No. B322276

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION ONE

ROBIN CREST, EARL DE VRIES and JUDY DE VRIES,
Plaintiffs and Respondents,
v.
ALEX PADILLA, In His Official Capacity as Secretary of State of the State of California,
Defendant and Appellant.

RESPONDENTS' ANSWER BRIEF

Los Angeles Superior Court, Case No. 19STCV27561
The Honorable Maureen Duffy-Lewis

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL SECOND **APPELLATE DISTRICT, DIVISION** ONE	COURT OF APPEAL CASE NUMBER: B322276
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: NAME: Robert Patrick Sticht FIRM NAME: Judicial Watch, Inc. STREET ADDRESS: 425 Third St. SW, Suite 800 CITY: Washington STATE: DC ZIP CODE: 20024 TELEPHONE NO.: (202) 646-5172 FAX NO.: E-MAIL ADDRESS: rsticht@judicialwatch.org ATTORNEY FOR (*name*): Plaintiffs and Respondents Robin Crest et al.	SUPERIOR COURT CASE NUMBER: 19STCV27561
APPELLANT/ PETITIONER: Alex Padilla, in his official capacity RESPONDENT/ REAL PARTY IN INTEREST: Robin Crest, Earl De Vries, Judy De Vries	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (*Check one*): [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE	

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1. This form is being submitted on behalf of the following party (*name*): Robin Crest, Earl De Vries, Judy De Vries

2. a. [X] There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. [ ] Interested entities or persons required to be listed under rule 8.208 are as follows:

	Full name of interested entity or person	**Nature of interest (*Explain*):**
(1)		
(2)		
(3)		
(4)		
(5)		

[ ] Continued on attachment 2.

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Date: June 26, 2026

Robert Patrick Sticht
(TYPE OR PRINT NAME)

▶ Robert Patrick Sticht
(SIGNATURE OF APPELLANT OR ATTORNEY)

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INTRODUCTION

After 27 days of trial, 16 witnesses, 174 exhibits, and a trial transcript that spans over 8,500 pages, the Secretary was unable to convince the trial court that SB 826's gender-based quota satisfies one of the toughest standards the law imposes—strict scrutiny. The law has multiple failings, not the least of which is that it was never intended to remedy alleged patterns and practices of discrimination in the board selection processes of some 625 publicly held corporations headquartered in California.

The law was sold to the Legislature by its author, Senator Hannah Beth Jackson and its sponsor, the National Association of Women Business Owners California, as a way to increase women's representation on corporate boards, if not achieve gender parity, and thereby boost the California economy and protect taxpayers, shareholders, and retirees. Because gender parity, economic benefits, and protecting taxpayers, shareholders, and retirees have never been compelling government interests under strict scrutiny, the Secretary needed another justification for the law when it was challenged in court. But because the legislative groundwork for a "remedying discrimination" compelling state interest had not been laid—and never could be laid—that effort failed. It should have come as no surprise then that the Secretary was unable to defend the law's gender-based quota, despite having every opportunity to do so.

On appeal, the Secretary has abandoned all but her "remedying discrimination" theory to justify the law. In advancing that claim, however, she asks this Court to make multiple, extraordinary and unprecedented rulings. She asks the Court to disregard long-standing precedent applying strict scrutiny to gender-based classifications and instead to apply intermediate scrutiny even though the lesser standard has no support in the law. She also asks the Court to ignore the trial court's factual findings—and lay waste to the tremendous judicial resources that went into them—and review the entire record *de novo*. She glosses over her complete failure to show any State participation, directly or passively, in any alleged discrimination SB 826 is purported to remedy and disregards the complete absence of any proper statistical analysis or anecdotal evidence that any publicly held corporation headquartered in California unlawfully discriminated against women in the board selection process. Among other serious shortcomings, she also asks the Court to suspend disbelief that SB 826's quota—even one of the

Secretary's own experts called it that—is in fact a quota. This Court should, respectfully, affirm.

FACTUAL AND PROCEDURAL BACKGROUND

I. Background.

By several measures, the number of women on the boards of California's publicly held corporations was increasing before Senate Bill 826's ("SB 826") passage on September 30, 2018. (Cal. Sen. Bill No. 826 (2017-2018 Reg. Sess.); Clerk's Transcript ["CT"]-4-1048.)[1] From 2012 to June 30, 2018, that number increased by 50%. (Reporter's Transcript ["TR"]-10-4625:26-4626:11.)[2] In 2017, 99 out of the 309 vacant board seats in California – approximately 32% – were filled by women. (TR-8-3367:20-3369:23; Appellant's Exhibits ["AE"]-3-000464.)[3] The number of female directors on California Russell 3000 company boards increased from 15.5% in 2017 to 17.2% in 2018, an

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[1] Clerk's Transcript citations follow this format: CT-volume-page:line.

[2] Reporter's Transcript citations this format: TR-volume-page:line.

[3] Appellant's Exhibits citations follow this format: AE-volume-page.

increase of approximately 11%. (TR-6-2207:6-2207:21; AE-13-004501.) The number of California Russell 3000 companies with no female directors on their boards decreased from 26.1% in 2017 to 20% in 2018, a change of 23%. (TR-6-2203:18-2205:24; AE-13-004501.)

From 2018 to 2021, states without legislation like SB 826 experienced growth in the number of female directors. (TR-8-3352:26-3353:24; TR-8-3381:6; AE-2-377; AE-14-4662; AE-14-4670.) Growth in some states was near, if not equal to or greater than, the growth in California, suggesting a natural progression over time. (AE-14-4662 [2018-2019: Arizona, Massachusetts, Nevada, Tennessee]; TR-8-3352:26-3354:4; AE-14-4670 [2019-2020: Indiana, Texas]; AE-2-377 [2020-2021: Utah, Washington]; TR-8-3378:6-3381:64 [noting increases in Nevada, Tennessee, and Arizona].) By 2020, boards of Russell 3000 companies in 23 of the 25 states analyzed were at least 20% female, up from 17 states in 2019. (AE-14-4670; TR-8-3401:13-3402:8.) Ironically, female representation on California boards increased slightly more between 2018 and 2019, prior to SB 826's implementation, than between 2019 and 2020, after the law took effect. (AE-14-004662; AE-14-004670; TR-8-3354:5-13.)

Service on the board of a publicly held company typically is the culmination of decades of professional achievement. Qualifying as a potential board member takes a great deal of senior-level business experience. (TR-7-2775:23-28.) First-time directors of S&P 1500 companies are, on average, 58 years old. (TR-11-5218:2-23.) It is not uncommon for directors to join boards only after retiring from senior corporate roles. (TR-14-7238:16-22.) Many directors also possess advanced degrees, including MBAs, law degrees, and doctorates in science, technology, and healthcare fields. (TR-11-5216:1-5218:1.) Only recently has gender parity been reached in the classes of top MBA schools. (*Ibid.*) Parity in science, technology, and healthcare doctorates remains in the future. (*Ibid.*)

Corporate board seats rarely become available, and openings are few. (TR-8-3371:15-17; TR-7-3082:10-18.) They are hotly coveted positions, and far more people want to be on boards than there are board seats. (TR-14-7238:28-7239:1, 7280:7-8.) There is little turnover. (TR-14-7250:26-7251:9.; TR-9-3700:2-7 ["some of these folks don't leave."].)

Corporate board seats are not filled through a formal application process, nor are they typically posted. (TR-7-2780:24-

25.) Prospective directors are identified primarily through personal and professional networks because corporations "don't want to find strangers for their boards." (TR-7-3076:18-24; TR-14-7249:28-7250:2.) The selection process generally begins with a nominating committee recommending a candidate to the board, after which the board votes on whether to nominate the candidate for election by shareholders. (TR-14-7254:12-7256:8.) Confidentiality is a necessary feature of the process. (TR-7-2780:25-26; TR-7-3047:5-27; TR-8-3329:12-23.) Shareholders ultimately determine whether a nominated candidate will serve on the board. (TR-14-7254:12-7256:8.)

II. SB 826's Enactment.

In 2012, Betsy Berkhemer-Credaire, then-President of the National Association of Women Business Owners California ("NAWBO-CA"), approached Senator Hannah Beth Jackson, President of the Women's Caucus, about legislative action requiring publicly held corporations headquartered in California to have a "critical mass" of women on their boards. (TR-7-2782:8-2785:8; TR-8-3364:3-18.) Berkhemer-Credaire defined a "critical mass" as having at least three women on a board because "as long as we had three women on every board . . . at least the women would have a voice in that group." (TR-8-3364:16-3365:3.) According to Berkhemer-Credaire, who also is the CEO of an executive search firm that specializes in placing women on corporate boards, research showed that, when companies have more women on their boards, "the companies are more profitable, more productive, and the work force is better engaged." (TR-7-2783:12-2784:5.) Berkhemer-Credaire described this as the "business reason" for having women on boards. (*Ibid.*)

Senator Jackson advised Berkhemer-Credaire it was necessary to have the Legislature pass a resolution encouraging corporations to add women to their boards before legislation could be enacted compelling them to do so. (TR-7-2784:2-18; TR-7-3376:24-3377:11.) Senator Jackson then authored Senate Concurrent Resolution 62 ("SCR 62"), which the Legislature passed in 2013. (Sen. Conc. Res. No. 62 (2013-2014 Reg. Sess.); AE-11-3900-3902; TR-7-2784:20-21.) According to Berkhemer-Credaire, the resolution had to last three years. (TR-7-2784:6-7; TR-7-3376:24-3377:11.) Accordingly, SCR 62 urged all publicly held corporations in California to have one to three women directors, depending on board size, by December 2016. (AE-11-3900-3902.)

