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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,[1] in his official capacity as Secretary of State of the State of California.

Defendants.

Case No. 20STCV37513

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT OR ALTERNATIVE SUMMARY ADJUDICATION

Reservation No. 667545469586

Date:	March 14, 2022
Time:	8:30 a.m.
Place:	Dept. 14
Judge:	Hon. Terry Green
Action Filed:	September 30, 2020
Trial Date:	May 2, 2022

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

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ARGUMENT

I. INTRODUCTION.

Plaintiffs respectfully submit that, as a matter of law, Defendant is unable to satisfy the heavy burden strict scrutiny places on her to sustain AB 979's racial, ethnic, and LGBT quota for publicly held corporations headquartered in California, as *Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16 plainly demonstrates. Plaintiffs moved for summary judgment on this same basis, but should the Court read *Connerly* and the requirements of strict scrutiny differently, Plaintiffs respectfully submit that a genuine dispute of fact exists with respect to the existence of discrimination in the board selection process and the "business case" – the claim that the quota furthers a compelling governmental interest in improving corporate performance and governance and, in turn, benefits the state, taxpayers, retirees, and the people of California by boosting the economy. Defendant's motion for summary judgment or, in the alternative, summary adjudication lacks merit and should be denied.

II. *CONNERLY* AND STRICT SCRUTINY.

Because suspect classifications are pernicious and so rarely relevant to a legitimate governmental purpose, they are subject to strict judicial scrutiny. (*Connerly*, 92 Cal.App.4th at 33.) Specificity and precision are demanded. (*Id*. at 36.) The legislature must clearly identify the reason(s) it used the suspect classification, and the use must be unquestionably legitimate. (*Ibid*.) The mere recitation of a benign or legitimate purpose is entitled to little or no weight, and generalized assertions of purpose are insufficient. (*Ibid*.) Generalized assertions of purpose provide little or no guidance to the legislature in narrowly tailoring its use of a suspect classification and inhibit judicial review. (*Ibid*.)

The government also must demonstrate that an alleged compelling governmental interest was the legislature's actual purpose, not a *post hoc* re-imagining of that purpose. (*Connerly*, 92 Cal.App.4th at 38-39.) Evidence of the purpose must have been gathered and considered by the legislature in advance of its use of the suspect classification. (*Id*. at 37-38.)

The strict scrutiny standard applies even if a law is claimed to be remedial. (*Connerly*, 92 Cal.App.4th at 35, 37-38.) There is no compelling governmental interest in remedying societal discrimination. (*Id*. at 38; *Hiatt v. City of Berkeley* (1982) 130 Cal.App.3d 298, 311-14.) There also is no compelling governmental interest in remedying generalized, non-specific allegations of

discrimination. (*Connerly*, 92 Cal.App.4th at 38.) The state also must have a strong basis in evidence to conclude that remedial action is necessary before it embarks on a program to remedy discrimination, and the discrimination cannot merely be conceded. *(Connerly*, 92 Cal.App.4th at 38.) Generalized assertions of discrimination in a particular region or industry are insufficient, as are mere statistical anomalies, and the discrimination must be identified with specificity. (*Ibid*.) The use of a suspect classification to remedy discrimination has not been upheld absent judicial, legislative, or administrative findings of constitutional or statutory violations. (*Hiatt*, 130 Cal.App.3d at 311 [citing *Regents of the Univ. of Cal. v. Bakke* (1978) 438 U.S. 265, 307 (Powell, J., concurring) ("*Bakke II*"].) "Without such findings of constitutional or statutory violations, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another." (*Ibid*. [citing *Bakke II*, 438 U.S. at 308-09].)

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 37.) Only the most exacting connection between the suspect classification and the justification for its use will suffice. (*Ibid*.) Use of the classification must advance the claimed governmental interest through the least restrictive means available. (*Connerly*, 92 Cal. App. 4th at 32.) The use also must be necessary rather than merely convenient. (*Id*. at 36.) The availability of neutral alternatives – or the Legislature's failure to consider neutral alternatives – is fatal. (*Id*. at 37.) The suspect classification's use also must be part of a broader, individualized consideration of each person; it can never be the only factor. (*See*, *e.g*., *Grutter v. Bollinger* (2003) 539 U.S. 306, 334; *Gratz v. Bollinger* (2003) 539 U.S. 244, 271-72; *Bakke II*, 438 U.S. 265, 317-18.) Otherwise, it is not narrowly tailored. (*Ibid*.) The use of the suspect classification also must be limited in scope and duration to that which is necessary to accomplish the state's purpose. (*Connerly*, 92 Cal.App.4th at 37.)

In addition to satisfying the other elements of narrow tailoring, the government must show, when using a suspect classification to redress specific discrimination, that the use of the classification is actually remedial. (*Connerly*, 92 Cal.App.4th at 38.) The remedy must be designed as nearly as possible to restore the victims of specific discriminatory conduct to the position they would have occupied in the absence of the discrimination. (*Id*. at 39; *see also Bakke II*, 438 U.S. at 307 ["We have

never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations."].) Random inclusion of racial groups without individualized consideration of whether the particular groups suffered from discrimination will belie a claim of remedial motivation. (*Connerly*, 92 Cal.App.4th at 39.) The lack of any effort to limit the remedial scheme to those who actually suffered from specific discrimination is fatal to the scheme. (*Ibid*.)

