



8 April 2016

The Honorable Ben Allen  
California State Senate  
State Capitol, Room 2054  
Sacramento, CA 95814

RE: Support for SB 1161 (Allen)

Dear Senator Allen,

The Center for International Environmental Law (CIEL) is a non-profit advocacy organization that uses the power of law to protect the environment, promote human rights, and ensure a just and sustainable society. On behalf of CIEL's supporters in California and around the world, we write to respectfully support your important legislation, SB 1161 (California Climate Science Truth and Accountability Act), as amended in Committee on March 29<sup>th</sup>.

As citizens throughout California, across the country and around the world suffer the growing impacts of climate change, a mounting body of evidence indicates that they may have suffered a related body of harms through coordinated campaigns to mislead regulators and the public with regards to climate science. Recent revelations brought to light by InsideClimate News, the Los Angeles Times, the Union of Concerned Scientists, and others offer compelling evidence that major fossil fuel companies understood climate science and climate risks decades earlier than is commonly believed, and that the companies used this knowledge to protect their own investments and interests, even as they undertook massive, coordinated campaigns to obfuscate and undermine climate science to consumers.

As the findings that accompany the bill make clear, major fossil fuel producers knew or should have known the risks of continued burning of their products by no later than 1988. Despite this knowledge, fossil fuel companies continued to mislead consumers with respect to climate science for many years thereafter. The scale and duration of these alleged practices, coupled with the severe impacts of climate change, demand that relevant authorities at every level of government investigate and, where misconduct is found, bring actions to hold the actors involved publicly accountable.

At the same time, allegations of misconduct extending decades into the past raise the specter that potential defendants might exploit the four-year statute of limitations generally applicable to Unfair Competition Law (UCL) claims in an effort to ensure government cases never reach the merits. To address that risk, and to bring greater certainty to potential actions by government, SB 1161 proposes specifically tailored amendments to California's Business & Professions Code to extend the statute of limitations to 30 years



for UCL claims arising from such acts, to ensure that alleged perpetrators cannot evade responsibility for their actions through the simple passage of time.

It is important to note that SB 1161 extends the statute of limitations only in actions initiated by the California Attorney General, district attorneys, or the city attorneys of cities with more than 750,000 residents. Moreover, the statute of limitation is extended only in cases brought under the UCL and specifically alleging unfair competition with respect to scientific evidence regarding the existence, extent, or current or future impacts of anthropogenic induced climate change.

Not surprisingly, industry advocates have raised a variety of arguments against the bill. As discussed in greater detail in the annex to this letter, none of those arguments withstand close scrutiny.

The amendments proposed by SB 1161 are purely procedural in nature. SB 1161 would remove a potential barrier to litigation, but would have no effect on the underlying claims themselves. As addressed in detail in the annex to this letter, this legislation does not impose liability on any company or effect any other change to applicable substantive law. Rather, it ensures that both defendants and public plaintiffs have the opportunity for a fair trial on the merits.

Putative defendants will all have their day in court, and a jury may find that they did not break the law. But if some of the world's largest companies—companies that have a significant presence in California and have made enormous profits from their California-based operations—have acted unlawfully, unfairly, or fraudulently, then they must be held accountable.

The state has a compelling interest in ensuring the question of accountability is addressed on its merits. SB 1611 advances that interest and provides California government officials with the tools necessary to ensure that justice prevails.

Accordingly, we respectfully give our support for SB 1161.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Carroll Meffett', is written over a faint, light blue circular watermark or background graphic.

Carroll Meffett  
President and CEO  
Center for International Environmental Law



Cc: Senator Bob Wieckowski  
Senator Hannah-Beth Jackson  
Members, Senate Environmental Quality Committee  
Members, Senate Judiciary Committee

## **Analysis of the California Climate Science Truth and Accountability Act**

The recent revelations brought to light by InsideClimate News,<sup>1</sup> the Los Angeles Times,<sup>2</sup> and the Union of Concerned Scientists<sup>3</sup> provide substantial and growing evidence of concerted and coordinated efforts by fossil fuel companies and industry-funded associations to mislead consumers regarding the existence, extent, and impacts of anthropogenic climate change. If proven true then this course of conduct would represent—in scale and duration—a deception rivaling the tobacco industry’s public disavowal of the link between smoking and cancer, however, dwarfing tobacco in its human, environmental and economic impacts.

