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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

ROBIN CREST, EARL DE VRIES, and JUDY DE VRIES,

Plaintiffs,

v.

ALEX PADILLA, in his official capacity as Secretary of State of the State of California.

Defendants.

Case No. 19STCV27561

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

Reservation No. 978453166871

Hearing:	September 21, 2021
Time:	9:30 a.m.
Place:	Dept. 38
Judge:	Hon. Maureen Duffy-Lewis
Action Filed:	August 6, 2019
FAC Filed:	September 20, 2019
Trial Date:	October 25, 2021

TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on September 21, 2021, at 9:30 a.m., or as soon thereafter as counsel may be heard, in Department 38 of the Los Angeles County Superior Court located at 111 North Hill Street, Los Angeles, California 90012, Plaintiffs Robin Crest, Earl De Vries, and Judy De Vries will, and hereby do, move for an order granting summary judgment in their favor on the sole cause of action against Defendant Alex Padilla,[1] in his official capacity as Secretary of State of California, for violation of Cal. Const., art I, §§ 7 and 31 as stated in Plaintiffs' first amended complaint filed on September 20, 2019. In the alternative, Plaintiffs seek an order granting summary adjudication on that cause of action in their favor as a matter of law.

[1] Dr. Shirley N. Weber is the current Secretary of State.

Plaintiffs' motion is made on the grounds that, under the applicable law, all the papers submitted, including all of the evidence set forth in the papers and all inferences reasonably deducible from the evidence, show that there are no triable issues as to any material facts and that the moving party is entitled to a judgment on the sole cause of action as a matter of law.

Plaintiffs' motion is based upon the first amended complaint, this notice, the accompanying memorandum of points and authorities, separate statement of undisputed material facts, declarations of Robin Crest, Earl De Vries, Judy De Vries, and Robert Patrick Sticht, evidence in support of the motion, the request for judicial notice, the reply in support, the file and record in this case, and such oral argument and further evidence as may be presented to the Court at the time of hearing.

Dated: June 29, 2021

JUDICIAL WATCH, INC.

By: */s/ Robert Patrick Sticht.*
ROBERT PATRICK STICHT

Attorneys for Plaintiffs,
Robin Crest, Earl De Vries, and Judy De Vries

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ROBIN CREST, EARL DE VRIES, and JUDY DE VRIES,

Plaintiffs,

v.

ALEX PADILLA, in his official capacity as Secretary of State of the State of California.

Defendants.

Case No. 19STCV27561

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Reservation No. 978453166871

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INTRODUCTION

Plaintiff taxpayers sue to enjoin Defendant from spending public funds on California's gender-based quota for boards of directors of publicly traded corporations. They also seek a judgment declaring the State's quota system to be unlawful. Plaintiffs demonstrate herein that the quota system violates article I, section 7(a) of the California constitution, its equal protection clause.

ARGUMENT

I. STANDARDS GOVERNING SUMMARY JUDGMENT.

The standards governing summary judgment are well-established. "A party may move for summary judgment in an action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding." (Code Civ. Proc. § 437c(a).) "The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc. § 437c(c).) "A plaintiff or cross-complainant has met his or her burden of showing that there is no defense to a cause of action if that party has proved each element of the cause of action entitling the party to judgment on that cause of action." (Code Civ. Proc. § 437c(p)(1).) "Once the plaintiff or cross-complainant has met that burden, the burden shifts to the defendant or cross-defendant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto." (*Id.)* "The defendant or cross-defendant shall not rely upon the allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto." (*Id.*) "A motion for summary adjudication may be made by itself or as an alternative to a motion for summary judgment and shall proceed in all procedural respects as a motion for summary judgment." (Code Civ. Proc. § 437c(f)(2).)

II. PLAINTIFFS ARE TAXPAYERS UNDER SECTION 526a.

To succeed on a claim under section 526a, a plaintiff first must demonstrate that he or she paid taxes to the state within the one-year period before the filing of the action. (Code Civ. Proc. § 526a) It is undisputed that Plaintiffs paid income and property taxes to the State of California in the one-year period before they filed this action on August 6, 2019. (Plaintiffs' Separate Statement of Undisputed

Material Facts in Support of Motion for Summary Judgment ("SOF") at ¶ 1.)