III. DEFENDANT'S "REPORTING ACTIVITY" ARGUMENT IS A RED HERRING.

Defendant misconstrues Plaintiffs' argument about Defendant's expenditures on AB 979. Plaintiffs challenge the quota itself, not merely reporting about the quota. Plaintiffs allege – indeed there is no dispute – that Defendant has implemented the quota by devising a way for corporations to demonstrate their compliance. She admits doing so. (SOF, ¶¶ 10, 18, and 23; OSOF,[2] ¶¶ 229-233.) Defendant engaged in a public education campaign to educate corporations about the new quota's requirements. (*Id*., ¶ 229.) This included sending letters to corporations Defendant identified as likely being subject to the law and updating Defendant's website to include information about the quota. (*Id*., ¶ 230.) Defendant also modified the corporate disclosure statement corporations file annually with Defendant's office to enable them to report their compliance. (*Id.*, ¶ 231.) In addition, Defendant intends to review these disclosure statements to identify which corporations are in compliance and publish the results on her website. (*Id*., ¶ 232.) Defendant admits having expended taxpayer funds and taxpayer-financed resources devising this scheme and implementing the quota, and there is every reason to believe that the scheme and the expenditures necessary for its operation will continue in the future. (*Id*., ¶ 233.) And while Plaintiffs do not dispute that Defendant has not yet issued formal regulations, the reporting mechanism Defendant has devised is the functional equivalent of a regulation. Plaintiffs also do not dispute that Defendant has yet to issue fines to corporations that have not complied with the quota, but the threat of fines is omnipresent. Section 526a of the California Code of Civil Procedure does not require a threat of fines be made real before taxpayers can sue. Expenditures need only be

[2] As used herein, "OSOF" refers to Plaintiffs' Additional Undisputed Material Facts and Supporting Evidence, set forth immediately following Plaintiffs' responses to Defendant's statement of facts.

threatened, not actual. (*Stanson v. Mott* (1976) 17 Cal.3d 206, 223.) Plaintiffs have demonstrated both.

While Defendant principally relies on *Connerly* to support her argument that "reporting" laws do not violate either equal protection or Proposition 209, *Connerly's* holdings with respect to the multiple "affirmative action" programs at issue are not nearly so simple. *Connerly*, like Plaintiffs' challenge to AB 979, was a "taxpayer" action under Code of Civil Procedure § 526a, and it found that "reporting" laws violate the constitution when they are part of broader programs requiring compliance with racial, sexual, or ethnic preferences. *Connerly* identified at least two such programs: "participation goals" for women and minorities in the bidding to underwrite state bond issuances and hiring preferences for "underrepresented" persons at the state's community colleges. With respect to the former, the Court rejected the state's argument that strict scrutiny did not apply because, among other reasons, "the statutory scheme requires that bidders certify their awareness of participation goals and imposes on them a duty to make efforts to achieve those goals." (*Connerly*, 92 Cal.App.4th at 52.) "Regardless of whether the statutory scheme imposes a penalty for the failure to comply with the duty that it imposes, it establishes racial and gender preferences." (*Ibid*.) With respect to the latter, the Court held: "Since their data collection and reporting requirements are entirely bound up and intermixed with the success of the preferential hiring scheme, they cannot be severed functionally and grammatically from the remainder of the statutory scheme." *(Id*. at 61.)

This case is no different. AB 979 creates clear preferences for certain racial, ethnic, and LGBT directors. The expenditures Plaintiffs have identified implementing AB 979 allow Plaintiffs to challenge these preferences – AB 979's quota – under section 526a of the Code of Civil Procedure. (*Blair v. Pitchess* (1971) 5 Cal.3d 258, 268.)

IV. DEFENDANT'S "FACIAL CHALLENGE" ARGUMENTS ARE BASELESS.

Defendant makes three attempts to demonstrate that AB 979 can be applied constitutionally. First, she asserts that corporations can "come into compliance" by increasing the number of directors without excluding "nondiverse" directors. Second, she asserts that corporations may comply with the law through natural attrition, letting "nondiverse" directors leave of their own accord and replacing them with directors from "underrepresented communities." Third, Defendant suggests that corporations could use blind selection processes to comply with the law's mandate. All three arguments fail for the same

reason: regardless of how "diverse" board members are added, AB 979 requires corporations to take racial, ethnicity, and LGBT status into account to achieve the state's preferred outcome.

It is AB 979's preference for directors of specific races, ethnicities, sexual orientations, and gender identities that violates the constitution, not the way corporations comply with the law's mandate. *Connerly* shows why. The case rejected similar, state-mandated preferences in procurement programs for the state lottery, contracts for underwriting the issuance of state bonds, and hiring for the state's civil service and community colleges. (*Connerly*, 92 Cal.App.4th at 47-48 [state lottery contracts], 49-53 [state bond underwriting], 53-56 [state civil service hiring], and 57-60 [state community college hiring].) With respect to the state lottery, the Court found that the challenged law "establishes preferences for persons from favored groups." (*Id*. at 48.) With respect to underwriting bond issuances, the Court noted that the challenged provisions "establish a state preference, at least to the extent of the established goals, for doing business with individuals based on their race and gender." (*Id*. at 50.) With respect to civil service and community college hiring, the Court declared that "participation goals differ from a quota or set-aside only in degree; it remains a line draw on the basis of race and gender" and "a goal of assuring participation by some specified percentage of a particular group merely because of race or gender is 'discrimination for its own sake' and must be rejected." *(Id*. at 55 and 59 [*citing Bakke II*, 438 U.S. at 307].)