The scale of these alleged allegations, coupled with the severe impacts of climate change, compel this legislation to ensure that there can be a fair trial on the merits to decide whether misinformation campaigns related to climate science were in violation of California’s Unfair Competition Law (UCL). This legislation does not impose liability on any company; putative defendants will all have their day in court, and a jury may find that they did not break the law. But if some of the world’s largest companies—companies that have profited enormously from fossil fuel products—have acted unlawfully, unfairly, or fraudulently, they must be held accountable.

SB 1161 safeguards accountability and does not infringe upon First Amendment rights. Arguments to the contrary are a distraction because SB 1161 is specifically tailored to a compelling government interest and does not change the substantive law of the UCL.<sup>4</sup> Indeed if there are First Amendment abridgment claims, those claims would apply to all causes of action under the UCL not simply the scope of claims offered by SB 1161.<sup>5</sup> This cannot be the case – the First Amendment does not give companies the right to commit fraud nor can companies mislead the public in the commercial context.<sup>6</sup>

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<sup>1</sup> See Neela Banerjee, Lisa Song & David Hasemyer, *Exxon: The Road Not Taken*, INSIDE CLIMATE NEWS, Sept. 16, 2015, <http://insideclimatenews.org/content/Exxon-The-Road-Not-Taken>.

<sup>2</sup> See Sara Jerving et al., *What Exxon Knew About the Earth’s Melting Arctic*, L.A. TIMES, Oct. 9, 2015; Katie Jennings et al., *How Exxon Went From Leader to Skeptic on Climate Change Research*, L.A. TIMES, Oct. 23, 2015, <http://graphics.latimes.com/exxon-research/>; Amy Lieberman & Susan Rust, *Big Oil Braced for Global Warming While it Fought Regulations*, L.A. TIMES, Dec. 31, 2015, <http://graphics.latimes.com/oil-operations/>.

<sup>3</sup> See *The Climate Deception Dossiers*, UNION OF CONCERNED SCIENTISTS, (last updated July 9, 2015), <http://www.ucsusa.org/global-warming/fight-misinformation/climate-deception-dossiers-fossil-fuel-industry-memos>.

<sup>4</sup> S.B. 1161, 2016 Leg., Reg. Sess. (Cal. 2016) § 3.

<sup>5</sup> With or without the adoption of SB 1161, the types of cases addressed by SB 1161 may nonetheless proceed. SB 1161 does not create new liability for speech. See *infra* at 4-5.

<sup>6</sup> See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 (1976) (“Untruthful speech, commercial or otherwise, has never been protected for its own sake. . . . Obviously,

**SB 1161 is specifically tailored to address the legitimate public policy interest in holding private companies accountable for unfair competition related to climate science.**

*SB 1161 does not affect the limitation periods for any other act and applies only to a narrow subset of UCL claims.*

By its terms, SB 1161 applies only to claims initiated pursuant to California’s Unfair Competition Law and only to a narrowly defined category of alleged misconduct under that Act. Specifically, the statute of limitations is extended only to alleged acts of unfair competition “with respect to scientific evidence regarding the existence, extent, or current or future impacts of anthropogenic induced climate change.”<sup>7</sup> For any action under the UCL other than actions related to such scientific evidence, the standard four-year statute of limitations remains unchanged.

Moreover, this bill does not apply wholesale to companies, but merely to specific acts.<sup>8</sup> Therefore, a company which may have engaged in an unlawful misrepresentation of any kind other than misrepresentation about the state of climate science will not be subject to actions under the UCL for those acts if the four-year statute of limitations has run.<sup>9</sup> This applies even to companies charged with the kinds of misrepresentation addressed in this bill—it is only the climate-science related claims that are subject to this unique extended statute of limitations.

*The statute of limitations is extended only with respect to actions initiated by government actors.*

Opponents of SB 1161 may claim that the bill invites frivolous, profit-driven litigation. In truth, SB 1161 creates a limited extension available only to state officials.

