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Ninth Circuit Says Scope 3 GHG Reporting in California is 'Likely Unconstitutional'

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The U.S. Court of Appeals for the Ninth Circuit held on November 9 that some of California's corporate climate disclosure requirements may remain in effect while others are likely unconstitutional under the First Amendment. The challenge in *U.S.A. Chamber of Commerce, et al. v. Sanchez, et al.* concerns two California laws: the Climate Corporate Data Accountability Act (SB 253) and the Climate-Related Financial Risk Act (SB 261). Several chambers of commerce and business associations (collectively, the "Chambers") challenged the laws, claiming, among other things, that their disclosure requirements violate the First Amendment because they compel speech.

The U.S. District Court for the Central District of California had previously denied the Chambers' request for a preliminary injunction. In its November 9 opinion, a divided Ninth Circuit panel affirmed that decision with respect to SB 253's Scope 1 and Scope 2 greenhouse gas (GHG) emissions disclosure requirements but reversed with respect to SB 253's Scope 3 disclosure requirement and SB 261. The Ninth Circuit remanded the case to the district court for further proceedings, including consideration of whether SB 253's Scope 3 disclosure provisions are severable from the rest of the statute.

The decision was issued one day before the November 10 deadline for covered entities to submit their first Scope 1 and Scope 2 emissions reports. Because the Ninth Circuit declined to preliminarily enjoin those requirements, the November 10 deadline remains in effect. The court's decision thus leaves the Scope 1 and Scope 2 disclosure requirements in place while directing that preliminary injunctive relief be granted with respect to Scope 3 disclosures and SB 261, subject to the district court's consideration of severability on remand.

SB 253: The Climate Corporate Data Accountability Act

SB 253 applies to certain entities doing business in California with more than $1 billion in annual revenue and requires covered entities to disclose their Scope 1, Scope 2, and Scope 3 GHG emissions. Scope 1 emissions are GHG emissions from sources the reporting company owns or directly controls. Scope 2 emissions are indirect GHG emissions associated with the generation of energy that is purchased or acquired by the company. Scope 3 emissions are other indirect upstream and downstream GHG emissions from sources that are not owned or directly controlled by the reporting company but that are part of the company's value chain. These include emissions associated with goods and services purchased by the company and emissions associated with consumption of goods or services sold by the company to others.

To assess the Chambers' likelihood of success on their First Amendment challenge, the Ninth Circuit separately analyzed the different disclosure categories and whether each constitutes commercial or noncommercial speech. That determination then dictated the degree of judicial scrutiny applicable to each

category. In general, restrictions on commercial speech are subject to "intermediate" First Amendment scrutiny. By contrast, restrictions on a person's non-commercial speech are subject "strict" scrutiny.

Scope 1 and Scope 2 Emissions

The Ninth Circuit affirmed the district court's conclusion that the Scope 1 and Scope 2 disclosure requirements may remain in effect during litigation. The court concluded that the Scope 1 and Scope 2 disclosure requirements regulate commercial speech because they compel disclosure of factual information on emissions generated through the reporting entities' own operations and bear on capital transactions.

Applying "intermediate" First Amendment scrutiny, the court concluded that, for purposes of a preliminary injunction, California had demonstrated substantial interests in mitigating information asymmetries for investors and reducing emissions. The court also concluded that the State had adequately shown that the Scope 1 and Scope 2 disclosure requirements directly advance those interests and are no more extensive than necessary. Accordingly, the court affirmed the district court's denial of a preliminary injunction with respect to the Scope 1 and Scope 2 disclosure requirements.

Notably, Judge Bennett partially dissented from the majority's decision and would have preliminarily enjoined the Scope 1 and Scope 2 disclosure requirements. Judge Bennett concluded that both SB 253 and SB 261 compel non-commercial speech and therefore should be subject to "strict" First Amendment scrutiny.

Scope 3 Emissions

The majority reached a different conclusion regarding the Scope 3 disclosure requirement. Unlike the Scope 1 and Scope 2 emissions reporting, the court determined that Scope 3 emissions reporting does not constitute commercial speech. The court reasoned that the required disclosures concern diffused third-party conduct in the value chain and are insufficiently tethered to a reporting entity's own operations and capital transactions. Having determined that Scope 3 reporting covered non-commercial speech, the court applied "strict" First Amendment scrutiny to the Scope 3 requirements.

Applying the more demanding standard, the Ninth Circuit concluded that California had not demonstrated that the Scope 3 disclosure requirement was narrowly tailored to the State's asserted interests. The court therefore concluded that the Chambers are likely to succeed on the merits of their First Amendment challenge to the Scope 3 disclosure requirement and reversed the district court's denial of preliminary injunctive relief with respect to that requirement.

Because the majority reached different conclusions regarding the First Amendment challenges to the Scope 1 and Scope 2 disclosures, on the one hand, and Scope 3 disclosures, on the other, it directed the district court to determine whether SB 253's Scope 3 disclosure requirement can be severed from the rest of the law. That determination will affect the scope of the preliminary injunction entered by the district court on remand.

SB 261 – The Climate Related Financial Risk Act

In November 2025, the Ninth Circuit preliminarily enjoined enforcement of SB 261 pending the appeal. The court's November 9 decision maintains that result by concluding that the Chambers are likely to succeed on their First Amendment challenge to SB 261.

SB 261 applies to certain companies doing business in California with gross annual revenues exceeding $500 million and requires them to publish biennial reports concerning their climate-related financial risks. The reports must provide information concerning the material risks to short- and long-term financial outcomes resulting from both climate change itself (physical risks) and policies to address climate change (transition risks). SB 261 also requires reporting entities to report on measures they are adopting to reduce or adapt to those risks.

The Ninth Circuit concluded that, unlike SB 253's Scope 1 and Scope 2 disclosure requirements, SB 261 goes beyond compelling the disclosure of factual information. The court determined that SB 261 regulates noncommercial speech because it requires companies to make assessments regarding climate-related financial risks, which involve "predictive and normative judgments about future economic conditions and a politically fraught subject."

Because the court determined that SB 261 compels noncommercial speech, it applied strict scrutiny and concluded that SB 261 fails that standard. Even assuming that overcoming information asymmetries and reducing emissions constitute compelling state interests, the court concluded that SB 261 was insufficiently tailored because California could have employed less restrictive means to accomplish those objectives. Accordingly, the court held that the Chambers are likely to succeed on their First Amendment challenge to SB 261.

Implications

As the case returns to the district court, companies subject to SB 253 and SB 261 should continue to monitor the litigation. Importantly, the Ninth Circuit's decision applies to the preliminary injunction stage and does not constitute a final judgment on the constitutionality of either statute.

The most immediate question on remand will be whether SB 253's Scope 3 disclosure requirement can be severed from the rest of the law. If the district court determines that the requirement is severable, preliminary injunctive relief may be limited to Scope 3 disclosures while the Scope 1 and Scope 2 disclosure requirements remain in effect. If the court concludes otherwise, the resulting preliminary injunction could have broader implications for SB 253.

For now, SB 253's Scope 1 and Scope 2 disclosure requirements remain in effect, including the November 10 reporting deadline. Companies should continue to monitor the litigation as future decisions will affect the scope of preliminary injunctive relief and the ultimate enforceability of these laws.

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For More Information

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