As in *Connerly*, the state is drawing lines and making distinctions based on suspect classifications. It requires corporations to identify and take into account the racial, ethnicity, and LGBT status of their directors, then reconfigure their boards to achieve the state's preferred mix. It is irrelevant that corporations may add new seats. They still must identify and take into account current directors' racial, ethnicity, and LGBT status, compare them to the state's preferred mix of these characteristics, then add a sufficient number of new directors, again based on race, ethnicity, and LGBT status, to satisfy the state's mandate. It also is irrelevant that a corporation may "come into compliance" through natural attrition. Not only does such a strategy still require a corporation to identify and take into account directors' racial, ethnicity, and LGBT status to satisfy the mandate – in this instance in deciding to reduce the size of its board – but the law demands compliance now, not at some indefinite time in the future when a vacancy occurs.

Defendant's fanciful suggestion that a corporation could employ a blind process for creating and filling new board seats fares no better. Identifying and taking into account directors' racial, ethnicity, and LGBT status would remain essential to satisfying the quota. Once the corporation created and filled a new seat using the blind process, it would have to identify and account for the racial, ethnicity, and LGBT status of the new, blindly added director. The blind process – a sort of racial, ethnic, and LGBT lottery – would have to be repeated until the quota is satisfied. The only difference is that identifying and taking into account directors' racial, ethnicity, and LGBT status would take place after, not before, a new director is added. The blind process shows that no matter how hard Defendant tries, directors' racial, ethnicity, and LGBT status cannot be separated from AB 979's racial, ethnic, and LGBT quota.

V. DEFENDANT'S "SIMILARY SITUATED" ARGUMENT FAILS.

"Similarly situated" in the equal protection context refers only to the fact that the Constitution does not require things that are different in fact or opinion to be treated in law as though they were the same. (*Woods v. Horton* (2008) 167 Cal.App.4th 658, 670.) The analysis does not ask whether persons subject to a classification are similarly situated for all purposes. (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.) "There is always some difference between the two groups which a law treats in an unequal manner since an equal protection claim necessarily asserts that the law in some way distinguishes between the two groups." (*Taking Offense v. State of California* (2021) 66 Cal.App.5th 696, 724.) "Thus, an equal protection claim cannot be resolved by simply observing that the members of group A have distinguishing characteristic X while members of group B lack this characteristic." *(Ibid.*) The two groups need only be sufficiently similar with respect to the purpose of the challenged law that some level of scrutiny is required to determine whether the distinction is justified. (*Ibid*.)

AB 979 regulates the composition of corporate boards and the processes corporations use to select directors. All directors and director candidates are subject to these processes. As a result, they are similarly situated for purposes of AB 979's regulation of corporate boards and director selection processes. The Court reached this same conclusion in *Taking Offense*, in the context of the state's regulation of the process for making room assignments in long-term care facilities. At issue in *Taking Offense* was a state law that required residents in long-term care facilities be assigned rooms based on

their gender identity rather than their biological sex. Proponents of the law argued that transgender residents were not similarly situated to non-transgender residents for purposes of the law because transgender persons had historically suffered discrimination. The Court rejected the proponents' discrimination argument, finding that both transgender and non-transgender residents were subject to the same room assignment system: "The question before us is not whether transgender residents . . . are historically more likely to experience discrimination. Rather, the question is whether transgender and non-transgender residents are sufficiently similar for purposes of application of the room assignment provision such that the classification is subject to scrutiny." (*Taking Offense*, 66 Cal.App. 5th at 725.) The same is true here. All directors and director candidates are subject to the same processes for board selection and the same board composition requirements. They are similarly situated for purposes of AB 979.

Defendant's discrimination argument would, if accepted, turn equal protection law on its head. If discrimination made two groups of otherwise similarly situated individuals not similarly situated for purposes of an equal protection challenge, the analysis would stop in its tracks before a court could ever reach the issue of whether the use of a suspect classification is justified by a compelling governmental interest and narrowly tailored to serve that interest. All California "affirmative action" jurisprudence, including such landmark cases as *Bakke v. Regents of the Univ. of Cal*. (1976) 18 Cal.3d 34 ("*Bakke I*") and *Connerly* would have to be considered wrongly decided, as would U.S. Supreme Court cases such as *Bakke II*, *supra*, *Wygant v. Jackson Bd. of Educ.* (1986) 476 U.S. 267 (minority retention preferences in public school layoffs), *Richmond v. J.A. Croson Co.* (1989) 488 U.S. 469 (minority set-asides in municipal contracting), *Adarand Constructors, Inc. v. Pena* (1995) 515 U.S. 200 (race-based presumptions in federal contracting), *Shaw v. Hunt* (1996) 517 U.S. 899 (race-based congressional redistricting), *Gratz v. Bollinger* (2003) 539 U.S. 244 (bonus points system for minority status in public university admissions), and *Grutter*, *supra* (race-based "plus factors" in public law school admissions). Again, the question is not whether the groups are similar in all regards, but whether they are sufficiently similar such that the state should have to justify its use of a suspect classification to differentiate between them. *Taking Offense*, 66 Cal.App.5th at 724.[3]

[3] Defendant claims Plaintiffs do not allege or contend that the groups of individuals at issue are

VI. DEFENDANT'S "REMEDYING DISCRIMINATION" ARGUMENT FAILS STRICT SCRUTINY.

A. Remedying Societal Discrimination Is Not A Compelling Governmental Interest.

In addition to satisfying the requirements of *Connerly*, *supra*, the state must show purposeful or intentional, unlawful discrimination by the entity employing the suspect classification in order to assert a compelling governmental interest in remedying discrimination. (*Hiatt*, 130 Cal.App.3d at 311; *Coral Constr. v. City and County of San Francisco*, 50 Cal. 4th 315, 337 [*citing Hi-Voltage Wire Works, Inc. v. City of San Jose* (2000) 24 Cal.4th 537, 568].)