III. DEFENDANT IS EXPENDING TAXPAYER FUNDS.

To succeed on a claim under section 526a, a plaintiff also must demonstrate that the defendant is a public official or agent of a public entity and is expending taxpayer funds illegally. (*Herzberg v. County of Plumas*, (2005) 133 Cal. App. 4th 1, 23-24 (*quoting National Organization for Reform of Marijuana Laws v. Gain*, (1979) 100 Cal. App. 3d 586, 598–599.)) The use of government funds to implement or carry out an unconstitutional law is an "illegal expenditure" for purposes of section 526a. (*Ames v. Hermosa Beach*, (1971) 16 Cal. App. 3d 146, 150-151; *Blair v. Pitchess*, (1971) 5 Cal. 3d 258, 268-69.) An expenditure may be actual or threatened. (*Humane Society of the United States v. State Bd. of Equalization*, (2007) 152 Cal. App. 4th 349, 355; *Connerly v. Schwarzenegger*, (2007) 146 Cal. App. 4th 739, 749; *Waste Management of Alameda County, Inc. v. County of Alameda*, (2000) 79 Cal. App. 4th 1223, 1240.) The size of the expenditure is immaterial. (*Blair*, 5 Cal. 3d at 268; *Wirin v. Parker* (1957) 48 Cal. 2d 890, 894.) Section 526a is satisfied where paid employees of a public entity are spending time implementing or carrying out the illegal law, policy, procedure, or action. (*Blair*, 5 Cal. 3d at 269; *Wirin v. Horrall*, (1948) 85 Cal. App. 2d 497, 504-05; *Citizens for Uniform Laws v. County of Contra Costa*, (1991) 233 Cal. App. 3d 1468, 1472-73.)

There is no genuine dispute of material fact that Defendant is expending taxpayer money implementing SB 826. Not only did both the Assembly and Senate appropriations committees find that SB 826 would cost taxpayers over $500,000 per year to develop regulations, investigate claims, and enforce violations of SB 826, but Defendant admits expending taxpayer funds to implement the law. (SOF at ¶¶ 5, 23-30.) First, Defendant expended taxpayer dollars compiling a list of the corporations subject to SB 826 and identifying whether they were in compliance with the new law's gender-based quota, then publishing his findings in a July 1, 2019 report. (*Id*. at ¶ 24.) Defendant then expended more taxpayer dollars devising a system by which corporations report their compliance with SB 826. (*Id*. at ¶¶ 25-26.) Specifically, Defendant revised the Corporate Disclosure Statement form that domestic and foreign publicly traded corporations are required to file with Defendant annually. (*Id*.) The revised form advised corporations about their obligations under SB 826 and provided them with a space to report their compliance. (*Id.*) Defendant expended yet more taxpayer dollars implementing SB

826 when he prepared and mailed, in December 2019, 2,526 form letters informing subject corporations of their SB 826 obligations and the new system he devised for reporting compliance. (*Id*. at ¶ 27.) He also expended taxpayer dollars preparing two subsequent reports in March 2020 and March 2021 identifying by name those corporations that reported having at least one female director and those that did not and prepared and disseminated a 2020 version of the Corporate Disclosure Statement form and December 2020 letter again advising corporations of their SB 826 obligations and the new reporting system. (*Id*. at ¶¶ 28-29, 47.) Defendant also admitted that he expended and continues to expend taxpayer dollars implementing SB 826 by creating a website advising corporations about their SB 826 obligations and reporting their compliance or non-compliance. (*Id*. at ¶ 30.) The website expressly states that Defendant's office reviews and reports on corporations' compliance with SB 826. (*Id.*) Finally, Defendant also has admitted that he will bring enforcement actions against noncompliant corporations "depending on the facts and circumstances at the time of a decision." (*Id*. at ¶ 31.) Clearly, there is no dispute that taxpayer funds have been spent and will be spent in the future implementing and enforcing SB 826.