In 2017, Berkhemer-Credaire and Senator Jackson began working on follow-up legislation to SCR 62, as previously planned, to compel corporations to do what SCR 62 only encouraged. (TR-7-2782:8-19; TR-8-3364:10-19.) Senator Jackson subsequently authored and introduced SB 826, with NAWBO-CA as the bill's sponsor, in 2018. (AE-3-714, 716; CT-4-1041-1042.) Like SCR 62, the bill specified a required number of women based on board size, but its ultimate goal was gender parity and gender equity. (SB 826 § 1(a); TR-8-3374:3-25; TR-12-5778:23-25; TR-15-7566:17-67:2; TR-15-7624:5-6; TR-15-7819:3-12.) "Again, the goal of this legislation was to achieve gender equity," Senator Jackson stated. (TR-15-7624:5-6.)

SB 826 was referred to several Senate committees for consideration. The Committee on Banking and Financial Institutions, Committee on Appropriations, and Rules Committee all prepared analyses of the bill. (AE-3-713-21; AE-3-741-43; AE-3-744-45; AE-3-755-62.) None referenced discrimination or remedying discrimination as the purpose of the bill. (*Ibid.*) The Banking and Financial Institutions and Rules committee analyses described the bill as being "intended to promote equitable and diverse gender representation on every corporate board." (AE-3-716; AE-3-759.)

SB 826 also was considered by the Senate Committee on the Judiciary. (AE-3-722-740.) According to that committee's analysis: "Women's high-level involvement in corporations clearly provides a benefit to corporations and to the economic strength and vitality of our state. . . SB 826 ensures a greater role for women in boardrooms and would make California the first in the nation to require the proactive change needed to fully realize gender equality throughout society." (AE-3-731-32.) The analysis also noted that the bill's findings and declaration did not explicitly draw a link between underrepresentation of women on boards and discrimination and advised Senator Jackson to add specific instances of past or present discrimination to try to satisfy strict scrutiny. (AE-3-734). Senator Jackson rejected including such examples in the bill. (AE-3-733-34.)

On the eve of the Senate floor vote on May 31, 2018, the Office of the Senate Floor issued a further analysis of the bill. (AE-3-755-762.) This additional analysis did not reference discrimination or remedying discrimination but instead described the bill as being "intended to promote equitable and diverse gender representation on every corporate board." (AE-3-759.) During the Senate pre-vote debate on May 31, 2018, no senator referenced "discrimination" or "remedying discrimination" in addressing the bill. (AE-3-580-603.)

SB 826 passed the Senate and advanced to the Assembly, where it was considered by the Committee on Banking and Finance, Committee on Judiciary, and Committee on Appropriations. None of these committees' analyses identified the purpose of the bill as "discrimination" or "remedying discrimination." (AE-3-768-789.) Both the Committee on Banking and Finance and Committee on Judiciary analyses quoted Senator Jackson describing the purpose of the bill as follows: "Research clearly shows that boards with women members perform better in the marketplace. By having such low participation rates for women in California's corporate leadership ranks, we effectively inhibit our own economic performance as a state. Senate Bill 826 takes the first step towards closing this gender gap." (AE-3-770; AE-3-783.) The Committee on Appropriations identified the purpose of the bill as "tak[ing] a first step towards closing the gender gap on corporate boards and help improve California's economic performance." (AE-3-788.).

As in the Senate, no member raised "discrimination" or "remedying discrimination" during the Assembly vote. (AE-19-5355-5361.) Assembly Member Gonzalez Fletcher, the floor manager who presented SB 826 to the Assembly, stated that "SB 826's goal was to achieve gender equity or parity" and that the bill would "provide greater gender diversity" and "take a big step towards closing this gender gap." (AE-19-5355-5361.) She never described the bill's goal as "remedying discrimination." (*Ibid*.)

SB 826 passed the Assembly with minor amendments and returned to the Senate. (AE-19-5253). Further analyses by the Senate Rules Committee and the Office of Senate Floor did not reference "discrimination" or "remedying discrimination." (AE-3-746-754; AE-3-763-767.) The additional Senate Floor analysis quoted Senator Jackson as describing the bill's purpose as putting more women on corporate boards to increase economic performance, not to remedy discrimination. (AE-3-765.) Ironically, the only reference to discrimination in the analysis found that the bill would be hard to defend as an anti-discrimination measure: "The use of a quota-like system, as proposed by this bill, to remedy past discrimination and differences in opportunities may be difficult to defend." (AE-3-767.)

The Senate held its final vote on SB 826 on August 30, 2018. (AE-19-5253.) Again, the floor debate before the vote did not reference "discrimination" or "remedying discrimination." (AE-3-675-692.)

After passing the Senate, SB 826 was presented to Governor Jerry Brown on September 10, 2018. (AE-19-5253.) On September 14, 2018, Senator Jackson sent a letter to Governor Brown requesting that he sign the bill. (AE-11-3835-3841.) While Senator Jackon's letter referenced discrimination, it focused more broadly on the bill's purported benefits to corporate performance and corporate governance. (*Ibid.*) The letter concluded by asserting that SB 826 "encourages greater corporate profitability and fairness, and is an idea whose time has come." (*Ibid.*)

The Governor signed SB 826 on September 30, 2018. (AE-11-3834.) Nothing in his one-page signing message identified discrimination or remedying discrimination as the purpose of the legislation. (*Ibid.*) The Governor noted that "serious legal concerns" had been raised about the statute and that he did not "minimize the potential flaws that indeed may prove fatal to its ultimate implementation." (*Ibid.*)

III. SB 826's Text and Purpose.

SB 826 required all publicly held corporations headquartered in California to have at least one female director on their boards by December 31, 2019. (SB 826 § 2(a).) It also required these same corporations to comply with the following by December 31, 2021 calendar year:

- boards of six or more directors must include at least three female directors;
- boards of five directors must include at least two female directors; and
- boards of four or fewer members must include at least one female director.

(*Id.* at § 2(b)(1-3).)

SB 826 authorizes the Secretary to adopt regulations implementing the law's requirements and imposing fines for violations. (SB 826 § 2(e)(1)(A-C).) The Secretary may impose a fine of $100,000 for a first violation. (*Id.* at § 2(e)(1)(B).) The Secretary may impose a fine of $300,000 for a second or subsequent violations. (*Id.* at § 2(e)(1)(C).)

SB 826 also directed the Secretary to prepare and publish a report, no later than July 1, 2019, documenting the number of publicly held, domestic and foreign corporations with principal executive offices in California that have at least one female director on their boards. (SB 826 § 2(c).) It requires the Secretary to prepare and publish annual reports, starting on March 1, 2020, documenting the number of corporations in compliance with SB 826, the number of corporations that moved their headquarters out of California, and the number of corporations that are no longer publicly traded. (*Id.* at § 2(d)(1-3).)

SB 826 begins with findings that describe the law's purpose. The first finding states: "More women directors serving on boards of directors of publicly held corporations will boost the California economy, improve opportunities for women in the workplace, and protect California taxpayers, shareholders, and retirees, including retired California state employees and teachers whose pensions are managed by CalPERS and CalSTRS." (SB 826 § 1(a).) It also expressly references parity: "[S]tudies predict that it will take 40 or 50 years to achieve gender parity, if something is not done proactively." (*Ibid.*) The second finding notes that the Legislature passed Senate Concurrent Resolution 62 in 2013. (*Id.* at § 1(b).) The third identifies studies purportedly correlating women on corporate boards and improvements in corporate performance. (*Id.* at § 1(c), (g).) The fourth notes that several European countries have instituted gender quotas to address "the lack of gender diversity" on corporate boards. (*Id.* at § 1(d).) The fifth identifies various percentages of women on corporate boards both nationally and in California. (*Id.* at § 1(e).) The sixth expressly references parity a second time: "If measures are not taken to proactively increase the number of women serving on corporate boards, studies have shown that it will take decades, as many as 40 or 50 years, to achieve gender parity among directors." (*Id.* at § 1(f).) The seventh and final finding sets forth Berkhemer-Credaire's "critical mass" theory. (*Id.* at § 1(g).) None of SB 826's findings reference "discrimination" or identify "remedying discrimination." (SB 826 § 1(a).)

IV. The Taxpayers' Lawsuit.

On September 30, 2019, Taxpayers Robin Crest, Judy De Vries, and Earl De Vries ("Taxpayers") sued the California Secretary of State alleging SB 826 violates Article I, sections 7 and 31 of the California Constitution. (CT-1-34-38.) The Taxpayers' claims were brought pursuant to both Code of Civil Procedure Section 526a and California's common law standing doctrine. (*Ibid.* at 34-35.)

The Secretary demurred to the Taxpayers' complaint, but the trial court overruled the demurrer. (CT-1-27-28.) After substantial discovery, both parties moved for summary judgment. (CT-1-61.) The trial court denied both motions, finding "triable issues of material fact." (*Id.* at 63.)

