired."[91]

In *Central Hudson Gas & Electric Corp. v. Public Service Commission*, the Supreme Court articulated the first test for restrictions on commercial speech.[92] The Court applied intermediate scrutiny review and articulated a four-part test to determine whether government regulations on commercial speech violate the First Amendment.[93] Under the *Central Hudson* test, regulations on commercial speech are permissible under the First Amendment if (1) the commercial speech is lawful and not misleading; (2) the state asserted a substantial interest advanced by the regulation; (3) the regulation is carefully designed to directly advance the government interest; and (4) the regulation is not more extensive than is necessary to serve that interest.[94]

Five years later, in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, the Supreme Court considered the constitutionality of a compelled commercial disclosure.[95] In *Zauderer*, a lawyer was required to include a specific disclosure statement in his advertising and he challenged this requirement as a violation of his First Amendment rights.[96] The Court declined to apply *Central Hudson* due to "material differences between disclosure requirements and outright prohibitions on speech."[97] The Court applied a less stringent, reasonable-relation test and held that compelling commercial disclosures that are "purely factual and uncontroversial" do not run afoul of the First Amendment when they (1) are "reasonably related to the State's interest in preventing deception of consumers," and (2) are not "unjustified or unduly burdensome."[98]

In *National Institute of Family & Life Advocates v. Becerra* (*NIFLA*), the last Supreme Court case to opine on the application of the *Zauderer* standard, the Court clarified that a disclosure must be independently "factual" and "uncontroversial" to warrant *Zauderer* review.[99] In *NIFLA*, the Supreme Court considered which standard of scrutiny to apply in reviewing a California law that required pro-life pregnancy clinics to provide information about publicly funded abortions to their clients.[100] The Court explained that while the speech at issue was "factual," it was nonetheless controversial because it concerned abortion, described as "hardly an 'uncontroversial' topic."[101] Additionally, the Court clarified the not "unjustified or unduly burdensome" prong of the *Zauderer* test, and explained that this prong is satisfied when the disclosure "remed[ies] a harm that is 'potentially real not purely hypothetical,'" and "extend[s] 'no broader than reasonably necessary.'"[102]

While *NIFLA* made clear that "factual" and "uncontroversial" are separately required elements necessary to warrant *Zauderer* review, many outstanding questions regarding the doctrine of compelled speech remain. Since *Zauderer*, courts have accordingly struggled with whether regulations on commercial speech warrant intermediate scrutiny under *Central Hudson* or reasonable-relation review under *Zauderer*,[103] and circuits have split on when

85. *See* Post, *supra* note 82; Brannon et al., *supra* note 82.
86. *See, e.g.*, Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557 (1980) (applying intermediate scrutiny to other restrictions on commercial speech); Zauderer v. Office of Disciplinary Couns. of Sup. Ct. of Ohio, 471 U.S. 626 (1985) (applying a lower, reasonable-relation standard of review); *see also* Brannon et al., *supra* note 82 (explaining different applications for intermediate scrutiny and a lower, reasonable-relation standard of review).
87. *See, e.g.*, Brannon et al., *supra* note 82.
88. National Ass'n of Mfrs. v. Securities & Exch. Comm'n (*NAM*), 800 F.3d 518, 524, 45 ELR 20155 (D.C. Cir. 2015).
89. 316 U.S. 52 (1942).
90. *See* 425 U.S. 748 (1976).
91. *Id*. at 772 n.24.
92. In *Central Hudson*, the Public Service Commission of New York imposed a ban on promotional advertising by utility companies during the 1973 oil crisis, and a utility company challenged the regulation on the grounds that it violated their First Amendment right to commercial speech by restricting their ability to communicate with customers. *See* 447 U.S. 557, 558-59 (1980).
93. *Id*. at 561.
94. In applying this newly articulated test, the Court in *Central Hudson* found that the Public Service Commission's ban on promotional advertising by utility companies did not pass the *Central Hudson* test because the regulated speech was more extensive than necessary because it included prohibitions on speech that would not lead to an increase in electricity usage such as "advertise[ments] for products and services that use energy efficiently." *Id*. at 570.
95. 471 U.S. 626 (1985).
96. *Id*. at 636.
97. *Id*. at 670.
98. *Id*. at 651.
99. 138 S. Ct. 2361, 2366 (2018).
100. *Id*. at 2365.
101. *Id*. at 2366.
102. *Id*. at 2377.
103. *See, e.g.*, *NAM*, 800 F.3d 518, 45 ELR 20155 (D.C. Cir. 2015). *NAM* illustrates a court's struggle to select a standard of review because the majority found that *Zauderer* could not apply, but that even if it applied, the disclosure at issue would not pass *Zauderer* review, and that the disclosure failed the *Central Hudson* test. By contrast, the dissent argued *Zauderer* should

commercial speech is "purely factual and uncontroversial" and thus warranting the *Zauderer* reasonable-relation test.[104] Because the doctrine is unclear regarding when a disclosure is "purely factual" and "uncontroversial," it is uncertain whether courts will apply intermediate scrutiny under *Central Hudson* or rational-basis review under *Zauderer* when analyzing compelled commercial speech.[105]

Additionally, the doctrine is unclear regarding whether corporate disclosures constitute "commercial" speech deserving of these lower levels of scrutiny at all.[106] When commercial speech jurisprudence evolved through common law, the Supreme Court did not explicitly define what speech is "commercial," leaving circuits to create their own definitional tests.[107] The U.S. Court of Appeals for the Second Circuit articulated this confusion well, explaining that "the Supreme Court has offered differing, and not always fully consistent, descriptions as to what constitutes protected commercial speech."[108] In 2014, in *Harris v. Quinn*, the Supreme Court provided some guidance by explaining that "precedents define commercial speech as 'speech that does no more than propose a commercial transaction.'"[109]