Defendant's claim that AB 979 remedies discrimination is an artificial, *post hoc* construct that falls far short of the requirements of equal protection. Defendant not only fails to demonstrate that, in enacting AB 979, the state identified purposeful or intentional discrimination by specific corporations subject to the law, but she relies primarily on statistics. She adds to these statistics generalities about stereotyping and bias and various aspects of the board selection process, including the confidential nature of the process and the fact that seats are typically filled from existing directors' personal networks and by individuals who either are, or have experience as, chief executive officers. None of these assertions, individually or collectively, are sufficiently specific or precise to constitute a compelling governmental interest under the law.[4] With respect to LGBT status, Defendant's expert Dr. M. V. Lee Badgett even admitted that she could find no direct research on such discrimination at the levels of board appointment. (OSOF, ¶ 234.)[5]

In *Connerly*, for example, the Court rejected at least two of the state programs challenged in that

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similarly situated. Not so. *Connerly* makes clear that the state's use of suspect classifications is presumptively invalid, and the burden is on the state to demonstrate extraordinary justification. (92 Cal.App.4th at 36.)

[4] The fact that one of Defendant's experts, Jessica Grounds, admits that "[o]nly a fraction of the 6,225 seats on California's public company boards must be filled by the underrepresented groups to satisfy the requirements of AB 979" undermines any claim that AB 979 addresses a compelling governmental interest. (OSOF, ¶ 235 [citing Grounds Decl., ¶ 47].)

[5] In addition, the basic fact that the legislative findings never mention Native Americans, Native Hawaiians, and Alaskan Natives undercuts, even belies Defendant's assertion that AB 979 seeks to remedy discrimination for at least those three groups. (*Connerly*, 92 Cal.App.4th at 39.) Defendant's statement of facts does not even mention Native Hawaiians or Alaskan Natives, and only mentions Native Americans once in the context of representation of Native Americans on governing boards of insurance companies, without any supporting proof of discrimination. (SOF ¶ 57.)

lawsuit on the basis that the state failed to identify specific instances of past discrimination that would justify the programs. (*Connerly*, 92 Cal.App.4th at 48 [state lottery program] and 52 [bond services contracting].) Likewise in *Hiatt*, the Court rejected the City of Berkeley's claim that its affirmative action program, which required the city's work force approximately equal the percentage of each race and sex in the city's population, on the grounds that there was no evidence of discrimination by the city and therefore no compelling governmental interest in using race and sex in hiring decisions: "The record contains no legislative or administrative declaration as to past discrimination with the City of Berkeley and denotes that the [affirmative action program] was enacted in response to a history of discriminatory practices in the American society as a whole." (*Hiatt*, 130 Cal.App.3d at 318.)

Analogous federal cases reached the same result. In *Richmond v. J.A. Croson Co.* (1989) 488 U.S. 469, the Court held, "[A] generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy." (*Richmond*, 488 U.S. at 498.) It continued, "[A]n amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota." (*Id*. at 499.) Defendant does not even limit her discrimination claim to a particular industry but instead reaches across countless industries to remedy what she claims – without evidence – is a discriminatory process common to all corporations. *Richmond* is fatal to Defendant's argument in this regard. (*Id*. at 505-06; *see also Shaw*, 517 U.S. at 909-10 ["An effort to alleviate the effects of societal discrimination is not a compelling interest."]; *Hiatt*, 130 Cal.App.3d at 313 and 318; *see also Coral Constr.*, 50 Cal.4th at 337 ["The only possibly compelling governmental interest implicated by the facts of this case is the interest in providing a remedy for purposeful discrimination."] [applying Cal. Const., art. 1, § 31].) Because Defendant cannot demonstrate that the state, before enacting AB 979, identified with specificity and precision any purposeful or intentional, unlawful discrimination by corporations in the selection of their directors, AB 979 cannot be said to further the compelling governmental interest of remedying discrimination as a matter of law.

Defendant's attempt to bolster her "remedying discrimination" argument with assertions about stereotypes and bias "infecting" the board selection process also fails. In doing so, she only further confirms that AB 979's quota only purports to remedy claims of generalized societal discrimination, not

the specific and particularized, unlawful discrimination the law demands to establish a compelling governmental interest. Another of Defendant's own experts, Professor Darren Rosenblum, even admits that that the "principal purpose" of the quota "is to counter structural discrimination, whether based on race, sexual orientation, or gender identity" and that "AB 979 is specifically crafted to help eliminate structural discrimination through its mandated inclusion of underrepresented communities." (OSOF, ¶¶ 236-237.)