IV. SB 826 VIOLATES ARTICLE I, SECTION 7 OF CALIFORNIA'S CONSTITUTION.

A. Governing Standards.

The California Constitution requires "*equal* treatment of men and women." (Cal. Const., art. I, § 7(a); *Woods v. Horton* (2008) 167 Cal. App. 4th 658, 674 (*quoting Koire v. Metro Car Wash*, (1985) 40 Cal. 3d 24, 37 (emphasis original)) A classification based on gender is considered suspect for equal protection purposes where the persons subject to the classification are similarly situated. (*Woods*, 167 Cal. App. 4th at 674.) Because suspect classifications are so pernicious, they are given strict judicial scrutiny. (*Id.*) The use of suspect classifications like sex may be upheld only if they are necessary to further a compelling state interest and address that interest through the least restrictive means available. (*Id.*) Put differently, if use of a suspect classification is necessary to serve a compelling state interest, the use of the classification must be narrowly tailored to serve that interest. (*Id.* at 674-75 (*citing Connerly v. State Personnel Bd.* (2001) 92 Cal. App. 4th 16, 36.))

Under the strict scrutiny test, specificity and precision are demanded. (*Connerly*, 92 Cal. App. 4th at 36.) The legislature must clearly identify the reason it used the suspect classification, and the use

must be unquestionably legitimate. (*Id.*) The mere recitation of a benign or legitimate purpose is entitled to little or no weight, and generalized assertions of purpose are insufficient. (*Id.*) Generalized assertions provide little or no guidance to the legislature in narrowly tailoring its use of a suspect classification. (*Id.*) They also inhibit judicial review. (*Id.*) And speculation about what may have motivated the legislature will not suffice. (*Id.* at 38.) It must be shown that an alleged purpose was the legislature's actual purpose, and evidence of that purpose must have been gathered and considered by the legislature in advance of its use of the suspect classification. (*Id.* at 37-38.)

Once a compelling state interest is shown, the inquiry then turns to the means chosen by the legislature to address that interest. (*Connerly*, 92 Cal. App. 4th at 36.) Only the most exacting connection between the suspect classification and the justification for its use will suffice. (*Id.*) The use must be necessary rather than merely convenient and must be supported by convincing evidence. (*Id.*) Absent a finding of necessity supported by convincing evidence, the legislature cannot narrowly tailor the proposed legislation, and a reviewing court will be unable to determine that use of the suspect classification is necessary. (*Id.*) The use of the suspect classification also must be limited in scope and duration to that which is necessary to accomplish the legislature's purpose. (*Id.* at 37.) The availability of gender-neutral alternatives – or the legislature's failure to consider general neutral alternatives – is fatal. (*Id*. at 36.)

The strict scrutiny standard applies even if a law is claimed to be remedial. (*Connerly*, 92 Cal. App. 4th at 35, 37-38.) Where the government interest asserted is to remedy the effects of past or present discrimination, the discrimination must be identified with specificity. (*Id.* at 38.) The legislature must have had strong evidence on which it concluded that the remedial action is necessary. (*Id.*) A generalized assertion that discrimination exists or has existed in the past is insufficient, and statistical differences alone cannot meet the government's burden. (*Id.*) The use of a suspect classification to remedy past discrimination also must actually be remedial. (*Id.*) The remedy must be designed as nearly as possible to restore victims of specific discriminatory conduct to the position they would have occupied absent the discrimination. (*Id.*) The lack of any effort to limit the benefits of a remedial scheme to those who actually suffered from specific discrimination is fatal to the scheme. (*Id.* at 39.)

Finally, when a statute employs an express gender classification, a plaintiff challenging the statute meets his or her initial and ultimate burden simply by pointing out the gender classification. (*Woods*, 167 Cal. App. 4th at 674.) The statute is presumed to be invalid, and the government bears the burden of demonstrating otherwise. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal. 3d 1, 17; *Woods*, 167 Cal. App. 4th at 674; *Connerly*, 92 Cal. App. 4th at 36, 43.) It must prove that strict scrutiny is satisfied. (*Id.*)

B. SB 826 Is Presumptively Invalid and Fails Strict Scrutiny.

There can be no doubt that SB 826 employs a suspect classification – gender – to differentiate between similarly situated persons – current and prospective members of corporate boards. The Legislature has decided that there are not enough women on corporate boards for its liking, so it has enacted SB 826, which requires that corporations have a minimum number of women on their boards. SB 826 treats current and prospective board members not as individuals, but as members of two groups based on their gender. Women may compete for every position on a corporation's board, yet men are excluded from competing for those positions reserved for women. No matter how strong a male candidate's qualifications might be, he is never afforded the opportunity to compete with female candidates for every board position available, but instead must compete only for those board positions for which there is no gender preference. In this regard, SB 826 creates the same type of quota system for seats on corporate boards that was found to be unconstitutional for seats in the medical school class at issue in *Regents of the Univ. of Cal. v. Bakke* (1978) 438 U.S. 265, 319-20 ("*Bakke*"). SB 826's gender-based quota is presumptively invalid because it relies expressly on suspect classifications, and Plaintiff need not make any further showing to prevail. (*Woods*, 167 Cal. App. 4th at 674.)