Recent years have witnessed a wave of criticism and legal challenges against various corporate disclosure laws, echoing the First Amendment challenges brought against SB 253 and SB 261. Last year, the Chamber of Commerce, one of the plaintiffs in the action against SB 253 and SB 261, challenged as unconstitutional compelled speech an SEC rule requiring that issuers of securities disclose their security repurchase data and the rationale for these repurchases.[110] The Fifth Circuit rejected this argument and found that the disclosure requirement did not run afoul of the First Amendment.[111]

Despite the Fifth Circuit's recent holding in protection of corporate disclosures regarding repurchase rationale, the doctrine of compelled commercial speech is still evolving and many outstanding questions remain. While compelled commercial speech warrants lower scrutiny than noncommercial speech,[112] it is often unclear whether intermediate scrutiny or rational-basis review applies.[113] Further, it is ambiguous when compelled corporate speech is "commercial" at all.[114] Given this significant doctrinal ambiguity, it is uncertain which level of scrutiny a court will apply in analyzing SB 253 and SB 261 and whether these CCD laws will be deemed unconstitutional compelled speech.

B. *The Doctrine of Compelled Speech Should Not Invalidate State CCD Laws*

1. SB 253 and SB 261 Should Be Evaluated as Commercial Speech Not Warranting Strict Scrutiny

Classifying SB 253 and SB 261 as noncommercial speech subject to strict scrutiny would defy established Supreme Court precedent, jeopardize widely accepted regulatory safeguards and disclosure norms in securities regulation, and be a regressive step in climate policy.

The Supreme Court has consistently supported the notion that various "communications [are] regulated without offending the First Amendment," including "the exchange of information about securities."[115] The Court has even endorsed the ability of states to have their own state securities laws "to regulate what sellers of securities may write or publish about their wares" without violating the First Amendment.[116]

SB 253 and SB 261 are inherently corporate disclosure mandates within the context of securities markets, as evidenced by the SEC's similar climate-related disclosure rule adlpted on March 6. Because SB 253 and SB 261 mandate disclosure regarding the "exchange of information about securities" and "regulate what sellers of securities may write or publish about their wares," they fall into the category of accepted regulations that do not infringe upon the First Amendment.[117] Deviating from precedent and classifying SB 253 and SB 261 as noncommercial speech would raise

apply, the disclosure passed the *Zauderer* test, but even if the disclosure warranted intermediate scrutiny, the disclosure would still survive the *Central Hudson* test.

104. *See, e.g.*, Alexis Mason, *Compelled Commercial Disclosures:* Zauderer*'s Application to Non-Misleading Commercial Speech*, 72 U. Miami L. Rev. 1193, 1218-20 (2018) (explaining a circuit split regarding whether compelled commercial speech disclosures should receive rational-basis review solely when the government compels "factual and uncontroversial" information to prevent consumer deception or also when the government compels such information for other policy objectives and a circuit split regarding what kinds of disclosures are "purely factual and uncontroversial").
105. *See, e.g.*, *id.* at 1219-20; *NAM*, 800 F.3d 518.
106. *See, e.g.*, Victor Brudney, *The First Amendment and Commercial Speech*, 53 B.C. L. Rev. 1153, 1154-61 (2012); Samuel A. DiLullo, *The Present Status of Commercial Speech: Looking for a Clear Definition*, 90 Dick. L. Rev. 705 (1986).
107. For example, in *Facenda v. N.F.L. Films, Inc.*, 542 F.3d 1007, 1017 (3d Cir. 2008), the U.S. Court of Appeals for the Third Circuit applied a three-factor test based on (1) whether the speech is an advertisement; (2) whether the speech refers to a specific product or service; and (3) whether the speaker has an economic motivation for the speech.
108. Alexander v. Cahill, 598 F.3d 79, 88 (2d Cir. 2010).
109. 573 U.S. 616, 648 (2014) (citing United States v. United Foods, Inc., 533 U.S. 405, 409 (2001) (citing Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976)).
110. Chamber of Com. of United States v. United States Sec. & Exch. Comm'n, 88 F.4th 1115 (5th Cir. 2023).
111. *Id.*
112. *See, e.g.*, Valerie C. Brannon, Congressional Research Service, R45700, Assessing Commercial Disclosure Requirements Under the First Amendment (2019), https://sgp.fas.org/crs/misc/R45700.pdf; Post, *supra* note 82, at 2; *see also* Board of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 477 (1989) (citing Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978)) (stating that Supreme Court "jurisprudence has emphasized that 'commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values,' and is subject to 'modes of regulation that might be impermissible in the realm of noncommercial expression'").
113. *See, e.g.*, Mason, *supra* note 104, at 1218-20.
114. *See, e.g.*, Post, *supra* note 82, at 2.
115. *Ohralik*, 436 U.S. at 456 (explaining that "the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity").
116. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 64 (1973) (stating "that neither the First Amendment nor 'free will' precludes States from having 'blue sky' laws to regulate what sellers of securities may write or publish about their wares. Such laws are to protect the weak, the uninformed, the unsuspecting, and the gullible from the exercise of their own volition.").
117. *Id.*; *Ohralik*, 436 U.S. 447.

doubt about the legitimacy of the entire regulatory structure governing securities, which routinely mandates securities-related speech "to protect investor, maintain efficient markets, and facilitate capital formation.[118]