Defendant misapplies the two cases she cites in support of this effort, *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 250-52 and *Equal Employment Opportunity Comm'n v. Inland Marine Indus.* (9th Cir. 1984) 729 F.2d 1229, 1236. Neither has any bearing on the case at hand. Both involve Title VII claims, not equal protection claims. Critically, both also involved specific instances of stereotyping committed by specific individuals against specific victims. (*Price Waterhouse,* 490 U.S. at 251; *Equal Employment Opportunity Comm'n*, 729 F.2d at 1235.) The Court in *Price Waterhouse* declared, "Remarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision. The plaintiff must show that the employer actually relied on her gender in making its decision." (*Price Waterhouse*, 490 U.S. at 251.) Again, here the record is devoid of any evidence that any specific corporation used racial, ethnicity, or LGBT status or even demonstrated stereotypes or bias in rejecting any particular candidate for a director position.

Defendant also tries to bolster her discrimination argument by highlighting what she ominously refers to as the "secretive" nature of the board selection process. Defendant's own experts acknowledge that confidentiality – not "secretiveness" – is a necessary feature of the process, not a defect to be remedied, and is required by the duty of loyalty directors owe to the corporations they serve. (OSOF, ¶ 238 [citing Rosenblum Decl., ¶ 5, n. 3 and Primus Decl., ¶ 17].)

Finally, Defendant's invocation of Title VII to support her "remedying discrimination" claim also misses its mark. Like Defendant here, the government in *Hiatt* argued that Title VII was relevant to demonstrating a compelling state interest in remedying discrimination. (*Hiatt*, 130 Cal.App.3d at 314-18.) The *Hiatt* court resoundingly rejected this argument in a lengthy analysis. (*Id.*) That conclusion is even more compelling here because the state purportedly seeks to remedy discrimination by private sector corporations while, in *Hiatt*, the defendant only sought to regulate itself. Defendant's reliance on

Title VII is untenable as a matter of law.

B. AB 979's Quota Is Not Narrowly Tailored to Remedy Discrimination.

Defendant also cannot demonstrate that AB 979's quota is narrowly tailored to remedy discrimination. Defendant's argument fails on every factor required by *Connerly*. Rather than showing that AB 979's use of racial, ethnicity, and LGBT status is necessary to remedy specific, purposeful or intentional, unlawful discrimination, Defendant cites to a handful of earlier efforts to try to improve diversity on corporate boards. None of these earlier efforts prove that AB 979's racial, ethnic, and LGBT quota is necessary to remedy alleged discrimination.

Defendant compares apples to oranges when she invokes the alleged lack of success of a 1993 registry of "distinguished women and minorities," diversity initiatives by CalPERS, CalSTERS, and the California Department of Insurance, a 2016 concurrent resolution, and legislator meetings. None of these prior efforts demonstrate the need for AB 979's racial, ethnic, and LGTB quota to remedy discrimination. Defendant suggests that the purpose of these measures – none of which was race, ethnic, or LGTB neutral – was to increase diversity, not remedy discrimination. Again, diversity for diversity's sake is not a compelling governmental interest. These efforts do nothing to demonstrate that AB 979's quota is necessary to remedy discrimination.[6] Defendant's reliance on at least two of the measures also is misleading. Regarding the registry, Defendant's own evidence – a declaration from the registry's head – suggests it did not succeed because the idea of diversity as a means to improve corporate performance "did not resonate with the corporations that we actively sought to persuade to join the Registry." (OSOF, ¶ 239 [citing Loewy Decl., ¶ 12].) "Unlike the current business environment, in which the benefits associated with diversity in the workforce and on corporate boards are widely known and better understood, our message at the time was more novel and within the realm of business strategy." (*Ibid.*) Another measure, the 2016 concurrent resolution, focused on gender, not racial, ethnicity, or LGBT status. (SOF, ¶ 197.) It is particularly inapposite.

There also is a complete absence of evidence demonstrating why, if remedying discrimination in

[6] If anything, Defendant's reliance on these earlier measures shows that the true purpose of AB 979 is to increase diversity for diversity's sake, not to remedy discrimination.

the board selection process was a compelling governmental interest, existing anti-discrimination laws were inadequate or could not be revised or strengthen to address discrimination in that process. Significantly, California law already provides remedies for employment discrimination without resorting to quotas. These include the Fair Employment and Housing Act, Cal. Gov't Code § 12940 *et seq*., among others. The Department of Fair Employment and Housing and the Civil Rights Section of the California Department of Justice are charged with enforcing existing employment discrimination laws. Yet, there is no evidence here that, before enacting AB 979, the state reviewed existing anti-discrimination laws to determine how they were being enforced, whether they could be made more effective, whether they needed to be updated or enhanced, or whether it was necessary to enact new laws to address alleged discrimination on corporate boards. Similarly, the state does not appear to have considered, and Defendant presents no evidence that the state reviewed, existing law enforcement agencies' efforts to enforce anti-discrimination laws against publicly held corporations headquartered in California. Certainly, if these agencies' efforts were deemed deficient, the state could have considered ways to make the agencies more effective. The failure to consider these or any other race, ethnic, and LGBT-neutral alternatives is fatal to any claim that AB 979 is narrowly tailored.