A 27-day bench trial followed. Sixteen witnesses testified and 174 exhibits were introduced into evidence. The Taxpayers called four lay witnesses—themselves and Betsy Bogart, chief of the Secretary's Business Programs Division—and one expert witness, Dr. Jonathan Klick, a Ph.D. economist and lawyer and professor of law at the University of Pennsylvania School of Law.[4] The Taxpayers' testimony established that they had paid taxes to the State in the year before they filed their lawsuit or were assessed and liable for such taxes. (CT-4-1029.) Bogart's testimony established that the Secretary had spent or was

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[4] Dr. Klick testified in rebuttal.

planning to spend taxpayer funds implementing SB 826. (CT-4-1030-1031; TR-4-1104:19-22.) The Taxpayers also demonstrated that SB 826 made use of a suspect classification—gender—and that men and women are similarly situated for purposes of the statute. (CT-4-1031-1033.)

The Secretary called eleven witnesses, including Berkhemer-Credaire and Senator Jackson. She called three witnesses—Dr. Allison Konrad, Cindy Schipani, and Jessica Grounds—as experts. She also called Susanne Meline, the only witness who ever served on a board.

The trial court issued its verdict on May 13, 2022, finding that SB 826 violated Article 1, Section 7 of the California Constitution.[5] (CT-4-1049:14-16.) It found that SB 826's goal was gender parity and putting more women on boards, not remedying discrimination, boosting California's economy, improving opportunities for women in the workplace, or protecting California's taxpayers, public employees, pensions, and retirees, as the Secretary had claimed. (CT-4-1035:4-23; CT-4-1041:3-5.) It rejected all three of the Secretary's compelling

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[5] The court did not reach the Taxpayers' claim that SB 826 violated Article 1, Section 31. (CT-4-1049:27-28.)

state interest claims. (CT-4-1033:22-1034:3; CT-4-1035:24-1036:16.) With respect to the Secretary's "remedying discrimination" claim, the trial court found that, not only was remedying discrimination not a purpose of the statute, but the Secretary failed to prove publicly held California corporations discriminated against women in the board selection process. (CT-1041:3-5; CT-4-1043:15-1048:12; CT-4-1049:3-11.) It also found the Secretary failed to prove that remedial action was necessary, and that SB 826's gender-based quota was narrowly tailored. (CT-4-1048:7-12.) With regard to the latter, the trial court found that the Secretary failed to show the Legislature considered gender-neutral alternatives, that SB 826's gender-based quota was limited in scope and duration, or that law was actually intended to be remedial. (CT-4-1048:13-1049:14.)

Judgment and a permanent injunction enjoining the Secretary from spending taxpayer funds or taxpayer resources on SB 826 was entered on July 25, 2022. (CT-5-1232-1236.) This appeal followed.

STANDARD OF REVIEW

A judgment of a lower court is presumed to be correct on appeal, and "all intendments and presumptions are indulged in favor of its correctness." (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.)

The Taxpayers do not dispute that questions of law are reviewed *de novo*. But the trial court also made a great many factual findings—including findings that remedying discrimination was not an actual purpose of SB 826, that the evidence did not identify specific, unlawful discrimination in the board selection process, that differences in the numbers of men and women on corporate boards result from reasons other than discrimination, and that there has been a natural progression towards adding more women to corporate boards over time. These and the trial court's other factual findings comprise no less than the entire factual predicate for SB 826's gender-based quota. They are essential for but distinctly different from the legal issues raised in the case and are reviewed under a substantial evidence standard. (*Board of Administration v. Wilson* (1997) 52 Cal.App.4th 1109, 1127-28.)

In applying the substantial evidence standard, the "power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, to support the trial court's findings." (*Estate of*

Leslie (1984) 37 Cal.3d 186, 201 [internal quotations and citations omitted].) An appellate court cannot reweigh the evidence even if it believes the evidence to be in an appellant's favor. (*People v. Poe* (1999) 74 Cal.App.4th 826, 830-831.) Conflicts are resolved in favor of the judgment. (*Wilson*, *supra*, 52 Cal.App.4th at p. 1127.)

Moreover, when the trier of fact determines that a party has not satisfied its burden—as is the case here—that party is not entitled to a "do-over" on appeal, where the appellate court looks at all the evidence and arguments anew and substitutes its judgment for that of the fact finder below. (*People v. Field* (2024) 106 Cal.App.5th 132, 157-58.) Rather, the question for the appellate court is whether the evidence compels a finding for the appellant as a matter of law. (*Ibid.*) It is an "onerous standard" and one that is "almost impossible" for the losing party to meet. (*Id.* at pp. 158-59.) Unless the trier of fact made specific factual findings in favor of the losing party, it is presumed the trier of fact concluded that the losing party's evidence lacked sufficient weight and credibility to carry the burden of proof. (*Ibid.*) Here, the trial court made no specific factual findings in the Secretary's favor, and, thus, the Secretary faces this "almost impossible" task on appeal.

The Secretary's assertion that the constitutionality of a statute is a question of law reviewed *de novo* is incorrect. Her argument ignores the distinction between legal issues, factual issues, and mixed issues of fact and law. It also ignores the fact that the trial court denied summary judgment because it found disputed issues of fact and held a lengthy trial precisely to resolve those disputes.

The Secretary's case law also is inapposite. *State of Ohio v. Barron* (1997) 52 Cal.App.4th 62 concerned a pure issue of law. *Redevelopment Agency of the City of Long Beach v. County of Los Angeles* (1999) 75 Cal.App.4th 68 presented questions of constitutional and statutory construction, which also are pure questions of law. *People v. McKee* (2012) 207 Cal.App.4th 1325, 1338-39 establishes no *per se* rule that all aspects of all equal protection cases are subject to *de novo* review. Indeed, the trial court in *McKee* "did not decide any disputed historical facts," but only determined whether the challenged law's disparate treatment of the class of persons at issue was supported by substantial evidence. (*Ibid.*)

Nor is there a "catch all" standard that cases involving "significant public policy questions" be reviewed *de novo*. Again, the case cited by the Secretary, *General Mills, Inc. v. Franchise Tax Bd.* (2012) 208 Cal.App.4th 1290, stands for no such proposition.[6] If anything, *General Mills* stands for the proposition that findings of historical and quantitative fact are reviewed under a substantial evidence standard and conclusions of law under a *de novo* standard. (*Id.* at p. 1303; accord *Sedlock v. Baird* (2015) 235 Cal.App.4th 874, 884.)

ARGUMENT

I. The Taxpayers Have Standing.

The Taxpayers' complaint expressly invoked taxpayer standing under both Code of Civil Procedure section 526a and the common law. (CT-1-34-35.) The parties litigated and tried the case as if the factual predicates for the two theories were interchangeable—which they are—and the trial court's factual findings support standing under both theories. The trial court

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[6] The Court's statement in *General Mills* about public policy questions and *de novo* review plainly relates to the inherently legal nature of policy questions – which require the exercise of judgment about legal principles and their underlying values – not to the resolution of contested issues of fact. (See, e.g., *People v. Louis* (1986) 42 Cal.3d 969, 987.)

found the Taxpayers paid, or were liable for, state taxes in the year before they filed suit, and that the Secretary expended taxpayer funds to implement SB 826. (CT-4-1028:25-1031:9.) Those findings satisfy common law taxpayer standing no less than section 526a standing, as that statute was construed at the time of the verdict. Because the factual predicates for the two theories are not meaningfully different, the trial court had no occasion to analyze them separately. This Court can affirm the Taxpayers' standing under the common law based on those same factual findings, which the Secretary has not challenged on appeal. [7]

Common law taxpayer standing is older than, and independent of, section 526a. California courts have recognized common law taxpayer standing to sue state officials since at least 1894. (*Livermore v. Waite* (1894) 102 Cal. 113, 115, 124; *Wheeler v. Herbert* (1907) 152 Cal. 224, 227-28.) *Taking Offense v. State of*

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[7] To the extent the Secretary contends the Taxpayers failed to preserve their common law standing theory, she forfeited that argument by not raising it in her opening brief. (*Telish v. State Personnel Bd.* (2015) 234 Cal.App.4th 1479, 1487, fn .4.) She also forfeited any challenge to the existing common law taxpayer standing doctrine by failing to raise that challenge in her opening brief. (*Ibid.*)

California (2025) 18 Cal.5th 891 did not disturb this long-standing precedent. *Taking Offense* only held that section 526a does not confer statutory standing on taxpayers to sue state officials. (*Taking Offense*, *supra*, at pp. 905, 911.) It expressly declined to address common law taxpayer standing or whether common law standing permits taxpayers to sue state officials. (*Id.* at pp. 911, 920.) If anything, *Taking Offense* reaffirmed the common law doctrine by highlighting California's longstanding precedent recognizing common law taxpayer standing. (*Id.* at pp. 911-17.)

Taking Offense also did not disturb the well-established precedent that a taxpayer may challenge expenditures implementing allegedly *ultra vires* (i.e., unconstitutional) laws under the common law. (*California State Employees' Assn. v. Williams* (1970) 7 Cal.App.3d 390, 395; *California DUI Lawyers Assn. v. Department of Motor Vehicles* (2018) 20 Cal.App.5th 1247, 1264.) In fact, *Taking Offense* recognized that common law taxpayer lawsuits encompass challenges to a wide variety of conduct, including the implementation of unconstitutional statutes. (*Taking Offense*, *supra*, 18 Cal.5th at p. 913, citing *California State Employees' Assn.*, *supra*, 7 Cal.App.3d at p. 395.)