Notwithstanding Supreme Court precedent indicating that disclosures regarding "the exchange of information about securities" do not run afoul of the First Amendment, the more recent dicta in *Harris* stating that "precedents define commercial speech as 'speech that does no more than propose a commercial transaction'"[119] raises concerns for advocates of CCD laws. *Harris* may lead challengers of SB 253 and SB 261 to argue that CCD requirements are noncommercial speech warranting strict scrutiny, on the grounds that they do "more than propose a commercial transaction" by seeking to influence climate policy.[120] However, a review of the compelled speech cases in the circuits since *Harris* shows this argument is unavailing. Since *Harris*, no court has found any corporate disclosure requirements to be noncommercial speech warranting strict scrutiny, and the only circuit to have opined on this dicta in *Harris* applied the same analysis that it utilized pre-*Harris*.[121]

Following *Harris*, multiple petitioners, including current challengers to SB 253 and SB 261, have unsuccessfully argued that corporate disclosures are not "commercial" speech; however, none have succeeded. In *National Ass'n of Manufacturers v. Securities & Exchange Commission* (*NAM*), the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit declined to address whether the disclosure in question was in fact "commercial" speech and instead "assumed *arguendo* that it was."[122] Similarly, in *Chamber of Commerce of the United States of America v. Securities & Exchange Commission*, the Fifth Circuit declined to address a petitioner's argument that an SEC-imposed disclosure was not "commercial" speech, and instead accepted that the disclosure at issue was commercial speech and found that the rule passed the rational-basis review under *Zauderer*.[123]

The U.S. Courts of Appeals for the Fourth Circuit, the Fifth Circuit, and the Eleventh Circuit are correct to be wary of limiting what constitutes "commercial" speech, because many important and public-interest-advancing regulations, from securities registrations to food labels to prescription drug advertisements, appropriately compel corporate speech to advance a legitimate end.[124] The doctrinal understanding of what constitutes commercial speech should not be narrowed to subject CCD requirements to strict scrutiny review, because like these other appropriate corporate disclosures, SB 253 and SB 261 require the disclosure of corporate information to serve the legitimate and important public interest of the state and its residents.[125] Climate change threatens the health and safety of individuals, communities, species, and ecosystems, and investors deserve transparency in understanding sources of carbon pollution and climate-related risks in understanding soources of carbon pollution and climate-related risks associated with their investment decisions as climate change accelerates.[126]

2. SB 253 and SB 261 Should Be Evaluated Under the *Zauderer* Standard

Emissions disclosures mandated by SB 253 and climate-related risk disclosures mandated by SB 261 are "purely factual" and "uncontroversial." First, emissions disclosures and climate-related risk disclosures are "purely factual," because they are comparable to other widely accepted corporate disclosures under the federal securities laws and constitute disclosure of objective business operations. Climate-related financial-risk disclosures are so analogous to other required securities disclosures that SEC Commissioner Hester Peirce critiqued the SEC's climate rule on the grounds that it is not necessary for the SEC to require specific climate-risk disclosures because the SEC *already has* many "[e]xisting rules requir[ing] companies to disclose material risks regardless of the source or cause of the risk."[127] For instance, Item 105 of Regulation S-K requires companies to disclose information about material risk factors which may include climate-related risks as well.[128] Treating climate-related risk disclosures as not "purely factual" would undermine the multitude of existing risk disclosures on which investors regularly rely.

Similarly, disclosure of emissions data constitutes the purely factual disclosure of business operations much like various other widely accepted factual disclosures under securities laws.[129] Even if a company prefers to keep its emissions data private, the desire for confidentiality does not alter the factual nature of disclosed information. Securities laws regularly require companies to disclose information they might prefer not to share. For example, under Item 103 of Regulation S-K, the SEC requires that companies disclose information about "material litigation

118. 15 U.S.C. §781 (the Securities and Exchange Act of 1934 lays out extensive disclosure requirements for registering securities); *see also Paris Adult Theatre*, 413 U.S. 49.
119. Harris v. Quinn, 573 U.S. 616, 648 (2014).
120. *Id.*
121. *See* Radiance Found., Inc. v. National Ass'n for the Advancement of Colored People, 786 F.3d 316, 331 (4th Cir. 2015) (The U.S. Court of Appeals for the Fourth Circuit applied the same multifactor test used prior to *Harris* to consider whether speech is commercial. Even post-*Harris*, the Fourth Circuit considered "(1) whether the speech is an advertisement; (2) whether speech refers to specific products or services; (3) whether the speaker has an economic motivation for the speech; and (4) [ ] whether the listener would perceive the speech as proposing a transaction.").
122. *NAM*, 800 F.3d 518, 521, 45 ELR 20155 (D.C. Cir. 2015) (discussing assumptions made by the court in its initial decision in *National Ass'n of Mfrs. v. Securities & Exch. Comm'n*, 748 F.3d 359, 372 (D.C. Cir. 2014)).
123. 85 F.4th 760, 769-70 (5th Cir. 2023).
124. *See, e.g.*, Brannon, *supra* note 112, at 1.
125. *See, e.g.*, S.B. 253, 2022-2023 Leg., Reg. Sess. (Cal. 2023) (explaining that "climate change that threatens the health and safety of Californians, undermines the sustainability of [ ] communities").
126. *See, e.g.*, *id.*; S.B. 261, 2022-2023 Leg., Reg. Sess. (Cal. 2023).
127. Statement, Hester M. Peirce, Commissioner, SEC, We Are Not the Securities and Environment Commission—At Least Not Yet (Mar. 21, 2022), https://www.sec.gov/news/statement/peirce-climate-disclosure-20220321.
128. 17 C.F.R. §229.105.
129. *Id.* §229.103.

proceedings."[130] Item 103 does not make any moral statements on the company's ethics or attitudes toward legal compliance; it simply reflects factual business operations. Similarly, requiring disclosure of emissions data does not make any moral statements on a company's environmental protection or attitude toward climate change; it merely discloses a reality of business operations.[131]