Defendant also fails to cite a single case in which the blunt instrument of a quota was found to be narrowly tailored to further a compelling governmental interest. Only directors' racial, ethnicity, or LGBT status matters to the state. AB 979 addresses no other factors or qualifications and requires no individualized consideration of directors or director candidates. Absent is any "synthesis of factors such as race and sex with several other factors, all of which are to be considered in arriving at the classification." (*Hiatt*, 130 Cal.App.3d at 319.) Racial, ethnicity, or LGBT status is not a "plus factor" to be taken into account along with other individualized factors. (*Grutter*, 539 U.S. at 334.) "To be narrowly tailored, a race-conscious admissions program cannot use a quota system – it cannot 'insulate each category of applicants with certain desired qualifications from competition with all other applicants.'" (*Ibid.* [*quoting Bakke II*, 438 U.S. at 315].) The same is true for AB 979's racial, ethnic, and LGBT quota. AB 979 affords none of the individualized consideration Grutter found necessary to uphold the use of race and ethnicity as a "plus factor" in law school admissions. In fact, because racial, ethnicity and LGBT status are all that matters under AB 979, the law is far more egregious than the

additional point system for minority applicants rejected in *Gratz*. (*Gratz*, 539 U.S. at 271-72 and 275.)

There also is a complete disconnect between Defendant's allegations about remedying discrimination and AB 979's racial, ethnic, and LGBT quota. The quota simply does not remedy discrimination suffered by any specific, identifiable person. It does not require that any person seeking a board seat set aside for an "underrepresented community" member demonstrate that he or she suffered discrimination in the past. Nor has any effort been made to determine whether corporations subject to the quota unlawfully discriminated against or even engaged in stereotyping or exhibited bias toward persons seeking boards seats under the quota. Instead of an individualized procedure for identifying and remedying actual discrimination, AB 979's quota is a convenient way to add "underrepresented community" members to boards, not a necessary measure to remedy discrimination.

Finally, AB 979's quota is not limited in scope or duration. It has no geographic or temporal limits. It applies as equally to anyone anywhere in the world as it does to Californians seeking seats on boards, and it has no end point. There is no mechanism for knowing when the past, alleged discrimination that the quota purports to address will have been remedied sufficiently such that the use of racial, ethnicity, and LGBT status is no longer necessary. In this regard, Defendant errs when she asserts that the absence of an end date is not important. The Court in *Connerly* expressly found that the lack of end dates or other limits on the scope and reach of the challenged state programs only further served to condemn the programs. (*Connerly*, 92 Cal.App.4th at 48, 53.) And, on their face, the reporting requirements cited by Defendant bear no relation to "monitoring" efforts by the legislature or the governor.[7] The reports are directed at the public – the law requires they be published on Defendant's website – most likely as a shaming mechanism for corporations that fail to comply.

VII. DEFENDANT'S VAGUE "BENEFITS OF DIVERSITY" ARGUMENT ALSO FAILS.

A. Defendant Fails to Identify A Clear, Intelligible, Alternative Compelling Governmental Interest.

Defendant's alternative compelling governmental interest argument is largely unintelligible. Although presented as a single interest, it includes "promoting integrity, oversight, and social and fiscal

[7] The state knows how to craft reporting mechanism so that future legislatures and governors can assess the efficacy of a law. *Connerly* cited several such examples. (*Connerly*, 92 Cal.App.4th at 62-63.

responsibility," "remedying discrimination below the board level by diversifying corporate leadership," "protecting shareholders," "fostering more inclusive workplaces" and improved "corporate governance." It also includes avoiding "groupthink," "facilitat[ing] responsiveness to consumers and employee stakeholders," and "promoting the performance, integrity and social responsibility of California's largest corporations for the benefit of the public, including the benefit of California's taxpayers, public pension funds, and workforce." It is not at all clear what Defendant means by any of this. None of this word salad comes anywhere near the specificity and precision required for identifying a compelling governmental interest. (*Connerly*, 92 Cal.App.4th at 36.)

The two, business-related cases Defendant cites in support of her alternative compelling government interest argument, *McGlynn v. State of California* (2018) 21 Cal.App.4th 548 and *West Corp. v. Superior Ct.* (2004) 116 Cal.App.4th 1167, 1180, are easily distinguishable. In *McGlynn*, a group of California judges brought an equal protection challenge to changes in their pension system, the financial condition of which an independent commission had described as "dangerously underfunded," "dire," "unmanageable," a "crisis" that "will take a generation to untangle," and "a harsh reality" that could no longer be ignored. (*McGlynn*, *supra*, at 564-65.) The judges had been elected to the bench when a more generous pension system was in place but did not take office until a new, less generous system became operative. The court declined to apply strict scrutiny to the judges' challenge, but opined that, even if strict scrutiny were to be applied, the new system would not violate equal protection. (*Id*. at 564.) Regardless, the concrete, specific interest identified by the government in shoring up the failing pension system in *McGlynn* bears no resemblance to the generalized, conclusory interests Defendant asserts here.

West Corp. was a personal jurisdiction case. The issue before the court was whether California courts had personal jurisdiction over out-of-state telemarketers sued for fraud in a class action lawsuit. In holding that the exercise of personal jurisdiction over the telemarketers was proper, the court found that California had a "legitimate and compelling interest" in providing a convenient forum to residents injured by telemarketing fraud committed by nonresident corporations. (*West Corp.*, 116 Cal.App.4th at 1180.) The case has absolutely nothing to do with equal protection and is inapposite in every respect.

If anything, Defendant appears to be invoking "diversity for diversity's sake" when she claims

two cases, *Grutter*, *supra*, and *Larsen v. U.S. Navy* (D.D.C. 2007) 486 F.Supp.2d 11, recognize a compelling governmental interest in diversity. *Grutter* arose in the very different context of higher education and involved the use of race and ethnicity as "plus factors" in a broader, individualized consideration of law school applicants. The Court found that the law school's educational mission and the unique First Amendment aspects of its selection of its student body, among other factors, supported a compelling governmental interest in having a diverse student body. (*Id*. at 328-29.) None of these or even similar factors are present in the corporate board context. And, of course, the overarching governmental interest in public university admissions – preparing students for work and citizenship in an "increasingly diverse workforce and society" – also has no counterpart in the corporate board context. (*Id*. at 330-31.)