Finally, any doubt about the Taxpayers' standing should be resolved in favor of reaching the merits. (*Taking Offense*, *supra*, 18 Cal.5th at p. 920.) Doing so is especially warranted in this constitutionally significant case, which affects all California taxpayers and all publicly held corporations headquartered in the State and has already required the expenditure of tremendous judicial resources. (See *California Water & Telephone Co. v. County of Los Angeles* (1967) 253 Cal.App.2d 16, 26 ["Were there any doubt about the justiciability of the controversy, that doubt would be resolved in favor of present adjudication, because the public is interested in the settlement of the dispute."]; see also *Dix v. Superior Court* (1991) 53 Cal.3d 442, 454; *Memorial Hospitals Assn. v. Randol* (1995) 38 Cal.App.4th 1300, 1305, fn. 2; *County of Alameda v. State Bd. of Control* (1993) 14 Cal.App.4th 1096, 1106, fn. 7.)

II. SB 826 Violates the California Equal Protection Clause.

A. Strict scrutiny, not intermediate scrutiny, applies.

The California Supreme Court determined fifty-five years ago that gender-based classifications are subject to strict scrutiny. (*Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1; Cal. Const., art. I, § 7.) This holding has been affirmed repeatedly over the years. (See, e.g., *People v. Contreras* (2018) 4 Cal.5th 349, 361; *People v. Chatman* (2018) 4 Cal.5th 277, 288; *Catholic Charities of Sacramento, Inc. v. Superior Ct.* (2004) 32 Cal.4th 527, 564; *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 37; *Arp v. Workers' Comp. Appeals Bd.* (1977) 19 Cal.3d 395, 400.)

The Secretary argues for the first time in this nearly seven-year-old case that intermediate scrutiny, not strict scrutiny, applies. But California law leaves no doubt that strict scrutiny applies to gender-based classifications. It is too late in the game for the Secretary to argue otherwise.

Under "elementary and fundamental principles," the Secretary cannot so completely revise her theory of the case on appeal. (*Anderson v. Derrick* (1934) 220 Cal. 770, 777; see also *Midway Venture LLC v. County of San Diego* (2021) 60 Cal.App.5th 58, 87; *Panopulos v. Maderis* (1956) 47 Cal.2d 337, 340-41.) This rule is particularly significant because the Secretary's new standard involves "controverted questions of fact." (*Panopulos*, *supra*, 47 Cal.2d at pp. 340-41.) A pure question of law may not be raised for the first time on appeal if it requires the appellate court to reconsider a factual dispute that the trial court never faced. (*People v. Williams* (2008) 43 Cal.4th 584, 625.)

The Secretary's intermediate scrutiny standard effectively seeks a new trial. She asks this Court to make factual findings based on a theory of intermediate scrutiny not presented to the trial court. Making this new argument on appeal not only wastes the tremendous time and effort expended by the trial court but also is "manifestly unjust" to the Taxpayers, who had no notice that the Secretary would argue intermediate scrutiny at a later date and therefore no opportunity to put on evidence at trial applicable to this new standard. (*Richmond v. Dart Indus., Inc.* (1987) 196 Cal.App.3d 869, 874.) The Secretary should not be allowed to retry her case on appeal when she had every opportunity to argue for a lesser standard in the trial court. (*Marsango v. Auto. Club of So. Cal.* (1969) 1 Cal.App.3d 688, 695.)

The Secretary's reliance on *ReadyLink Healthcare, Inc. v. Jones* (2012) 210 Cal.App.4th 1166 is misplaced. *ReadyLink* holds only that, in appeals from administrative decisions presenting purely legal issues, a party may raise a new legal issue for the first time on appeal. It does not permit a party to fundamentally change its legal theory after losing in the trial court on contested facts. (*Id.* at pp. 1174-75.)

The Court also should reject intermediate scrutiny on the merits. The Secretary fails to specify whether intermediate scrutiny applies because SB 826 uses a gender-based classification, because it is alleged to remedy discrimination, or some combination of both. While the Taxpayers dispute as a factual matter that SB 826 is remedial—the trial court found it was not (CT-4-1041:3-5)—California law makes no distinction between remedial and non-remedial uses of suspect classifications. (See, e.g., *Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16, 31, fn. 1 & 35-38; *Hiatt v. City of Berkeley* (1982) 130 Cal.App.3d 298, 320-21.)

The California Supreme Court also has expressly rejected a lesser standard for so-called "positive" or "beneficial" discrimination. (*Bakke v. Regents of Univ. of Cal.* (1976) 18 Cal.3d 34, 50, overturned on other grounds *Regents of Univ. of Cal. v. Bakke* (1978) 438 U.S. 265.) The federal courts also have repeatedly rejected such a standard, as the Secretary acknowledges. (AOB at 41-42.)

Finally, the Secretary does not identify what she believes are the elements of this new standard, the relevant facts, or how those facts should be applied. She apparently assumes the Court will figure it out for her. Because the Secretary's argument fails in this most basic regard, the Court should treat the issue as waived. (See *People v. Stanley* (1995) 10 Cal.4th 764, 793.)

B. The Secretary bore the burden of satisfying strict scrutiny.

"A person may not be . . . denied equal protection of the laws." (Cal. Const., art. I, § 7(a).) To succeed on an Equal Protection Clause challenge, a plaintiff must show that the state has adopted a classification that affects two or more "similarly situated" groups in an unequal manner. (*Woods v. Horton* (2008) 167 Cal.App.4th 658, 670.) The court does not ask whether persons in the groups are similarly situated for all purposes, but only whether they are similarly situated for purposes of the law in question. (*Id.*, *supra*, at p. 670.) When the plaintiff makes this showing and the classification at issue is a suspect classification, the law is presumptively unconstitutional. (*Connerly*, *supra*, 92 Cal.App.4th at pp. 36, 43.) The burden of proof then shifts to the government to try to prove that the law passes constitutional muster. (*Ibid.*)

The trial court found men and women are similarly situated for purposes of SB 826 and that the statute makes use of a suspect classification—gender. (CT-4-1031:16-1033:11.) SB 826 was therefore "presumptively unconstitutional," and the burden shifted to the Secretary to satisfy strict scrutiny. (CT-4-1033:11-13.) The Secretary does not challenge these findings or the burden shifting.

C. The trial court correctly found the Secretary failed to prove a compelling state interest in remedying discrimination.

The trial court correctly rejected the Secretary's compelling state interest arguments on factual grounds. It found that: (1) the purpose of SB 826 was to achieve gender equity or parity in board seats and to get more women on boards, not to remedy discrimination; (2) even if remedying discrimination had been the actual purpose of SB 826, the Secretary failed to show the State was directly or passively involved in any unlawful discrimination; and (3) the Secretary also failed to identify any specific, unlawful discrimination to be remedied. Any one of these failures is fatal.

1. Remedying discrimination was not an actual purpose of the Legislature.

To be a compelling state interest, the Secretary had to show that a claimed compelling state interest was the actual purpose of the Legislature, not a post hoc reimaging of that purpose. (*Connerly*, *supra*, 92 Cal.App.4th at pp. 38-39.)

The trial court specifically rejected the Secretary's claim that the purpose of SB 826 was remedying discrimination and found as a factual matter that the actual purpose was "gender equity or parity," "gender balancing," and getting "more women on boards." (CT-4-1035:4-23, 1041:3-24.) This finding was supported by substantial evidence, including the text of SB 826 itself, Senate and Assembly floor debates and committee analyses, other legislative materials, and the trial testimony of two key witnesses—Berkhemer-Credaire, who headed the organization that sponsored SB 826, and Senator Jackson, the author of the bill. The trial court had the opportunity to observe these key witnesses firsthand, assess their testimony, and decide what weight to give it as compared to the text of the statue and the documentary evidence. The Secretary provides no convincing reason why the trial court's assessment should be disturbed. The trial court's finding also is common sense because the statute's gender-based quota does nothing to provide relief to purported victims of discrimination but instead only commands that more women be placed on boards.

The Secretary cannot dispute the trial court's finding that the "text of SB 826 does not reference discrimination or remedying discrimination." (CT-4-1041:25-26.) The Secretary also cannot and does not challenge the trial court's finding that the statute expressly references gender parity and the purported need to proactively put more women on corporate boards.[8] (CT-4-1041:3-5, citing SB 826 §§1(a), (f).)

With respect to Senate and Assembly floors debates, the trial court considered the legislators' statements before all three floor votes: the Senate floor vote on May 31, 2018 (AE-3-580-603); the Assembly floor vote on August 29, 2018 (AE-19-5355-5361); and the Senate floor vote on August 30, 2018 (AE-3-675-692; CT-4-1041:25-42:3.) The trial court noted that each "does not reference discrimination or remedying discrimination." (CT-

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[8] At least one other court agrees that SB 826's purpose is gender parity. *Meland v. Weber* (9th Cir. 2021) 2 F.4th 838, 846.)

4-1042:1-3.) The Secretary cannot and does not challenge this finding either.