SB 826 does not survive strict scrutiny in any event. Governor Brown and even the Legislature itself express serious doubts about whether it could. (SOF at ¶¶ 4, 7-9, 11-13.) The law is plainly unconstitutional.

1. SB 826's Purposes.

The Legislature included the following findings in SB 826 to describe the statute's purposes: (1) "boost[ing] the California economy;" (2) "improv[ing] opportunities for women in the workplace;" and (3) "protect[ing] California taxpayers, shareholders, and retirees." (2018 Stats., ch. 954, § 1(a).)

The means chosen by the Legislature to achieve these generic goals is increased corporate performance. (*Id.*, §§ 1(c) and (g).) And the means chosen by the Legislature to increase corporate performance is to have more women on corporate boards. (*Id.*) According to the Legislature, having women on corporate boards increases corporate performance. (*Id.*) Hence, the Legislature appears to have concluded that, by increasing the number of women on corporate boards, it can increase corporate performance, thereby boosting California's economy, improving opportunities for women in the workplace, and protecting California's taxpayer, shareholders, and retirees, whatever that might mean. Plaintiffs can identify no other purpose described by the Legislature for enacting SB 826, nor can Plaintiffs identify anywhere that the Legislature described SB 826's purposes with any greater specificity.

Strict scrutiny demands specificity and precision, and these generic statements of purpose do not provide either. (*Connerly*, 92 Cal. App. 4th at 36.) Additionally, Plaintiffs can identify no case in which a California court has ever found that any of these generic purposes constitutes a compelling state interest for equal protection purposes.

"Boosting the California economy" is anything but specific and precise. The Legislature's cavalier use of the economy as an excuse to justify gender-based discrimination falls far short of the constitution's requirements. The same is true for "protecting California taxpayers, shareholders, and retirees," a statement of alleged purpose that is essentially meaningless. Protect them from what? The Legislature does not say. The statement only makes a modicum of sense if it is paired with "boosting the California economy," which may benefit California's taxpayers, shareholders, and retirees. Even then, it still is an enormously broad, generalized goal lacking the specificity and precision needed to satisfy strict scrutiny.

"[I]mprov[ing] opportunities for women in the workplace" is as broad and overarching as "boosting the California economy" and "protecting California taxpayers, shareholders, and retirees," if not more so. It is not even limited to California. Does California really claim to have a compelling state interest in improving work opportunities for women anywhere and everywhere in the world? If the Legislature meant to limit its ambition to improving work opportunities for women in California, it did not say so. The nexus between improving opportunities for women in the workplace and increasing the number of women on corporate boards also is unexplained. Are the "opportunities in the workplace"

referenced in SB 826 limited to corporate board memberships or does the statement of purpose refer to the economy in general? Again, SB 826 does not say. Given that Defendant subsequently determined that 625 corporations are subject to SB 826, no more that approximately 1,875 board memberships could be at issue. (SOF at ¶ 46.)[1] With a population of 40 million and a $3.2 trillion economy, California cannot have a compelling state interest in creating no more than 1,875 corporate board membership opportunities for women who most likely are already highly accomplished, successful professionals. Like the other two purposes, improving opportunities for women in the workplace lacks the specificity and precision needed to satisfy strict scrutiny, especially given the ambiguity about whether the opportunities in question are for all women everywhere, all women in California, or only women seeking positions on corporate boards.

In interrogatory answers, Defendant advanced additional, purported compelling state interests in SB 826. These are: (1) remedying past and current discrimination; (2) benefitting corporations' sustainability; and (3) preserving public confidence by benefitting corporate performance and moving towards gender equity. (SOF at ¶¶ 32 and 35.) SB 826's legislative findings do not identify remedying past or current discrimination, benefitting corporate sustainability, or preserving public confidence as purposes or state interests furthered by the legislation. (*Id.* at ¶ 33.) Moreover, SB 826's legislative history does not identify these purported purposes or the purposes or state interests furthered by the legislation. (*Id.* at ¶ 34.) Accordingly, Defendant cannot demonstrate that these additional, purported purposes were the Legislature's actual purposes and cannot rely on theses purposes in trying to defend SB 826's constitutionality. (*Connerly*, 92 Cal. App. 4th at 37-38.)