Notwithstanding the multitude of accepted corporate disclosure requirements that have never been deemed not to be "purely factual," one D.C. Circuit decision, *NAM*, held that an SEC rule requiring certain companies that manufacture products with so-called conflict minerals (including gold, tantalum, tin, or tungsten) to disclose that their products were not found to be "DRC conflict-free" was not "purely factual" and violated the First Amendment.[132] This rule aimed to address a war and humanitarian crisis in the Democratic Republic of the Congo, which was financed in part from "conflict minerals" trade.[133]

The D.C. Circuit determined that "*Zauderer*'s loose standard of review" could not apply to the conflict mineral disclosure rule, but that "the more demanding standard of *Central Hudson*" applied, and that the conflict mineral disclosure rule did not survive the *Central Hudson* test.[134] Emphasizing the ambiguity in determining the applicable level of scrutiny, the majority argued that even under *Zauderer*, the rule would not have survived because the required disclosures were not "purely factual and non-controversial," because they "convey[ed] moral responsibility for the Congo war" and because the disclosures were not "reasonably related to the State's interest" in reducing the humanitarian crisis in the Democratic Republic of the Congo.[135]

The *NAM* majority highlighted ambiguity in determining whether a disclosure was "purely factual and uncontroversial," and even expressed uncertainty regarding whether climate-related disclosures would be "purely factual and uncontroversial" under existing doctrine.[136] The majority explained

> that line is often blurred, and it is far from clear that all opinions are controversial. Is Einstein's General Theory of Relativity fact or opinion, and should it be regarded as controversial? If the government required labels on all internal combustion engines stating that "USE OF THIS PRODUCT CONTRIBUTES TO GLOBAL WARMING" would that be fact or opinion?[137]

Additionally, one judge on the panel strongly dissented and argued that while the conflict mineral disclosure rule "should be subject to relaxed *Zauderer* review," the rule would satisfy both the *Zauderer* test and intermediate scrutiny under *Central Hudson*.[138] The contrasting majority and dissenting opinions in *NAM* highlight the substantial ambiguity of the compelled speech doctrine, the lack of clarity regarding which standard of scrutiny applies in evaluating corporate disclosures, and uncertainty as to whether CCD laws would survive either test.

In contrast to the conflict mineral disclosure at issue in *NAM*, which required binary labeling of a product as "conflict-free" or "not conflict free," with one label serving as a "metaphor that conveys moral responsibility for the Congo war," the CCDs required by SB 253 and SB 261 are not metaphorical labels that convey a binary of moral responsibility for climate change.[139] Unlike the disclosure at issue in *NAM* and a hypothetical posed by the court of a warning stating that "USE OF THIS PRODUCT CONTRIBUTES TO GLOBAL WARMING," SB 253 does not require companies to state that a company either (a) "contributes to climate change" or (b) "does not contribute to climate change." Similarly, SB 261 similarly does not require companies to state that they either (a) "face climate-related financial risks" or (b) "do not face climate-related financial risks."

Instead, SB 253 requires disclosure of objective measurable data relating to corporate operations, and SB 261 requires disclosure of a spectrum of risks without a metaphorical binary label of culpability. Therefore, the CCDs imposed by SB 253 and SB 261 constitute the required disclosure of factual, objective, and measurable data, as opposed to a metaphorical binary of culpability, and are thus analogous to many existing and accepted disclosure requirements within securities regulation.

Second, emissions disclosures and climate-related financial-risk disclosures as mandated by SB 253 and SB 261 are "uncontroversial," even in light of the Supreme Court's *NIFLA* decision, which found that a disclosure related to the controversial topic of abortion could not receive *Zauderer* review.[140] While opponents of SB 253 and SB 261 may invoke *NIFLA* to argue that CCD laws cannot receive *Zauderer* review because they concern the arguably "controversial topic" of climate change, a closer reading of *NIFLA* indicates that the mere relation to a controversial topic does not render a disclosure controversial and ineligible for *Zauderer* review.

In contrast to SB 253 and SB 261, the disclosure law at issue in *NIFLA* compelled "largely Christian belief-based organizations" to disclose information that was fundamentally at odds with their mission and religious beliefs.[141] The law at issue in *NIFLA* was enacted *specifically* to regulate largely Christian belief-based pro-life organizations that seek to prevent abortions, and required these pro-life, belief-based organizations to distribute a government-

130. *Id.*
131. *See* Rebecca Tushnet et al., *SEC's Climate Rule Is Compatible With the 1st Amendment*, Law360 (July 28, 2022), https://www.law360.com/articles/1514053/sec-s-climate-rule-is-compatible-with-the-1st-amendment.
132. *NAM*, 800 F.3d 518, 530, 45 ELR 20155 (D.C. Cir. 2015).
133. *See generally id.*
134. *See id.* at 522.
135. *See id.* at 530.
136. *See id.* at 528.
137. *See id.*
138. *See generally id.* (Srinivasan, dissenting).
139. *Id.*
140. *NIFLA*, 138 S. Ct. 2361, 2366 (2018).
141. *Id.* at 2368.

drafted notice about state-provided abortions.[142] This disclosure law directly clashed with the religiously motivated objectives of belief-based pro-life organizations.[143] By contrast, SB 253 and SB 261 were not implemented to regulate any particular religion or belief-based organization, and are void of faith-based implications found in *NIFLA*. Unlike the disclosure at issue in *NIFLA*, SB 253 and SB 261 do not impose disclosure obligations that conflict with the core mission or beliefs of any particular faith-based entity.

Additionally, the Court distinguished uncontroversial disclosures in *Zauderer* from controversial disclosures in *NIFLA* based on the fact that the law at issue in *NIFLA* mandated the disclosure of information about *state-provided* abortion services, as opposed to information about *services provided by the regulated entity* itself.[144] Unlike *NIFLA*, SB 253 and SB 261 do not compel companies to disclose information about state-provided services, but like *Zauderer*, they compel companies to disclose information about themselves.