The trial court next weighed the analyses of the various legislative committees that considered the bill. (CT-4-1042:3-13.) It found that neither the Senate Judiciary Committee analysis (AE-3-722-740) nor the two Senate Rules Committee analyses (AE-3-746-754; AE-3-755-762) referenced discrimination or remedying discrimination. (*Ibid.*) The trial court also found a Senate analysis (AE-3-763-767) only referenced remedying discrimination in predicting, ironically, that the law would not survive a constitutional challenge: "The use of a quota-like system, as proposed by this bill, to remedy past discrimination and difference in opportunities may be difficult to defend." (*Ibid.*) The Assembly Committee on Banking and Finance analysis (AE-3-768-774), the trial court found, also does not reference discrimination or remedying discrimination in its description of the stated purpose of SB 826. (*Ibid.*)

In addition, the trial court considered a Senate Committee on Judiciary Background Information Request Senator Jackson completed when she introduced SB 826. (CT-4-1042:13-16, citing AE-8-2508-09.) It found Senator Jackson did not reference discrimination in response to the question, "'What is the problem or deficiency in current law which this bill seeks to remedy?" (*Ibid.*) Instead, she described the bill as promoting "equitable and diverse gender representation" on boards and claimed the bill would boost California's economy, improve opportunities for women in the workplace, and protect the investments of California taxpayers, shareholders, and retirees. (AE-8-2509-10.)

The trial court also considered the witnesses' live trial testimony, including that of Senator Jackson and Berkhemer-Credaire. (CT-4-1041:3-24; see also CT-4-1035:4-23.) It weighed these witnesses' testimony and the voluminous documentary evidence the parties presented, then made a factual finding that "the evidence offered by [the Secretary] tended to support gender parity and proactively putting more women on boards demonstrated that the Legislature's actual purpose was gender-balancing, not remedying discrimination." (CT-4-1041:3-5.) Among other evidence, it cited the overwhelming number of instances in which Senator Jackson testified about the need for, and proactive steps required to achieve, gender parity and gender equity.[9] (CT-1041:8-24.)

The Secretary's claimed legal errors in this finding fail. First, and as the Taxpayers have demonstrated, the trial court did not rely solely on the text of SB 826 for its finding. It relied on multiple sources of evidence, including the statute's text, floor debates, legislative analyses, and live witness testimony, all of which reinforced each other and provide a substantial basis in evidence for the finding.

Second, while the legislative materials contain a few, scant references to discrimination—or what the Secretary claims are references to discrimination—the trial court weighed this evidence against the text of SB 826 and the far greater volume of materials that contained no reference to remedying discrimination. It plainly was not impressed by the handful of

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[9] The Secretary attempts to re-define what the Legislature meant by "parity" in SB 826, citing to a qualitative dictionary definition. (AOB at 60.) But Senator Jackson testified at trial that "parity" as used in SB 826 "essentially means equal." (TR-16-8173:7-15.) "It doesn't necessarily have to be 50/50, but it is close to achieving [it]." (*Ibid.*) Moreover, SB 826 specifically lists studies that define "parity" quantitatively, anywhere from 30% to 50%. (SB 826 §1(f)(1) [AE-12-4095-4133] [31.4%]; SB 826 §1(f)(2) [AE-12-4134-4140] [50%].)

references the Secretary cites. The Secretary cherry-picked the evidence, not the Taxpayers or the trial court.

Third, the Secretary seeks to redefine discrimination by equating it with a lack of parity or just plain equity. (AOB at 59-60.) But these generic and capacious terms are not equivalent to the specific, identified instances of unlawful discrimination found to support remedying discrimination in an equal protection context. The Legislature easily could have specified that remedying such discrimination was SB 826's purpose if, in fact, it was the actual purpose. That it did not is highly probative.

Fourth, the Secretary cannot fault the trial court for using the term "critical mass" in the same way the term is used in the statute. As the trial court noted, SB 826 uses "critical mass" to address the purported economic benefits of having more women on corporate boards, not to remedy discrimination. (CT-4-1042:17-23, citing SB 826 §1(g) ["studies have concluded that having three women on the board, rather than just one or none, increases the effectiveness of boards."].) While "critical mass" as used in the statute plainly was intended to support what Berkhemer-Credaire described as the "business reasons" for SB 826, the Secretary has abandoned that argument on appeal.

That the Secretary now seeks to use "critical mass" to support an alternative argument does not justify overturning the trial court's well-supported factual finding.

In sum, the Secretary provides no reason why this Court should second guess the trial court's weighing of the evidence or reweigh that evidence itself. Not only does the trial court's factual finding on this point have substantial evidentiary support, but the Secretary's evidence cannot be said to compel a finding in her favor as a matter of law. (*Field*, *supra*, 106 Cal.App.5th at p. 158.) Because remedying discrimination is the only purportedly compelling state interest invoked by the Secretary on appeal—she has waived her other claims of compelling state interest—the Court's analysis can end here. (*Stanley*, *supra*, 10 Cal.4th at p. 793.)

2. The Secretary failed to prove the state was a direct or passive participant in unlawful discrimination.

As the trial court correctly determined (CT-4-1034:13-16), remedying discrimination can only be a compelling state interest when the state itself has a hand in the discrimination. (*City of Richmond v. J.A. Croson Co.* (1989) 488 U.S. 469, 492; *Wygant v. Jackson Bd. of Educ*. (1986) 476 U.S. 267, 274; *Hi-Voltage Wire*

Works, Inc. v. City of San Jose (2000) 24 Cal.4th 537, 568; *Hiatt*, *supra*, 130 Cal.App.3d at p. 311; *Associated General Contractors of California, Inc. v. City & County of San Francisco* (9th Cir. 1987) 813 F.2d 922, 930.) There must be "some showing of prior discrimination by the governmental unit involved" before allowing limited use of a suspect classification to remedy that discrimination. (*Hi-Voltage*, *supra*, 24 Cal.4th at p. 568 [quoting *Wygant*, *supra*, 476 U.S. at p. 274].) "At a minimum, the state or local government must be acting to remedy *government-imposed discrimination*, perpetrated by it or by one of its departments or divisions." (*Associated General Contractors of California, Inc.*, *supra*, 813 F.2d at p. 930 [emphasis added].) The involvement can be direct—such as when the government itself engages in unlawful discrimination—or passive—when the government expends taxpayer dollars by contracting with private contractors or suppliers who engage in illegal discrimination. "[A]ny public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." (*Croson*, *supra*, 488 U.S. at p. 492.)

The Secretary cites no less than eight cases in support of her "remedying discrimination" argument in which the government entity seeking to use the suspect classification either directly or passively engaged in the unlawful discrimination to be remedied. (See AOB at 44, citing *Associated Gen. Contrs. of Am., Inc. v. Cal. DOT* ("*AGCA*") (9th Cir. 2013) 713 F.3d 1187, 1197 [passive discrimination by the State]; *United States v. Paradise* (1987) 480 U.S. 149, 167-68 [direct discrimination by the State]; *Minnick v. Department of Corrections* (1979) 95 Cal.App.3d 506, 515 [direct discrimination by the State]; *H.B. Rowe Co., Inc. v. Tippett* (4th Cir. 2010) 615 F.3d 233, 251-56 [passive discrimination by the State]; *Concrete Works of Colorado, Inc. v. City & County of Denver* ("*Concrete Works II*") (10th Cir. 2003) 321 F.3d 950, 958 [passive discrimination by a municipality]; *Peightal v. Metropolitan Dade County* (11th Cir. 1994) 26 F.3d 1545, 1553 [direct discrimination by a municipality]; *Associated General Contrs. of California, Inc. v. Coalition for Economic Equity* (9th Cir. 1991) 950 F.2d 1401,1412-14 [passive discrimination by a municipality]; *Davis v. City & County of San Francisco* (9th Cir. 1989) 890 F.2d 1438, 1446-47 [direct discrimination by a municipality].) If anything, the Secretary's own citations confirm the trial court's ruling that the government must have a hand in the discrimination to be remedied for there to be a compelling interest in remedying discrimination. Purely private discrimination does not suffice. (CT-4-1043:15-18 ["Neither Plaintiffs nor Defendant have identified any case holding that the government has a compelling interest in remedying societal discrimination or even specific, private-sector discrimination that justified the use of a suspect classification."].)

Completely absent from both the Secretary's evidence at trial and her arguments on appeal is any mention of the State's involvement—direct or passive—in unlawful discrimination against women in publicly held California corporations' board selection processes. Given that the corporations targeted by SB 826 are not government entities, the Secretary cannot show the State directly discriminated against women in board selection. But she did not even try to present evidence of—or argue—passive State involvement. She has waived the issue. (*Stanley*, *supra*, 10 Cal.4th at p. 793.)

Moreover, the only type of passive State involvement recognized in the cases cited by the Secretary is the expenditure of taxpayer dollars on private contractors or vendors who engaged in discrimination. (See, e.g., *Croson*, *supra*, 488 U.S. at p. 492.) The Secretary made no showing and raised no argument that the State pays taxpayer dollars to the corporations subject to SB 826. Her argument fails completely on this essential element.

3. The Secretary's purported evidence of discrimination is plainly inadequate.

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*, *supra*, 130 Cal.App.3d at pp. 311-13.) And not any claim of discrimination will support a compelling state interest in remedying unlawful discrimination. The discrimination must be identified with specificity, and the need for remedial action must be supported by a "strong basis in evidence." (*Croson*, *supra*, 488 U.S. at p. 500.) It cannot be conceded, and mere statistical anomalies do not suffice. (*Connerly*, supra, 92 Cal. App.4th at pp. 38, 56.) The trial court correctly found the Secretary's evidence of discrimination was lacking. (See CT-4-1043:15-1048:12.) It summarized its finding as follows: "neither the Legislature nor [the Secretary] could identify any specific, purposeful, intentional, and unlawful discrimination to be remedied." (CT-4-1043:19-22.)

a. No statistical evidence of discrimination

Croson, which raised an equal protection challenge to the City of Richmond's 30% set aside quota for qualified minority contractors, noted that a significant statistical disparity "could" give rise to an inference of discrimination. (*Croson*, *supra*, 488 U.S. at pp. 509-10.)