Under the UCL, a claim may generally be prosecuted “by the Attorney General or any district attorney or by any county counsel ... [or] by a city prosecutor ... [or] by a city attorney ... or upon the complaint of any board, officer, person, corporation or association or by any person acting for the interests of itself, its members or the general public.”<sup>10</sup> By

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much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State’s dealing effectively with this problem. The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.”)

<sup>7</sup> S.B. 1161 § 3.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Cal. Bus. & Prof. Code § 17200.

contrast, SB 1161 extends the statute of limitation only in actions initiated by the California Attorney General, a district attorney, or certain city attorneys.<sup>11</sup> Private lawsuits, which could be greater in number and raise distinct legal issues, are not covered by the provisions in this bill.<sup>12</sup> While private citizens still have the right to bring claims under the UCL, they would remain bound by the four-year statute of limitations unless grounds existed for tolling the statute with respect to the claim.<sup>13</sup>

This distinction guarantees that any litigation resulting from the bill's passage will be constrained to government actors and pursued in the public interest.

### **SB 1161 protects consumers and does not infringe upon First Amendment rights.**

As discussed above, SB 1161 does not enlarge the substantive causes of action provided for by the UCL—it strengthens the ability of certain government officials to protect consumers. It provides the pathway for fair trials on the merits where judges and juries can decide these issues of law and fact. For these reasons, claims that SB 1161 would somehow abridge First Amendment speech are misguided.

*This bill allows for a fair trial on the merits.*

This bill furthers California's ability to protect its consumers because it allows a fair trial on the merits. SB 1161 ensures that the procedural issue of the statute of limitations does not displace the substantive right for Californian citizens to be protected from acts of unfair competition.

The UCL defines unfair competition to include “unlawful, unfair or fraudulent actions or practices, and unfair, deceptive, untrue or misleading advertising.”<sup>14</sup> Ensuring access to a fair trial on the merits of whether a company has acted unlawfully, unfairly or fraudulently, or engaged in unfair, deceptive or misleading advertising, is particularly important in the context of climate change. The damage caused by climate change, regardless of how much we accelerate our shift away from fossil energy, has been and will continue to be severe in both its human and financial impact. This begs analysis under the UCL, which evaluates whether a defendant's conduct is unethical in the commercial context and then weighs the conduct against the gravity of a victim's harm.<sup>15</sup>

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<sup>11</sup> S.B. 1161 § 3.

<sup>12</sup> *See id.*

<sup>13</sup> *See id.*

<sup>14</sup> Cal. Bus. & Prof. Code § 17200.

<sup>15</sup> A business practice is “unfair” when it “violates established public policy or if it is immoral, *unethical*, oppressive or unscrupulous *and causes injury to consumers which outweighs its benefits*. The determination whether a business practice is unfair involves an examination of that practice's impact on its alleged victim,

The people of California confront a grave and growing array of climate impacts.<sup>16</sup> Heat waves cause surges in heat-related illnesses and mortality;<sup>17</sup> sea level rise threatens coastal cities;<sup>18</sup> droughts and changing precipitation patterns affect access to basic needs like food and water;<sup>19</sup> wildfires threaten life and property across large parts of the state.<sup>20</sup> In light of these impacts, and the growing evidence of a massive consumer deception that might have compounded them dramatically, the public deserves to have its day in court.<sup>21</sup>

*Claims of First Amendment speech abridgement are a distraction.*

Arguments of First Amendment speech abridgement are a distraction because SB 1161 does not change the substantive causes of action provided for by the UCL. SB 1161 simply extends the statute of limitations to allow certain government officials to litigate unfair competition actions “with respect to scientific evidence regarding the existence, extent, or current or future impacts of anthropogenic climate change.”<sup>22</sup> Neither the UCL nor SB 1161 prohibit honest speech and discourse concerning climate science.<sup>23</sup> Nor does SB 1161 purport to punish any entity simply for holding and expressing different views with respect to climate change.<sup>24</sup> Instead SB 1161 furthers the aims of the UCL, which since 1933 has protected the general public in California from unlawful, unfair and fraudulent practices, including potential cases in which companies have misled consumers

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balanced against the reasons, justifications and motives of the alleged wrongdoer. In brief, the court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim . .

.. *McKell v. Wash. Mut., Inc.*, 142 Cal. App. 4th 1457, 1473 (2d Dist. 2006) (emphasis added and internal citations and quotations omitted).

<sup>16</sup> The National Academy of Sciences affirmed in March 2016 that it is possible to estimate the influence of climate change on some types of specific extreme events—in particular: heat waves, cold snaps, droughts and heavy precipitation. NATIONAL ACADEMY OF SCIENCES, *ATTRIBUTION OF EXTREME CLIMATE EVENTS IN THE CONTEXT OF CLIMATE CHANGE*. (March 2016), <http://nas-sites.org/americasclimatechoices/other-reports>.

<sup>17</sup> See OFFICE OF S. BEN ALLEN, SB 1161 FACT SHEET (Mar. 28, 2016), available at <https://assets.documentcloud.org/documents/2778259/SB1161ClimateScienceTruthAccountabilityFactSheet03.pdf>.

<sup>18</sup> See *id.*

<sup>19</sup> See *id.*

<sup>20</sup> See *id.*

<sup>21</sup> Cf. *In re Tobacco II Cases*, 46 Cal. 4th 298, 312 (Cal. 2009) (citing *Fletcher v. Security Pacific National Bank*, 23 Cal. 3d 442, 453 (Cal. 1979)) (stating that the UCL focuses on “defendant's conduct, rather than the plaintiff's damages, in service of the statute's larger purpose of protecting the general public against unscrupulous business practices”).

<sup>22</sup> S.B. 1161 § 3.

<sup>23</sup> *Id.*

<sup>24</sup> However, a “perfectly true statement couched in such a manner that it is likely to mislead or deceive the consumer, such as by failure to disclose other relevant information, is actionable under the UCL.” *McKell v. Washington Mutual, Inc.* 142 Cal. App. 4th at 1471 quoting *Massachusetts Mutual Life Ins. Co. v. Superior Court* 97 Cal. App. 4th 1282, 1290 (2002).

about scientific evidence with regard to the existence, extent or current or future impacts of a potential harm.<sup>25</sup>

Over the years, the UCL has allowed prosecution of claims concerning:

- deceptive practices of the tobacco industry;<sup>26</sup>
- misleading representations on a website;<sup>27</sup>
- misrepresentations made during a public relations campaign;<sup>28</sup>
- product packaging likely to deceive or confuse the public;<sup>29</sup> and
- omission of material scientific information regarding prescription drugs.<sup>30</sup>

As reflected in these examples, the UCL already prohibits unlawful, unfair, or fraudulent statements analogous to the narrow scope of claims contemplated by SB 1161. In applying the UCL to the climate context, state officials already have a duty to ask and California courts a duty to consider whether “members of the public are likely to be deceived” by conduct related to climate science.<sup>31</sup> The information that has come to light in recent months suggest that some companies have in fact engaged in unfair and fraudulent practices likely to deceive consumers with respect to climate science. SB 1161 exists only to ensure these questions are addressed; not to dictate—or even suggest—an answer.

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In sum, this law does not change the substantive law of the UCL but it does ensure that California government officials have the tools necessary to safeguard accountability for unlawful, unfair, and fraudulent practices with respect to scientific evidence regarding the existence, extent, or current or future impacts of anthropogenic induced climate change.

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<sup>25</sup> See, e.g., *In re Neurontin Marketing & Sales Practices Litigation*, 748 F. Supp. 2d 34 (D. Mass 2010) (District Court found drug company in violation of California UCL due to withholding material scientific information regarding off-label use of one of its drugs).

<sup>26</sup> See *In re Tobacco II Cases*, 46 Cal. 4th at 312.

<sup>27</sup> See *Rosado v. eBay Inc.*, 53 F.Supp.3d 1256 (N.D. Cal. 2014).

<sup>28</sup> See *Kasky v. Nike, Inc.*, 27 Cal. 4th 939 (2002), *as modified* (May 22, 2002).

<sup>29</sup> See *Williams v. Gerber Products Co.*, 552 F.3d 934, 938 (9th Cir.2008).

<sup>30</sup> See *In re Neurontin*, 748 F. Supp. 2d 34.

<sup>31</sup> *C.f.*, *In re Tobacco II Cases*, 46 Cal. 4th at 312.