Further, the Court in *NIFLA* emphasized that its decision was not intended to alter the scope of permissible disclosures, and does not "question the legality of health and safety warnings long considered permissible, or purely factual and uncontroversial disclosures about commercial products."[145] Because disclosures about securities have been "long considered permissible" and CCD laws are one form of securities-related disclosure, *NIFLA* should not be read to "question the legality of" CCD laws.[146]

Circuit decisions following *NIFLA* support the notion that the mere relation to a "controversial topic" does not automatically render a disclosure controversial for *Zauderer* purposes.[147] For example, the Fifth Circuit held that laws requiring disclosure about content moderation and social media censorship were uncontroversial for purposes of applying *Zauderer* rational-basis review,[148] and explained that "[i]t's hard to think of a more controversial topic in current public discourse than content moderation and social media censorship."[149] Similarly, the U.S. Court of Appeals for the Ninth Circuit has explained that "[they] do not read [*NIFLA*] as saying broadly that any purely factual statement that can be tied in some way to a controversial issue is, for that reason alone, controversial."[150] Instead, the Ninth Circuit interpreted the compelled speech in *NIFLA* to be controversial because it "took sides in a heated political controversy, forcing the clinic to convey a message fundamentally at odds with its mission."[151]

A close reading of *NIFLA* demonstrates, and subsequent circuit court decisions confirm, that *even if* CCD laws are considered tied to the controversial topic of climate change, being "tied in some way to a controversial issue is [not], for that reason alone, controversial."[152] Therefore, SB 253 and SB 261 are "purely factual" and "uncontroversial," and thus warrant *Zauderer* review.

3. SB 253 and SB 261 Pass the *Zauderer* Test

Emissions disclosures mandated by SB 253 and climate-risk disclosures mandated by SB 261 are "reasonably related to the State's interest in preventing deception of consumers," and are not "unjustified or unduly burdensome."[153] First, SB 253 and SB 261 prevent deception by increasing corporate transparency and reducing information asymmetries between companies, consumers, and investors.[154] Emissions disclosures decrease the inherent information asymmetry between investors and companies regarding the environmental impact of their investment decisions, prevent consumer deception by providing clear insights into a company's environmental performance, and ensure that consumers and investors are well-informed about a company's environmental impact throughout its supply chain.[155]

As SB 253 declares, "[t]he people, communities, and other stakeholders in California, facing the existential threat of climate change, have a right to know about the sources of carbon pollution, as measured by the comprehensive GHG emissions data of those companies benefiting from doing business in the state, to make informed decisions."[156] Additionally, the inclusion of third-party assurance eliminates the possibility that disclosed emission data has been altered or manipulated to greenwash a particular company.[157]

Similarly, climate-related financial-risk disclosures prevent deception by equipping investors with climate-related financial risks that can substantially impact a business's operations, financial condition, and shareholder value.[158] SB 261 also eliminates the potential for varied and thus potentially misleading information by standardizing reporting through defining "climate-related

142. *Id.*
143. *Id.* at 2371.
144. *Id.* at 2366.
145. *Id.* at 2376.
146. *Id.*
147. *See, e.g.*, Chamber of Com. of United States v. Securities & Exch. Comm'n, 85 F.4th 760, 770 (5th Cir. 2023); CTIA-The Wireless Ass'n v. City of Berkeley, 928 F.3d 832, 845 (9th Cir. 2019).
148. *See* NetChoice, LLC v. Paxton, 49 F.4th 439, 485 (5th Cir. 2022), *cert. granted in part sub nom*. Netchoice, LLC v. Paxton, No. 22-555, 2023 WL 6319650 (U.S. Sept. 29, 2023).
149. *Chamber of Com. of United States*, 85 F.4th at 770 (explaining the *Net Choice* decision).
150. *CTIA*, 928 F.3d at 845.
151. *Id.*
152. *Id.*
153. Zauderer v. Office of Disciplinary Couns. of Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985).
154. *See* California Office of Senate Floor Analyses, S.B. 253, 2022-2023 Leg., Reg. Sess. (May 18, 2023); S.B. 253, 2022-2023 Leg., Reg. Sess. (Cal. 2023); S.B. 261, 2022-2023 Leg., Reg. Sess. (Cal. 2023).
155. *See* California Office of Senate Floor Analyses, *supra* note 154; S.B. 253, 2022-2023 Leg., Reg. Sess. (Cal. 2023); S.B. 261, 2022-2023 Leg., Reg. Sess. (Cal. 2023).
156. S.B. 253, 2022-2023 Leg., Reg. Sess. (Cal. 2023).
157. *Id.*; California Office of Senate Floor Analyses, *supra* note 154.
158. *See* California Office of Senate Floor Analyses, *supra* note 154. The senate floor analysis explains, "[A]ccurate risk management is essential. If companies and investors do not have access to sufficient information, they may misprice climate-related assets and create financial instability."

financial risk" and requiring adherence with TCFD.[159] Additionally, by requiring a climate reporting organization to create a public report, including a review of disclosed climate-related financial risks across industries, SB 261 further safeguards against deception by giving consumers a platform to make inter-firm comparisons, thus fostering transparency of climate risks and informed decisionmaking in the marketplace.[160]

Second, the CCD requirements imposed by SB 253 and SB 261 are not "unjustified or unduly burdensome," because they directly address real and present harm associated with climate change and a lack of corporate transparency and "extend 'no broader than reasonably necessary.'"[161] In mandating emissions disclosures, SB 253 directly contributes to remedying the real harms resulting from climate change.[162] As SB 253 acknowledges, California is already grappling with devastating wildfires, sea-level rise, droughts, and other climate-related impacts that threaten the health, safety, and economic well-being of its residents.[163] These impacts are not hypothetical but represent the current and escalating challenges faced by the state, its residents, communities, and other stakeholders.[164]