Like "boost[ing] the California economy," "improv[ing] opportunities for women in the workplace," and "protect[ing] California taxpayers, shareholders, and retirees," these additional, purported purposes are too vague and too generalized to constitute compelling state interests. Again, "specificity and precision" are demanded, not the conclusory, generic, or boilerplate assertions of purpose Defendant makes. (*Connerly*, 92 Cal. App. 4th at 36.) And, as with the three purposes identified in SB 826's legislative findings, none of the additional purposes asserted by Defendant in his interrogatory answers has ever been found to be a compelling state interest.

[1] According to the March 2021 report, the number slightly increased to 647. (SOF at ¶ 48.)

In sum, SB 826 fails strict scrutiny because the Legislature failed to identify any sufficiently specific and precise, compelling state interest that justifies the law's gender-based quota for corporate boards.

2. SB 826 Is Not Narrowly Tailored.

Defendant cannot show "[o]nly the most exacting connection" between SB 826's gender-based quota and the various justifications offered for the quota's use. (*Connerly*, 92 Cal. App. 4th at 36.) Defendant also cannot show that a gender-based quota is necessary to achieve any actual purpose the Legislature may have had or that any such necessity is supported by "convincing evidence." (*Id.*) Nor can Defendant show that SB 826's gender-based quota is limited in duration to that which is necessary to achieve the legislature's purpose. (*Id.* at 37.)

The Legislature's stated goals of "boost[ing] the California economy," "improv[ing] opportunities for women in the workplace," and "protect[ing] California taxpayers, shareholders, and retirees," are multiple steps removed from SB 826's gender-based quota. The same is true for the corporate sustainability and preserving public confidence purposes claimed by Defendant but which do not appear in SB 826's legislative findings or legislative history. Again, the alleged purpose of SB 826's gender-based quota is to improve corporate performance, which will allegedly boost the economy, which in turn will allegedly improve opportunities for women in the workplace and protect California's taxpayers, shareholders, and retirees. The nexus between the means and the ends is anything but the "most exacting."

The requirement of necessity is also absent. Does California really need to impose a gender-based quota on corporate boards to improve its economy? To improve opportunities for women in the workplace? To protect taxpayers, shareholders, and retirees or improve corporate sustainability or preserve public confidence? Are the tools available to the Legislature really so weak or so limited that it must resort to gender discrimination to achieve these goals? To state such a claim is to refute it. Nothing in SB 826's legislative findings or legislative history demonstrate that the Legislature had to resort to a gender-based quota system out of necessity to achieve its goals.

Also absent is any clear evidence supporting the effect of a gender-based quota on corporate performance. While the Legislature cited various studies for the proposition that having women on

corporate boards increases board performance, the studies themselves disclaim any causal connection between women on boards and corporate performance. (SOF at ¶¶ 14-20; *see also id.* at 21 (concluding that "[s]ome research has found that gender diverse boards may have a positive impact on a company's financial performance, but other research has not.")) Even the legislative analyses of SB 826 note the lack of any evidence demonstrating that more women on corporate boards causes better corporate performance. (*Id.* at ¶¶ 6 and 10.) Evidence of the necessity for a gender-based quota is anything but convincing. Given the absence of convincing evidence demonstrating a causal relationship between women on boards and corporate performance, Defendant cannot show the Legislature's gender-based quota is likely to have any significant effect on the issues the Legislature sought to address. Also absent is any limitation on the duration of the quota. In short, SB 826 is not narrowly tailored.

3. Gender-Neutral Alternatives Exist But Were Not Considered.

SB 826 also fails because (1) gender-neutral alternatives were available, and (2) the Legislature failed to consider those alternatives. Both are fatal to SB 826's constitutionality. (*Connerly*, 92 Cal. App. 4th at 36.)