Larsen does not support Defendant either. The case concerned a legal challenge to a U.S. Navy Chaplin Corps hiring program. It did not "uphold[] [an] affirmative action program for [the] Navy chaplin corps," as Defendant asserts. Rather, the federal appeals court rejected First and Fifth Amendment claims by three disappointed applicants who alleged that the program discriminated against them because of their religious beliefs. In no way does *Larsen* support the claim that California has a compelling governmental interest in diversity on corporate boards.

AB 979 and Defendant's justifications also plainly "embody stereotypes that treat individuals as the product of their race, [ethnicity, sexual orientation, or transgender status] evaluating their thoughts and efforts—their very worth as citizens—according to [] criterion[s] barred to the Government by history and the Constitution." (*Miller v. Johnson* (1995) 515 U.S. 900, 912.) In the end, AB 970 is simply a numerical set-aside that amounts to racial, ethnic, and LGBT balancing. (*See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, (2007) 551 U.S. at 732 ["Racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.'"].)

To the extent Defendant claims that diversity improves corporate performance and corporate governance, which, in turn, benefits the state and its taxpayers and retirees – the "business case" – she still fails to demonstrate a compelling governmental interest. Even Defendant's "business case" lacks the specificity and precision strict scrutiny demands. Defendant provides no evidence that quantifies

any alleged benefit from the "business case," nor does AB 979's legislative findings quantify any such benefit. Defendant also fails to provide any evidence quantifying or otherwise demonstrating the degree to which California corporations with the required number of "diverse" board members outperform California corporations with fewer or no "diverse" members, or even if that is the case. There also is no evidence demonstrating that, if there is such a benefit, the benefit is material. California Department of Finance chief revenue forecaster Jay Chamberlain testifies here that only ten percent of the state's general fund revenue comes from corporate income taxes and that this percentage includes not just corporations headquartered in California, but also corporations doing business in the state. (OSOF, ¶ 240.) Obviously, the tax revenue derived from publicly held corporations headquartered in California – *i.e.*, those corporation subject to AB 979's quota – must be something less than this ten percent. Chamberlain is unable to identify the precise amount. (*Id.* ¶ 241.) And, of course, improved corporate performance and corporate governance does not translate directly into higher tax revenues. Tax credits and other factors affect the amount of taxes a corporation ultimately pays. (*Id*. ¶ 242.) Any benefit, and, therefore, any compelling governmental interest, is illusory.

B. <u>AB 979's Quota Is Not Narrowly Tailored to Defendant's Alternative Governmental Interest</u>.

Given the vague and generalized nature of Defendant's claimed alternative compelling governmental interest, it also is not possible to perform the specific and precise narrow tailoring that strict scrutiny demands. Even if it were, AB 979's use of racial, ethnicity, and LGBT status would not be narrowly tailored to achieve this alternative interest for many of the same reasons it is not narrowly tailored to remedy purported discrimination. A few additional points warrant consideration.

As with "remedying discrimination," the state's use of racial, ethnicity, and LGBT status to achieve this imprecise and ambiguous, alternative interest is unlimited in scope and duration. Defendant makes no effort to address when, how, or even whether the state would ever know it had sufficiently advanced this alternative interest such that AB 979's use of racial, ethnicity, and LGBT status was no longer necessary (although of course Plaintiffs dispute that there is any evidence it is necessary). And by what standards are corporate integrity, oversight, and social and fiscal responsibility to be measured? The same question applies equally to the other aspects of the purported, alternative interest. Obviously,

success cannot be measured by the number of racially, ethnically, or LGBT diverse directors added to boards because that would be diversity for the sake of diversity, which is prohibited. The relevant measure would be the degree to which corporate integrity, oversight, and social and fiscal responsibility improved, how much "groupthink" was avoided, *etc*., not the level of racial, ethnic, or LGBT diversity that was attained. Defendant is silent on the issue.

Even more significant is that any number of non-racial, non-ethnic, or non-LGBT status alternatives are available to achieve the alternative interest Defendant identifies. Corporate integrity, oversight, and social and fiscal responsibility plainly can be furthered and "groupthink" avoided without resorting to racial, ethnic, and LGBT quotas. Discrimination "below the board level" can be and is remedied by race-, ethnic-, and LGBT-neutral anti-discrimination laws. Any number of ways exist to "foster more inclusive workplaces" and "facilitate responsiveness to consumers and employee stakeholders" without mandating the racial, ethnic, and LGBT composition of corporate boards. The same is true for promoting the "performance, integrity, and social responsibility" of California corporations. To articulate these points is to demonstrate their obvious truth. Defendant does not claim otherwise. The most she asserts is that diversity may advance these interests by some measure. Importantly, she does not and cannot claim that the use of a racial, ethnic, and LGBT quota is necessary to advance them, and that no race, ethnic, or LGBT-neutral alternatives exist.