SB 253 responds to the immediate need for comprehensive and transparent GHG emissions reporting to inform stakeholders and facilitate effective risk management by requiring that this information be calculated, verified, and disclosed.[165] SB 253's mandated disclosure of scope 1, 2, and 3 emissions "extend[s] 'no broader than reasonably necessary'" because this reporting of emissions data conforms with the Greenhouse Gas Protocol standards.[166] Additionally, SB 253 is structured to prevent companies from duplicating emissions reporting because the law allows reporting entities to submit similar reports prepared "to meet other national and international reporting requirements."[167]

SB 261 also "remed[ies] a harm that is 'potentially real not purely hypothetical.'"[168] As SB 261 explains, "the long-term strength of global and local economies will depend on their ability to withstand climate-related risks" and the "[f]ailure of economic actors to adequately plan for and adapt to climate-related risks to their businesses and to the economy *will result* in significant harm to California, residents, and investors."[169]

SB 261's framework of requiring disclosure in accordance with TCFD "extend[s] no broader than reasonably necessary" because TCFD is the international benchmark for climate-risk disclosure as evidenced by other countries' use of this standard, the SEC March 6 climate rule relying on this framework, and large business entities', such as the National Association of Insurance Commissioners, use of this standard.[170] Additionally, SB 261 is structured to prevent companies from duplicating climate-risk reporting as the law only requires disclosures at the parent rather than subsidiary level and allows reporting entities to submit comparable reports prepared "[p]ursuant to a law, regulation, or listing requirement issued by any regulated exchange, national government, or other governmental entity."[171]

In conclusion, SB 253 and SB 261 should survive the *Zauderer* test because they prevent consumer and investor deception by increasing corporate transparency, they remedy real harm associated with cororate transparency and climate change, and they extend no broader than reasonably necessary by conforming with internationally accepted standards.

C. *Even if State CCD Laws Are Invalidated, They May Still Increase Disclosure*

This section looks to another California law, SB 826, as a case study and argues that *even if* SB 253 and SB 261 are ultimately struck down, they are likely to catalyze a lasting increase in CCDs regardless of their constitutionality.

1. Value in the Face of Unconstitutionality: SB 826 as a Case Study

Six years ago, the California State Legislature sought to utilize the state's corporate law for a wholly different pioneering purpose: to get more women on corporate boards.[172] In 2018, California passed SB 826, the first law requiring gender diversity on corporate boards in the United States.[173] While a handful of European countries have enacted similar corporate board gender diversity requirements, the United States lacks a similar mandate.[174] The only related federal law regarding corporate board representation is the Proxy Disclosure Enhancement Regulation, enacted by the SEC in 2010 to require corporations to disclose whether their board selection committees consider a candidate's

159. *See id.*; S.B. 261, 2022-2023 Leg., Reg. Sess. (Cal. 2023).
160. S.B. 261, 2022-2023 Leg., Reg. Sess. (Cal. 2023).
161. *NIFLA*, 138 S. Ct. 2361, 2377 (2018).
162. *See* Section II.C (discussing the impact of emissions disclosures on developing climate policy and reducing emissions).
163. S.B. 253, 2022-2023 Leg., Reg. Sess. (Cal. 2023).
164. *See id.*
165. *See id.*
166. *NIFLA*, 138 S. Ct. at 2377. The Greenhouse Gas Protocol was developed and updated by the World Resources Institute and the World Business Council for Sustainable Development, and provides a globally recognized framework for corporate GHG emissions accounting and reporting. *See* S.B. 253, 2022-2023 Leg., Reg. Sess. (Cal. 2023).
167. S.B. 253, 2022-2023 Leg., Reg. Sess. (Cal. 2023).
168. *NIFLA*, 138 S. Ct. at 2377.
169. S.B. 261, 2022-2023 Leg., Reg. Sess. (Cal. 2023) (emphasis added); *see also* Exec. Order No. 14030, *supra* note 74 (emphasizing the harms associated with failing to understand and address climate-related financial risks).
170. S.B. 261, 2022-2023 Leg., Reg. Sess. (Cal. 2023); The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334, 21343 (proposed Mar. 21, 2022).
171. S.B. 261, 2022-2023 Leg., Reg. Sess. (Cal. 2023).
172. *See* S.B. 826, 2017-2018 Leg., Reg. Sess. (Cal. 2018).
173. *See id.*
174. *See, e.g.*, *id.* SB 826 includes statistics about European mandates in the text of the bill and explains that, in 2003, Norway was the first country to legislate a mandatory 40% quota for female representation on corporate boards. Subsequently, France, Germany, Spain, Iceland, and the Netherlands have implemented corporate gender mandates.

contribution to the board's diversity.[175] However, this loose rule requiring disclosure of a board's consideration of diversity did little or nothing to impact the number of women on corporate boards.[176]

Grappling with a lack of federal regulation and seeking to ameliorate this lack of gender diversity in the boardroom, in 2018, California passed SB 826, which required that each publicly held corporation with executive offices in California have at least a certain number of women on its board of directors, depending upon the size of the board.[177] In addition to imposing these mandates, SB 826 had teeth to enforce them.[178] If a corporation did not comply with the gender mandate, the corporation would be subject to an annual fine of $100,000 for a first violation and $300,000 for a subsequent violation.[179]