The Legislature could have chosen any number of available means to boost California's economy and either directly or indirectly improve opportunities for women in the workplace, protect California taxpayers, shareholders, and retirees, benefit corporate sustainability, and promote public confidence. It had no need to resort to gender discrimination. Reducing taxes and regulatory burdens and encouraging business investment and start-ups are just some obvious, readily available ways to boost California's economy and thereby improve opportunities for women in the workplace, protect California taxpayers, shareholders, and retirees, benefit corporate sustainability, and promote public confidence. Minimizing burdens on employers and minimizing obstacles to hiring also are obvious ways to improve employment opportunities for women regardless of any boost to the economy. Improving education and training opportunities is another. None require the use of suspect classifications or gender-based quotas.

Connerly also suggests at least two, gender-neutral alternatives for increasing workplace opportunities for women: (1) encouraging employers to evaluate applicable hiring criteria to ensure they are reasonably job-related and do not arbitrarily exclude women; and (2) promoting inclusive outreach

efforts to encourage a broad class of eligible candidates to participate in the selection process. (92 Cal. App. 4th at 56 and 60). The Legislature does not appear to have considered these or any other available, gender-neutral alternatives to improving employment opportunities for women, either in general or in the far more limited context of opportunities on corporate boards.

SB 826's legislative findings note that, in September 2013, the Legislature passed a resolution encouraging corporations to add more women to their boards of directors. (2018 Stats., ch. 954, § 1(b).) Defendant has suggested in interrogatory answers that this resolution, Senate Concurrent Resolution No. 62, was an earlier attempt at a gender-neutral alternative. (SOF at ¶¶ 36-37.) The implication is that the measure was tried but did not achieve the desired result, and therefore a legally mandated, gender-based quota was the only other available option. Obviously, there is an enormous range of choices between a non-binding resolution encouraging corporations to have more women on their boards and a legally mandated, gender-based quota. Any suggestion otherwise is a false dichotomy.

Indeed, one of the studies cited by the Legislature in its findings suggests a gender-neutral alternative to increasing women's participation on corporate boards. A December 2015 study by the U.S. Government Accountability Office entitled "Corporate Boards: Strategies to Address Representation of Women Include Federal Disclosure Requirements," suggests requiring corporations to make disclosures about board diversity. (SOF at ¶¶ 21-22.) Neither the legislative findings nor the legislative history of SB 826 offers any suggestion that the Legislature considered a "stand alone" disclosure requirement as a gender-neutral alternative for encouraging corporations to have more women on their boards.

A committee analysis of SB 826 also suggests another gender-neutral alternative. The Senate Banking and Financial Institutions analysis cites the NFL's "Rooney Rule," which requires minority candidates for head coaching and senior football operations be interviewed before filling those jobs. (SOF at ¶¶ 39-40.) The committee analysis and SB 826's legislative findings provide no indication that the committee, any other committee, or the Legislature as a whole considered the "Rooney Rule" as a gender-neutral alternative to the quota system that SB 826 adopted. (SOF at ¶ 41.) If it was considered, there is no indication when it was considered, what body considered it, or why it was not chosen over SB 826's gender-based quota. (*Id.*)

The relevant universe of gender-neutral alternatives are not just alternatives to gender-based quotas for women's participation on corporate boards, but gender-neutral alternatives to boosting California's economy, improving opportunities for women in the workplace, and protecting California's taxpayers, shareholders, and retirees. And, of course, another relevant universe of gender-neutral alternatives is gender-neutral alternatives to increase corporate performance as a means to achieving these ends. There is a complete absence of evidence demonstrating that the Legislature considered any of the multitude of gender-neutral alternatives available to the Legislature to achieve these broader goals. This failure further demonstrates that SB 826 does not satisfy strict scrutiny.

4. Remedying Discrimination.

While nothing in SB 826's legislative findings or legislative history demonstrates that the Legislature enacted SB 826 to remedy past or current discrimination, Defendant makes this claim in interrogatory answers, asserting that remedying discrimination is a compelling state interest furthered by SB 826's gender-based quota. (SOF at ¶ 32.) Again, however, Defendant must prove that a claimed purpose was the Legislature's actual purpose. (*Connerly*, 92 Cal. App. 4th at 37-38.) A legislative purpose cannot be made up after the fact to try to salvage an otherwise unconstitutional statute, and Defendant cannot prove that remedying past or current discrimination was the Legislature's actual purpose in enacting SB 826.