A proper comparison is crucial. For remedial set aside programs in public contracting and public employment, a proper comparison requires comparing the number of qualified women or minorities (or women- or minority-owned entities) willing and able to perform a particular service in the relevant industry and geographic region with the number of such women or minorities (or women- or minority-owned entities) actually engaged to perform the services. (*Croson*, *supra*, 488 U.S. at pp. 501-02, 508.) Since *Croson*, governments commonly undertake "disparity studies" to make these comparisons. (See, e.g., *Concrete Works II*, *supra*, 321 F.3d at p. 974; *W H Scott Construction Co. v. City of*

Jackson (5th Cir. 1999) 199 F.3d 206, 218; *AGCA*, *supra*, 713 F.3d at pp. 1191-92.)

The trial court found and the Secretary does not refute that the "Legislature cited only statistics about the number of women on corporate boards as compared to men." (CT-4-1044:9-11, citing SB 826 § 1(e).) On its face, SB 826 does not compare the number of qualified women willing and able to serve on boards with the number of women serving on boards in California. (*Ibid.*) Nor does the Secretary point to any such statistics in the legislative record.

The Secretary tries to make up for this shortcoming by citing the following statistics:

- Women occupied 25% of CEO positions nationwide when the Legislature considered SB 826[10]
- There were 1.5 million women business owners across California (AE-3-000653:22-25) in 2018[11]

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10 The Secretary cites no record evidence for this assertion.

11 The witness did not testify, as the Secretary asserts, that many of these 1.5 million women were qualified to serve on boards. The witness only testified that some unquantified number were qualified. (AE-3-653:22-25.)

- Women accounted for 51.5% of workers nationwide—over 32 million women—employed in management, professional, and related occupations in 2018 (AE-18-005142)
- Women outnumber men in graduate degrees since the 1980s, in master's degrees since the 1990's, and in Ph.D's since about 2006 or 2007[12] (TR-6-2133:18-23).
- Women have received almost 40% of MBA awarded since 2006. (*Ibid.*)

(AOB at 16-17 & 48.) These are workforce statistics, and incredibly generalized ones at that.[13] Moreover, the Secretary did not include either the 25% statistic or the 40% statistic in her post-trial filings. Neither statistic was properly before the trial court, and they should not be considered on appeal.

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12 The Secretary's witness did not identify the fields in which any of these degrees were awarded.

13 Reliance on national statistics is also problematic. "Data sharing" across jurisdictions presents a significant risk that "data of 'societal discrimination' will become the factual basis" for an affirmative action program. (*Coral Constr. Co. v. King County* (9th Cir. 1991) 941 F.2d 910, 917.)

It also goes without saying that owning a business, working in management or a profession, or having an MBA or other graduate degree, without significant additional credentials, does not qualify someone to serve on the board of a publicly held corporation. Nor does being a CEO. One of the Taxpayers' counsel founded, owned, and was CEO of a cupcake-themed business in California when she was in high school. That did not make her qualified at the time to sit on the board of some of the largest, most successful publicly held corporations in the world, including Alphabet, Apple, Meta, and Nvidia. It takes "a great deal of senior-level business experience to qualify as a potential board member," and it is not uncommon for directors to join boards only after retiring from senior corporate roles. (TR-7-2775:23-28; TR-14-7238:16-22.)

Also, because only some board seats are open at a given time period, only those seats are available to be filled. A proper statistical analysis requires comparing the number of qualified women willing and able to fill an open board seat during a given period with the number of women chosen for the available seats.

(*Croson*, *supra*, 488 U.S. at p. 509.) The Secretary completely ignores the issue of available board seats.[14]

The Secretary's statistical analysis lacks a proper numerator and ignores the denominator. It describes neither the pool of qualified women willing and able at a given time to fill an open seat nor the number of open seats actually filled by women in that same period. Because it is not a proper statistical analysis, it does not satisfy the Secretary's burden of proof. (*Croson*, *supra*, 488 U.S. at pp. 501-02.) And it plainly does not compel a factual finding in the Secretary's favor as a matter of law. (*Field*, *supra*, 106 Cal.App.5th at p. 158.)

In addition, all board seats are not the same. As former board member Susanne Meline, the Secretary's witness, testified, boards may require unique expertise in filling particular seats:

> Every board is like its own little country … I think typically there's going to be some discussion about kind of what skills, what things you're looking for. And again, you've got these regulatory things that you have to deal with. So, for example, maybe … you

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[14] If, as the testimony showed, an MBA is a common credential for board membership, women have received almost 40% of MBAs since 2006, and it takes decades to establish the qualifications to serve on the corporate board of a publicly held corporation, it would be reasonable to expect to begin seeing more women added to corporate boards as women who were awarded MBAs in 2006 advance through their careers.

> might need a qualified financial expert, somebody who's going to be the audit chair. That's a specific type of person that you might need. Or, you know, maybe like I typically sit on boards where a company needs somebody who understands the capital markets. … Other times maybe [] they'll sort of have a different idea of what they need[.] That's been my experience. But again, every board is a little bit different.

(TR-14-7276:22-7277:21). Boards also are small groups—the average size is nine or ten individuals—and personal compatibility and trust are particularly important. (TR-5-1818:1-3; TR-7-2795:13-16.) Potential board members also may have conflicts of interest that disqualify them from serving. (TR-7-2795:17-2796:8.) Accordingly, the Secretary did not and cannot show that corporate board seats lend themselves to the type of statistical analysis she now asks this Court to perform.

The cases cited by the Secretary that invoke statistical disparities do not share these same concerns. They concern skill sets and services that are far less specialized, far less personalized, and much more interchangeable than serving on the board of a publicly held corporation. Some are even fungible, such as competitively bid public contracts. (AOB at 47-48, citing *Hazelwood School Dist. v. United States* (1977) 433 U.S. 299 [public school teachers]; *Croson*, *supra*, 488 U.S. at p. 481

[plumbing]; *Concrete Works II*, *supra*, 321 F.3d at p. 957 [construction]; *Davis, supra*, 890 F.2d at p. 1441 [firefighters]; *Harris v. Civil Service Comm'n* (1998) 65 Cal.App.4th 1356 [public transit managers]; *Aiken v. City of Memphis* (6th Cir. 1994) 37 F.3d 1155 [police].) Also, "[s]tatistical evidence often does not fully account for the complex factors and motivations guiding employment decisions, many of which may be entirely race-neutral." (*King County*, *supra*, 941 F.2d at p. 919.)

Not only does the Secretary's statistical evidence fall far short, but she fails to cite a single case in which statistics were used to identify discrimination in a corporate board selection process, much more in the board selection processes of the approximately 625 separate entities across the State. (See *Wal-Mart Stores, Inc. v. Dukes* (2011) 564 U.S. 338, 356-60 [noting the difficulty of using statistics to draw inferences about employment discrimination against individuals with different skills and qualifications, in different jobs, and at different locations across the nation, albeit at the same employer]; *Vitolo v. Guzman* (6th Cir. 2021) 999 F.3d 353, 362 [noting that an extreme disparity may permit an inference of discrimination "[w]hen there is a single decisionmaker behind the disparity."].) Nothing in the public contracting and public employment cases cited by the Secretary suggests a statistical approach has any meaningful applicability here.[15]

b. No anecdotal evidence of discrimination.

"Anecdotal evidence" of discrimination may be used to supplement statistical evidence. (See, e.g., *King County*, *supra*, 941 F.2d at p. 919.) Typically, such evidence consists of individual instances of discrimination or complaints of discrimination. (See, e.g., *Western States Paving Co. v. Washington State DOT* (9th Cir. 2005) 407 F.3d 983, 1001-02; *Concrete Works of Colorado, Inc. v. City & County of Denver* (10th Cir. 1994) 36 F.3d 1513, 1520-21; *Associated General Contractors of California, Inc.*, *supra*, 950 F.2d at p. 1415.) However, "anecdotal evidence may even be less probative than statistical evidence in the context of proving discriminatory patterns or practice. While anecdotal evidence may suffice to prove individual claims of discrimination, rarely if ever, can such evidence show a systemic pattern of discrimination necessary for

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[15] There also obviously are far more persons employed in public service and public contracting than in board service, allowing for more data for statistical comparisons in these other contexts.

the adoption of an affirmative action plan." (*King County*, *supra*, at p. 919.)

The Secretary failed to present any such evidence. As the trial court found, "the [Secretary] was unable to present specific evidence of actual, unlawful discrimination against any specific woman by any specific corporation subject to S.B. 826." (CT-4-1044:4-9.) Indeed, Senator Jackson herself admitted that the Legislature did not "have any specific data of a particular woman being denied access to a corporate board."[16] (TR-15-7546:2-4.) She also admitted that she did not know of any cases in which women had brought lawsuits against publicly held corporations headquartered in California for gender discrimination in the board selection process. (*Ibid.*) Dr. Konrad could not identify a single instance of a woman being discriminated against in the board selection process in California. (TR-5-1907:8-16.) Dr. Konrad testified that there is an "overall basic anti-female bias in judgment of leaders" at the "senior level of business" in the

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[16] Relatedly, the trial court noted that Senator Jackson declined to follow the Senate Judiciary Committee's advice to include in SB 826's legislative findings specific instances of past or present discrimination. (CT-4-1042:12-16; AE-3-722-740; TR-14-6933-6935:7.)