With a clear directive and a financial penalty for noncompliance, SB 826 worked. Within a few years after enacting SB 826, the number of women on California boards more than doubled.[180] In 2018, the year SB 826 was passed, just 14.6% of California board directors were women.[181] By the end of 2021, 32.1% were women.[182] Within a few years, SB 826 propelled California from one of the states with the lowest gender diversity on corporate boards to the state with the highest percentage of women on boards in the country.[183]

While compliance with SB 826 was only required for companies with executive offices in California, SB 826, coupled with the #MeToo movement[184] and a broader societal push to elevate women into leadership roles, precipitated an increase in gender diversity on corporate boards at the national level.[185] From 2018 to 2021, the percentage of women on the boards of directors at the 3,000 largest public companies in the United States increased from 17.7% to 25.6%.[186]

Following the enactment of SB 826, the Nasdaq implemented its own board diversity rule, in which Nasdaq-listed companies would have to either have a particular number of diverse members on their boards or explain why the company's board does not encompass diverse individuals including women.[187] Further, SB 826 catalyzed several other states to propose their own bills to increase board diversity for corporations in their states.[188]

While companies were complying with SB 826 and dramatically increasing the number of women on corporate boards, SB 826 was actively being challenged in the courts. In May 2022, in *Crest v. Padilla*, the law was struck down as a violation of the California Constitution under the state's Equal Protection Clause.[189]

While *Crest* was a blow to gender diversity advocates, the challenges against and ultimate striking down of SB 826 were hardly a surprise.[190] Many legal commentators anticipated that SB 826 would be challenged and might be struck down.[191] Even former Gov. Jerry Brown who signed the bill into law suggested that SB 826 might not survive legal challenges.[192] Despite foreseeable challenges and the recognized possibility that the law would be struck down, advocates advanced the bill and enacted it anyway.[193] SB 826 shows that it can be worthwhile to advance a law even if its advocates recognize that it might not survive legal challenges.

SB 826 effectively enforced board gender diversity requirements during the interval between its enactment and ultimate repeal three years later. Although SB 826 encountered legal challenges, the inherent procedural nature of litigation necessitated a significant time lag between the passing of the law and companies' subsequent need to seek to comply with the law and the law's overturning. During this interim period between the law's enactment and its eventual removal, corporations adapted their governance structures to ensure compliance with its gender diversity provisions.

In the span of just three years, California, once lagging behind in gender board representation, transformed into the national leader.[194] Despite being held unlawful, SB 826 was nonetheless a tremendous advance for women in leadership and demonstrated that companies can diversify their boards when they

175. *See* Nikki Williams, *Making Mandates Last: Increasing Female Representation on Corporate Boards in the U.S.*, 29 Mich. J. Gender & L. 211, 217 (2022); 17 C.F.R. §§229, 239, 240, 249, 274 (2010).
176. *See* Williams, *supra* note 175, at 217.
177. *See* S.B. 826, 2017-2018 Leg., Reg. Sess. (Cal. 2018).
178. *See id.*
179. *See id.*
180. *See, e.g.*, Williams, *supra* note 175, at 241; Bryce Covert, *The Secret to Getting More Women on Corporate Boards: The $100,000 Threat*, Politico (Feb. 25, 2022), https://www.politico.com/news/magazine/2022/02/25/california-companies-women-boards-quotas-00010745.
181. *See, e.g.*, Covert, *supra* note 180.
182. *See, e.g.*, Williams, *supra* note 175, at 241; Covert, *supra* note 180.
183. *See, e.g.*, Williams, *supra* note 175, at 217; Covert, *supra* note 180.
184. *See, e.g.*, Jeff Green & Malathi Nayak, *How Boardroom Diversity Has Evolved in the #MeToo Era*, Bloomberg (Oct. 18, 2021), https://www.bloomberg.com/news/articles/2021-10-19/how-boardroom-diversity-has-evolved-in-the-metoo-era-quicktake.
185. *See, e.g.*, Williams, *supra* note 175, at 217; Covert, *supra* note 180.
186. *See, e.g.*, Williams, *supra* note 175, at 217; Covert, *supra* note 180.
187. *See* Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Order Approving Proposed Rule Changes, as Modified by Amendments No. 1, to Adopt Listing Rules Related to Board Diversity and to Offer Certain Listed Companies Access to a Complimentary Board Recruiting Service, Exchange Act Release No. 34-92590 (Aug. 6, 2021), https://www.sec.gov/files/rules/sro/nasdaq/2021/34-92590.pdf; *see also, e.g.*, *SEC Approves Nasdaq Board Diversity Listing Standards*, Skadden (Sept. 2021), https://www.skadden.com/insights/publications/2021/09/quarterly-insights/sec-approves-nasdaq-board-diversity-listing.
188. *See, e.g.*, Rich Ehisen, *Will More States Set Board Diversity Mandates?*, LexisNexis (Jan. 13, 2022), https://www.lexisnexis.com/community/insights/legal/capitol-journal/b/state-net/posts/will-more-states-set-board-diversity-mandates; Tania Faransso et al., *California Court Strikes Down Law on Board Diversity*, WilmerHale (May 24, 2022), https://www.wilmerhale.com/en/insights/blogs/esg-epicenter/20220524-california-court-strikes-down-law-on-board-diversity.
189. No. 19STCV27561, 2022 WL 1565613, at *12 (Cal. Super. Ct. May 13, 2022).
190. *See, e.g.*, Nathan Solis, *California Law Requiring Women on Corporate Boards Is Ruled Unconstitutional*, L.A. Times (May 16, 2022), https://www.latimes.com/california/story/2022-05-16/california-law-women-on-corporate-boards-ruled-unconstitutional; Martha Groves, *Can California's New Boardroom Diversity Law Withstand Courtroom Backlash? Women Say "Bring It On,"* Cal Matters (June 23, 2020), https://calmatters.org/economy/2018/11/california-women-boardroom-law-faces-legal-challenges/.
191. *See, e.g.*, Solis, *supra* note 190; Groves, *supra* note 190.
192. *See, e.g.*, Solis, *supra* note 190; Groves, *supra* note 190.
193. *See, e.g.*, Solis, *supra* note 190; Groves, *supra* note 190.
194. *See, e.g.*, Williams, *supra* note 175, at 217; Covert, *supra* note 180.