Defendant's remedy argument fails for other reasons as well. Strict scrutiny applies even if a law is claimed to be remedial. (*Connerly*, 92 Cal. App. 4th at 35, 37-38.) Where the state interest asserted is to remedy the effects of past or present discrimination, the discrimination must be identified with specificity. (*Id.* at 38.) The Legislature must have had strong evidence on which it concluded that the remedial action was necessary. (*Id.*) A generalized assertion that discrimination exists or has existed in the past is insufficient, and statistical differences alone cannot meet the government's burden. (*Id.*) "A goal of assuring participation by some specified percentage of a particular group merely because of its . . . gender is 'discrimination for its own sake' and must be rejected as facially invalid under equal protection principles." (*Connerly*, 92 Cal. App. 4th at 59 (*quoting Bakke*, 438 U.S. at 307.)) As the Court in *Connerly* also explained, "There may be explanations other than discrimination for statistical variations[.]" (92 Cal. App. 4th at 56.) Yet statistical differences and claims about "parity"

are all the Legislature offered. (2018 Stats., ch. 954, §§ 1(a) and (e).) It made no specific finding of past or current discrimination in either its legislative findings or legislative history. (SOF at 44.) This shortcoming is fatal to any claim that SB 826 furthers a compelling state interest in remedying past or current discrimination.

The use of a suspect classification to remedy past or current discrimination also must actually be remedial. (*Connerly*, 92 Cal. App. 4th at 38.) The remedy must be designed as nearly as possible to restore victims of specific discriminatory conduct to the position they would have occupied absent the discrimination. (*Id.*) The lack of any effort to limit the benefits of a remedial scheme to those who actually suffered from specific discrimination is fatal to the scheme. (*Id.* at 39.)

The Legislature made no effort to identify specific past or present victims of alleged discrimination or to identify specific perpetrators of such discrimination. No specific victims or perpetrators were identified in SB 826's legislative findings, and Defendant was unable to identify any such victims or perpetrators in response to interrogatories seeking this specific information. (SOF at ¶¶ 42-43.) In response to an interrogatory asking Defendant to identify specific victims of discrimination, Defendant responded generically, identifying "women," "corporations," "California taxpayers and retirees," and "shareholders and investors" as well as "the economy." (*Id.* at ¶ 42.) Because SB 826 is not actually remedial and does not restore victims of alleged discrimination to the position they would have occupied absent the discrimination, and because no effort has been made to limit SB 826's "remedy" to such victims, SB 826 cannot withstand strict scrutiny. Indeed, the blunt instrument of a quota is unlikely to ever satisfy this standard. (*See Bakke*, 438 U.S. at 319-20.)

5. "Diversity" For Diversity's Sake Is Never Constitutional.

Defendant asserts that SB 826 serves the compelling state interest of "securing the benefits of increased gender diversity." (SOF at ¶ 32.) Like remedying past and current discrimination, benefiting corporate sustainability, and preserving public confidence, "securing the benefits of increased gender diversity" appears nowhere in SB 826's legislative finding or legislative history. Thus, Defendant fails to show that this alleged purpose was the Legislature's actual purpose. (*Connerly*, 92 Cal. App. 4th at 37-38.) Defendant cannot rely on this unsupported purpose to satisfy strict scrutiny. (*Id.*)

Regardless, diversity for diversity's sake is never constitutional. "'Preferring members of any

one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.'" (*Connerly*, 92 Cal. App. 4th at 34 (*quoting Bakke*, 438 U.S. at 307.)) "Assur[ing] participation" of women on corporate boards cannot be a compelling state interest because such action "would be impermissible discrimination." (*Id.* at 55 (*citing Bakke*, 438 U.S. at 307.)) Defendant's "diversity for diversity's sake" argument will not save SB 826's blatantly unconstitutional quota. And of course, asserting that more women on corporate boards will add diversity merely perpetuates gender-based stereotypes about both men and women.

V. CONCLUSION.

Defendant cannot demonstrate that California may lawfully prefer women over men on corporate boards to achieve the Legislature's stated goals or any other purported goals claimed by Defendant. Plaintiffs respectfully request that summary judgment be granted in their favor, that SB 826 be declared unconstitutional, and that Defendant be permanently enjoined from expending taxpayer funds or using taxpayer-financed resources on SB 826.

Dated: June 29, 2021

JUDICIAL WATCH, INC.

By: */s/ Robert Patrick Sticht.*
ROBERT PATRICK STICHT

Attorneys for Plaintiffs,
Robin Crest, Earl De Vries, and Judy De Vries