“entire industrial base of the United States,” not in any particular industry or even in publicly held corporations headquartered in California. (TR-5-1549:21-1550:17.) She also testified that accessing data on discrimination is “very difficult” and that discrimination studies are “all over the map.” (TR-5-1818:5-1820:14.) Cindy Schipani, another witness called by the Secretary, likewise could not identify discrimination against a single individual but instead opined that discrimination exists in a broad, generalized sense due to “gender matching” and other social phenomenon. (TR 6-2216:15-2117:3; TR-6-2439:17-2440:17.)

Rather than trying to refute this latter finding, the Secretary chides the trial court for noting the absence of any specific instances of actual discrimination, claiming it was error to find such evidence was required. (AOB at 51.) But anecdotal evidence showing accounts of actual discrimination is plainly part of the analysis. Also, the trial court did not say the Secretary “must” present such evidence; it only found that she failed to do so. (CT-4-1044:4-6.) The trial court was correct to point out the lack of any such anecdotal evidence.

Lacking proper statistical evidence or anecdotal evidence of individual accounts of discrimination, the Secretary argues that a grab bag of other evidence supports a finding of specific, unlawful discrimination. (AOB at 49-53.) She cites *AGCA* for the proposition that anecdotal evidence need not be limited to individual accounts of discrimination, but, in *AGCA*, the anecdotal evidence the Secretary cites supported both statistic evidence and anecdotes of "many incidents" of individual discrimination. (*AGCA*, *supra*, 713 F.3d at pp. 1197-98.) *AGCA* did not find this alternative anecdotal evidence, on its own, provided the requisite strong basis in evidence.[17] (*Ibid.*)

The additional evidence on which the Secretary relies concerns the selection process for filling board seats, the "corporate pipeline," research, and expert testimony. (AOB at 49-51; see *id.* at 18-22.) With respect to the selection process, the Secretary's witnesses testified that boards look for prior board or CEO experience, which tend to be male and therefore limits women from consideration. (*Ibid.*) Her witnesses also testified

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[17] Additionally, the federal authority *AGCA* cites takes into account that Congress has authority under the 14th Amendment that California lacks. (*Western States Paving, Co.*, *supra*, 407 F.3d at pp. 992-93.)

that male boards and male CEOs look to their own networks and social circles, which also tend to be male, and that the process reflects cultural bias and "gender matching" – boards that replace men with men when a vacancy arises. (*Ibid.*) With respect to the "corporate pipeline," the Secretary's witnesses testified that women are promoted less frequently than men and therefore have less opportunities to be considered for boards, and that anti-female bias against women leaders and other gender stereotypes continue to exist in the "corporate world." (*Ibid.*) But none of this testimony was specific to the 625 publicly held corporations subject to SB 826. (*Ibid.*) It only purported to describe corporations nationwide. (*Ibid.*)

The trial court considered this testimony and was not persuaded by it. (CT-4-1044:12-1048:16.) It correctly found—based on the lack of focus on the California corporations subject to the law—that the testimony described claims of "societal and structural discrimination" and "general social phenomena" neither "unique to nor associated with any particular, publicly held corporation headquartered in California." (CT-4-1044:12-16; see also CT-4-1046:22-27.) The Secretary does not argue that the trial court was wrong but instead asserts, in essence, that it should have given the testimony more weight. But assessing testimony and deciding what weight to give it is, quintessentially, the job of the trier of fact.[18] (*Poe*, *supra*, 74 Cal.App.4th at pp. 830-31.) The Secretary cannot and does not show the trial court's finding was not based on substantial evidence. And that evidence is nothing close to what would be required to compel a verdict in the Secretary's favor as a matter of law. (*Field*, 106 Cal.App.5th at p. 158.)

Finally, the Secretary argues that corporations failed to add more women to their boards despite being shown that diversity increases corporate performance. (AOB at 50-51.) This, she claims, "reinforces" her other evidence of discrimination. (*Ibid.*) The Secretary did not make this argument at trial. She relied on corporations' purported "refusal to remedy" to argue that remedial action was necessary, not that it was proof of

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[18] In this regard, the Secretary also takes issue with the trial courts' findings about two studies referenced by the Secretary's experts. (AOB at 36 & 54, fn. 27.) The trial court considered the testimony, the studies themselves, and the Taxpayers' expert witness' testimony about the studies and decided the two studies were not helpful. (CT-4-1047:23-1048:1.) The trial court did not, as the Secretary suggest, disregard the experts' testimony solely because of the studies. (CT-4-1044:15-16.) It gave the testimony the weight it thought it was due. (*Poe*, *supra*, 74 Cal.App.4th at pp. 830-31.)

discrimination. (CT-4-954:7-17.) The argument cannot be raised for the first time on appeal. It fails in in any event. Because there is no evidence of discrimination, there is nothing to reinforce. Moreover, the Secretary failed to prove that adding women to boards improves corporate performance (CT-4-1037:7-1040:9), and the Secretary does not challenge that finding on appeal. She cannot use one failed claim to reinforce another that lacked evidentiary support. Nothing plus nothing is still nothing. And, like the Secretary's other arguments, it does not compel a verdict in the Secretary's favor as a matter of law. (*Field*, 106 Cal.App.5th at p. 158.)

c. The Secretary failed to prove unlawful discrimination.

Of course, the targeted discrimination must be unlawful. It must violate a constitutional or statutory provision. (*Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* ("*SFFA*") (2023) 600 U.S. 181, 207.) The Secretary has not identified any state action, so no constitutional claim can arise from the subject corporations' alleged private conduct. Title VII (42 U.S.C. §§ 2000e et seq.) and the Fair Employment and Housing Act (Gov't Code §§ 12920 et seq.) apply to "employees," and board members are not employees. (TR-6-2437:22-2438:2; TR-16-8168:13-21; see also, Unemp. Ins. Code § 622(a).) The Unruh Act is a public accommodation statute that prohibits discrimination by businesses providing goods, services, or facilities to its clients, patrons, or customers. (Civil Code § 51; *Smith v. BP Lubricants USA Inc.* (2021) 64 Cal.App.5th 138, 149.) It plainly does not apply to filling board seats. (See, e.g., *Hiatt, supra*, 130 Cal.App.3d at pp. 312-14 [no compelling government interest in remedying discrimination where there was no evidence of unlawful discrimination].)

The Secretary's witnesses also used the terms "discrimination" and "bias" interchangeably and did not even attempt to address unlawful discrimination, either in California or nationwide. (CT-4-1046:22-1047:4.) Dr. Konrad did not even "see a value in the distinction for [her] analysis." (TR-5-1909:16-24.) In short, the Secretary's evidence also failed to identify any unlawful discrimination.

d. Other factors account for the differences in the numbers of men and women on boards.

The trial court found the Secretary's own witnesses, including Senator Jackson and Berkhemer-Credaire, undermined the Secretary's discrimination claim. These witnesses "attributed the differences in the numbers of men and women on corporate boards to reasons other than actual discrimination," including the lack of open board seats and women's networking issues. (CT-4-1045:8-18.) Indeed, Senator Jackson testified, "the fact that some of these [male board members] don't leave . . . there's no term limits like what I had to experience, that's the problem." (TR-8-3700:4-7.) Berkhemer-Credaire likewise testified to both the Legislature and the trial court that the "lack of open seats is our problem." (TR-8-3371:15-17.) She also testified that women "need to network like men do in order to seek and win a corporate board seat" (TR-7-2780:22-23) and "women are just really getting to understand how to network and how to be remembered as potential [board] candidates." (TR-7-2782:5-7.) Schipani testified that the selection process is "an internal process to the company and those members of the board working their networks to decide who would be best for the company." (TR-6-2427:11-13.) The trial court also found that Dr. Konrad's generalized testimony about discrimination in the corporate board selection process nationwide was contradicted by Ms. Berkhemer-Credaire's testimony about the lack of open seats. (CT-4-1047:6-9.)

The Secretary offers no response to the trial court's findings other than to challenge how to interpret the witnesses' testimony and what weight to give to it. (AOB at 53-54.) Again, assessing witnesses' testimony and deciding who to believe and what weight to give it quintessentially the job of the trier of fact and should not be disturbed on appeal. (*Poe*, *supra*, 74 Cal.App.4th at 830-31.) The trial court's findings in this regard are well-supported by the Secretary's own witnesses, and the Secretary offers no reason why this Court should overturn those findings. The evidence is nothing close to what would be required to compel a finding in the Secretary's favor as a matter of law. (*Field*, 106 Cal.App.5th at p. 158.)

e. The evidence shows a natural progression towards adding more women to boards over time.

The trial court also found a natural progression towards adding more women to corporate boards over time. (CT-4-1048:7-12.) It made this finding while evaluating the Secretary's asserted compelling state interest in remedying discrimination. (*Ibid.*) The finding was directly relevant to the Secretary's burden of proving by a "strong basis in evidence" that remedial action was necessary. (*Croson*, *supra*, 488 U.S. at p. 500). The

Secretary raised the issue in the "narrow tailoring" section of her brief (AOB at 60-61), however, apparently confusing her burden of proving that remedial action was necessary with her additional burden of proving that use of a suspect classification was necessary to satisfy narrowly tailoring. (AOB at 61-62; see *SFFA*, *supra*, 600 U.S. at p. 207.)