make it a priority, and prompted other entities in the private sector, such as Nasdaq, to implement other diversity requirements.[195] Despite being held unconstitutional, SB 826 paved the way for countless women to become directors of public companies.[196]

Following SB 826's invalidation in *Crest*, corporate practices did not revert to their pre-SB 826 state.[197] As of March 30, 2023, more than one year after SB 826's overturning, California continues to maintain its leadership position, with women occupying 34% of public company board seats, and the state has seen no decline in gender representation since SB 826 was struck down.[198] This sustained gender representation underscores the lasting influence of SB 826 on corporate governance and shows that while mandates can serve to expedite the pace of progress, the true power of a mandate lies not only in its continued enforcement but, perhaps more importantly, in its initial enactment. SB 826's impact on gender diversity has endured, demonstrating that state legislative initiatives can leave a profound and lasting mark on corporate practices, even when the legal requirement itself is no longer in force.

2. Lessons From SB 826 Applied to California's Climate Accountability Package

SB 826 shows that even if SB 253 and SB 261 are struck down, they may still succeed in increasing corporate climate-related disclosures. First, having these disclosure laws in effect for a few years between their enactment and subsequent legal challenges and potential overruling is a triumph in its own right. A span of mandated disclosure, even if relatively brief, is unquestionably preferable to a complete absence of such mandates.

Just as SB 826 was valid state law for three years before being struck down, SB 253 and SB 261 may similarly have a multi-year period of being law before a challenge makes its way through the courts. In fact, since its enactment, many law firms acknowledged that California's Climate Accountability Package will likely face legal challenges, but nonetheless encouraged entities to develop an action plan to comply with California's requirements.[199] While it is possible that a court could grant preliminary relief staying the law while litigation proceeds as occurred in the context of the SEC's climate rule, to date no such stay has been granted and, as current law, SB 253 and SB 261 will still prompt the development of climate reporting disclosure mechanisms in the intervening time before challenges to the laws proceed through the courts.

Second, enacting state CCD laws such as SB 253 and SB 261 has the potential to precipitate a transformative and lasting shift in corporate disclosure practices. Even a brief period of their being law, and corporate anticipation of enforcement, may prompt companies to develop and galvanize corporate will to disclose emissions and climate-related risks. Just as SB 826 had a lasting impact on board gender diversity, fundamentally reshaping the gender composition of corporate boards even after the legal mandate ceased to be in force, SB 253 and SB 261 have the potential to usher in enduring climate disclosure corporate practices, irrespective of the fate of the laws themselves.

III. Conclusion

Climate change is a global emergency that requires mitigation and adaptation advocacy across disciplines and at all levels of government. Climate change is also a pressing business consideration, and investors increasingly demand transparent climate-related information to make informed investment decisions. One policy tool at the intersection of corporate law and climate change of growing interest is CCD mandates. CCDs can both increase corporate transparency and aid in climate mitigation and adaptation efforts by incentivizing companies to voluntarily decrease their emissions and generating crucial data for developing effective climate change adaptation and mitigation policies.

In the absence of a sufficient federal CCD regime, California, as an economic superpower with a strong environmental political will, is filling the void through its recent passage of SB 253 and SB 261, the first state-implemented CCD laws and the most far-reaching CCD laws in the United States. SB 253 and SB 261 face numerous legal challenges, including on the grounds that they violate the First Amendment as compelled speech. While there are strong legal arguments that SB 253 and SB 261 do not violate the First Amendment, and compelling policy justifications for declining to extend the compelled speech doctrine to these corporate disclosures, given significant ambiguity in the doctrine of compelled speech, it is at least possible that a court may strike down SB 253 and SB 261 on First Amendment grounds.

However, even if SB 253 and SB 261 are struck down, they nonetheless may succeed in increasing the CCDs by catalyzing corporate capacity to disclose emissions data and climate-related financial risks. Therefore, regardless of the ongoing First Amendment challenge and the possibility of being struck down, state-imposed CCD laws like SB 253 and SB 261 are a useful tool in the state legislature's toolkit to advance policies at the intersection of corporate transparency and climate change.

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195. *See, e.g.*, Williams, *supra* note 175, at 217.
196. *See, e.g.*, California Partners Project, The Big Picture: The Impact of California's Groundbreaking Law to Advance Gender Diversity in Corporate Boardrooms (2022), https://www.calpartnersproject.org/_files/ugd/2ceb15_44cae1773f31432bb4bce54db0306c78.pdf.
197. *See, e.g.*, 50/50 Women on Boards, Gender Diversity Index Third Quarter 2023 Key Findings (2023), https://5050wob.com/wp-content/uploads/2023/12/5050WOB-Q3_23_Infographic_FINAL.pdf.
198. *See, e.g.*, *id.*
199. *See, e.g.*, *Preparing for Compliance With California's New Landmark Climate Disclosure Laws*, Covington (Oct. 9, 2023), https://www.cov.com/en/news-and-insights/insights/2023/10/preparing-for-compliance-with-californias-new-landmark-climate-disclosure-laws; *California Poised to Adopt Sweeping Climate Disclosure Rules*, Skadden (Sept. 26, 2023), https://www.skadden.com/insights/publications/2023/09/california-poised-to-adopt-sweeping-climate-disclosure-rules; Gamble et al., *supra* note 55.