Additionally, the leap from AB 979's racial, ethnic, and LGBT quota to improved corporate performance and corporate governance and benefitting the state, taxpayers, retirees, and the people of California is a long one. Even larger is the claim that the quota is both necessary and limited in scope and duration to achieve such results and benefits. There also are any number of race, ethnic, and LGTB-neutral ways to improve corporate performance and corporate governance without imposing a racial, ethnic, and LGBT quota for boards of directors. Common sense shows that reducing taxes, streamlining regulations, creating a more business friendly environment, and updating infrastructure are obvious ways to improve corporate performance without resorting to racial, ethnic, and LGBT quotas. There also are already any number of existing state and federal laws that promote improved corporate governance. AB 979 expressly references the Sarbanes-Oxley Act of 2002. (2020 Cal. Stats. ch. 316 § 1(r).) Congress certainly did not use racial, ethnic, or LGBT quotas when it passed Sarbanes-Oxley.

(*See generally* 15 U.S.C. §§ 7201 *et seq*.) Defendant also makes no effort to demonstrate that existing laws are inadequate or need to be supplemented with a racial, ethnic, or LGBT quota.

Finally, in the event that this Court reads *Connerly* and the requirements of strict scrutiny differently than Plaintiffs present, Plaintiffs dispute Defendant's underlying assertions that discrimination exists in the board selection process and that mandating the racial, ethnic, and LGBT status of corporate boards improves corporate performance and corporate governance. Defendant relies on various studies and expert opinions to establish the existence of discrimination. Defendant's own expert, Dr. M. V. Lee Badgett, undercuts this assertion, stating that she could find no direct research on discrimination against LGBT people at the levels of board appointment. (OSOF ¶ 234.) Similarly, Defendant relies on various studies and the expert opinions of Professors Cheng, Konrad, and Badgett to establish the "business case." Defendant's own expert, Dr. Alison Konrad, undercuts the "business case," finding inconclusive results from "racioethnic diversity." (OSOF, ¶¶ 243, 246.) While some studies showed positive effects, others showed null effects. (*Ibid.*) Plaintiffs' expert, Dr. Jonathan Klick, demonstrates that the studies and expert opinions on which Defendant relies for both asserting that discrimination exists in the board selection process and that mandating the racial, ethnic, and LGBT status of corporate boards improves corporate performance and corporate governance are not reliable. (OSOF, ¶ 247.) Accordingly, should the Court read *Connerly* and the requirements of strict scrutiny differently, Plaintiffs respectfully submit that a genuine dispute of fact exists with respect to Defendant's assertion that discrimination exists in the board selection process and the "business case" for the quota.

VIII. AB 979 VIOLATES CAL. CONST., ART. I, SECTION 31.

Defendant also misconstrues Plaintiffs' section 31 claim. Article 1, section 31 of the California Constitution states, "The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of . . . public contracting." (Cal. Const., art. I, §31(a).) The provision is a limitation on the Legislature's authority to grant race-, sex-, or ethnicity-based preferences in public contracting, which is exactly what AB 979 does. The law grants preferences to persons having the State's desired racial, sexual, or ethnic characteristics by requiring that a predetermined number of persons having such characteristics be given seats on the boards of publicly held corporations headquartered in California. There can be no genuine

dispute that publicly held corporations headquartered in California are and have been awarded countless public contracts. Therefore, the constitutional provision plainly applies as a limitation on the Legislature's authority to subject these corporations to AB 979's quota.

"Unlike the equal protection clause, section 31 categorically prohibits discrimination and preferential treatment. Its literal language admits no 'compelling state interest' exception[.]" (*Hi-Voltage Wire Works, Inc. v. City of San Jose* (2000) 24 Cal. 4th 537, 567.) Not unlike the public contracting program at issue in *High Voltage Wire Works, Inc.*, which required prime contractors to grant preferential treatment to women/minority-owned subcontractors, AB 979 violates section 31 because it requires public contractors that are publicly held corporations headquartered in California must grant preferential treatment to persons having the State's desired racial, sexual, or ethnic characteristics by setting aside seats for such individuals on their boards.

IX. CONCLUSION.

For the foregoing reasons, Defendant's motion for summary judgment or alternative summary adjudication should be denied.

Respectfully submitted,

Dated: February 28, 2022

JUDICIAL WATCH, INC.

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

Attorneys for Plaintiffs

PROOF OF SERVICE

I, Robert Patrick Sticht, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at Judicial Watch, Inc., 425 Third Street SW, Suite 800, Washington DC 20024.

On February 28, 2022, I served the following document(s):

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT OR ALTERNATIVE SUMMARY ADJUDICATION

on the following persons:

Laura L. Faer
Vilma Palma-Solana
Supervising Deputy Attorneys General
Julia Harumi Mass
Deputy Attorney General
California Department of Justice
455 Golden Gate Avenue, Suite 11000
San Francisco CA 94102
Attorneys for California Secretary of State

[X] BY UNITED STATES MAIL: Following ordinary business practices, I caused true and correct copies of the above document(s) to be sealed in addressed envelope(s) and placed for collection and mailing with the United States Postal Service. I am readily familiar with the firm's practices for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that were placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.

[X] BY ELECTRONIC MAIL: Based on a court order or an agreement of the parties to accept electronic service, I caused the document(s) to be served electronically through One Legal in portable document format ("PDF") Adobe Acrobat.

[X] BY EMAIL: I caused the document(s) to be served electronically to laura.faer@doj.ca.gov, vilma.solana@doj.ca.gov, and julia.mass@doj.ca.gov in PDF format.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed February 28, 2022, at Los Angeles, California.

ROBERT PATRICK STICHT