Regardless, the trial court relied on testimony from Berkhemer-Credaire and reports of an organization, 20/20 Women on Boards, of which Berkhemer-Credaire was CEO, to support its finding. (TR-7-3081:19-23). Berkhemer-Credaire testified and the reports showed that States without a gender-quota law like SB 826—Arizona, Nevada, Tennessee, Utah, and Washington—experienced the same if not greater increases in the number of women on corporate boards between 2018 and 2021. (CT-4-1048:7-12.) While the Secretary claims these increases show SB 826 was necessary to spur change (AOB at 62), she provides no evidentiary support for this conclusion, which is pure speculation and contrary to the trial court's finding that the change was natural. Indeed, the evidence showed at least some of these states – Nevada, Tennessee, and Arizona – saw increases in the percentages of women on boards before SB 826 took effect.[19] (AE-14-4662; TR-8-3352:26-3354:4.) The Secretary's argument does not now show the trial court's finding lacked substantial support nor that the evidence compels a contrary finding in her favor as a matter of law. (*Field*, *supra*, 106 Cal.App.5th at 158.)

The trial court also heard additional evidence that supports this natural trend and undermines the Secretary's position. Berkhemer-Credaire testified that, in the year before SB 826's passage, 99 out of the 309 board seats that became vacant in California – approximately 32% – were filled by women. (TR-8-3367:20-3369:27; AE-3-464.) Schipani testified that in the one-year period ending June 30, 2018 – prior to SB 826 – the number of California Russell 3000 companies with no female directors decreased by 23% and the number of female directors on boards of California Russell 3000 companies increased by approximately 11%. (TR-6-2204:18-2205:27, 2206:27-2208:24; AE-13-4491-4511.) And Grounds testified that the number of women on

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[19] SB 826's requirement that subject corporations have at least one woman on their boards only took effect on December 31, 2019. (Corp. Code § 301.3(a).) It's requirement for having a fixed number of women based on board size did not take effect until December 21, 2021. (Corp. Code § 301.3(b).)

boards of publicly held corporations headquartered in California increased by 50% from 2012 to June 30, 2018. (TR-10-4625:26-4626:11; AE-19-5352-5354.)

Additionally, while the Secretary relies upon Grounds for the claim that women were being added to boards at a 0.56% rate from 2006 to 2018 and it would take "up to 70 years to achieve parity at that rate" (AOB at 16-17, 61.), Grounds' analysis was not credible.[20] She took numbers purportedly representing the percentage of women on boards in 2006 and 2018, subtracted the first from the last, then divided by the number of years in between. (TR-9-4303:15-28.) She then described her result as the "average growth rate"—it's plainly not; it's only an average of end points—then used a linear projection to determine how long it would take to achieve parity at that rate. (TR-9-4304:5-24.) Dr. Klick testified that Grounds' analysis contained multiple

[20] The Secretary cites the Senate Judiciary Committee's SB 826 analysis for the claim that "in the absence of discrimination, women would currently occupy close to 50 percent of seats on corporate boards, if not more." (AOB at 17 and 57.) Yet the committee cited no authority for this claim. Indeed, the Secretary omits the passage's critical prefatory language—"It is self-evident that . . . ." (AE-3-000735.) It is completely unsupported and is not evidence of anything.

shortcomings, including relying on older and therefore less relevant data[21] and her choice of linear modeling. (TR-11-5219:26-5226:22.) Because the trend from 2006 to 2018 is nonlinear and compounding, the rate calculation cannot be reduced to a simple mathematical equation but required other modeling choices and regression analyses and more sophisticated methodologies, such as "matching on trend." (*Ibid*.) The trial court was correct not to credit Grounds' testimony on this point and to conclude that no remedial action was necessary.

* * *

After considering all the evidence, the trial court found that the Secretary failed to demonstrate a compelling state interest in remedying a pattern or practice of unlawful discrimination against women in the board selection process. The reason for this failure is obvious. SB 826 was never intended to be a "remedying discrimination" statute. The law's author and sponsor, the Legislature, and the Secretary at trial focused on other, purportedly compelling state interests that the Secretary has

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21 Elsewhere, Grounds acknowledged a 50% increase using 2012 and June 2018 as endpoints. (TR-10-4625:26-4626:11; AE-19-5352-5354.)

now abandoned on appeal. Because the law was never intended to remedy discrimination or be defended on remedying discrimination grounds, the Secretary falls far short of satisfying strict scrutiny.

D. The trial court correctly found that SB 826 was not narrowly tailored.

In *Croson*, the Court found a 30% quota for minority contractors was unconstitutional because, among other reasons, "it is almost impossible to assess whether [the plan] is narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way." (*Croson*, *supra*, 488 U.S. at p. 507.) Accordingly, *Croson*'s quota could not "in any realistic sense be tied to any injury suffered by anyone" or "be said to be narrowly tailored to any goal, except perhaps outright racial balancing." (*Id.* at pp. 499 and 507.) *Croson* describes this case exactly, only for gender balancing. The trial court's finding that the Secretary failed to identify intentional, unlawful discrimination in the board selection processes of the corporations subject to the statute mirrors *Croson* in this regard. (CT-4-1049:3-11.)

The trial court found SB 826 is not narrowly tailored because the Legislature failed to consider gender-neutral alternatives, like amending existing anti-discrimination laws or enacting new ones addressing board selection, and because the statute was not limited in scope or duration to remedy specific, unlawful discrimination. (CT-4-1048:18-25.) It also found the law was not actually remedial. (CT-4-1048:26-1049:2.) All three findings are well-supported.

With regard to gender-neutral alternatives, the trial court credited Senator Jackson's admission that the Legislature did not consider amending existing anti-discrimination laws or enacting a new law focused on directors and the board selection process.[22] (TR-15-7568:23-7571:3; TR-16-8167:21-8171:14.) Senator Jackson acknowledged that directors are not considered employees and therefore are not covered by existing laws. (TR-16-8168:13-21; see also, e.g., Unemp. Ins. Code § 622(a).) One of the Secretary's expert witnesses also testified that directors are

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[22] SB 826's author also testified that she rejected a "Rooney Rule" because a report she saw on *ESPN* asserted the rule had not worked in the NFL. (TR-9-3911:6-3914:3; AE-9-3520.) Surely, this aspect of narrow tailoring required more than what one legislator happened to see in a media report.

not employees and therefore are not protected from discrimination under Title VII. (TR-6-2437:15-2438:2.) The Unruh Act, which is a public accommodation statute, plainly does not apply. Nothing prevented the Legislature from amending FEHA or creating a new law applicable to board selection if it had sought to remedy actual, identified discrimination, but it does not appear to have even considered doing so.[23]

Rather than addressing this obvious failure, the Secretary points to two earlier legislative actions—the creation of a registry for women board candidates in 1993 and SCR 62 in 2013. Neither measure was gender-neutral on its face. And both measures, like SB 826, sought to increase women's representation on corporate boards, not remedy actual discrimination. When the Legislature enacted FEHA to remedy

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[23] The Secretary's assertion that the trial court "strayed from the record" in finding the legislature failed to consider such gender-neutral alternatives is plainly incorrect. The Taxpayers cited Senator Jackson's testimony and the FEHA and Unruh Act in their proposed verdict form, and the Secretary not only cited both statutes in her pre-trial brief and in her verdict form but also requested that the trial court judicially notice both statutes (which she included in the Amended Joint Exhibit List) after using the statutes to elicit testimony from Senator Jackson. (CT-3-671; CT-3-751:18-21; CT-4-951:3-15; CT-4-1103:13-21; TR-13-6724:14-6727:13; TR-16-8201:4-8202:15.)

employment discrimination, it did not create a list of women available for work or pass a resolution encouraging employers. Nor did it require employers hire a fixed number of women based on the size of their workforces. It passed a law—without using any suspect classification—to make it illegal to discriminate in the employment context, and it provided an enforcement mechanism in what is now the Civil Rights Department and a private right of action. Neither the registry or SCR 62 obviates the Legislature's failure to consider either amending existing law or enacting a new law to prohibit discrimination in board selection.

The trial court's finding that SB 826 is not limited in scope or duration also is plainly correct. It is disingenuous for the Secretary to assert that SB 826 is limited because it only applies to publicly held corporations. That is no meaningful limitation at all. SB 826 applies to every publicly held corporation in the State regardless of whether it ever discriminated against women in its board selection process. It treats PG&E, established in 1905 and publicly held since 1919, the same as DoorDash, which was incorporated in 2013 and only went public in 2020, after SB 826's enactment. It even applies to corporations that have yet to be formed and therefore, by definition, never could have discriminated against anyone. SB 826 has no meaningful limitation.

Nor can the Secretary refute that SB 826 is not actually remedial. She makes no effort to show that SB 826 was "designed as nearly as possible to restore the victims of specific discriminatory conduct to the position they would have occupied in the absence of such conduct," language from *Connerly* that the trial court quoted almost verbatim. (*Connerly*, *supra*, 92 Cal.App.4th at p. 38.) Indeed, "[t]he lack of any effort to limit the benefits of a remedial scheme to those who actually suffered from specific discrimination will be fatal to the scheme." (*Id.* at p. 39.) The Secretary claims the trial court did not apply the correct standard but does not identify what else *Connerly*'s clear language might mean. Her argument suggests that SB 826 is sufficiently remedial because women appointed under its provisions are treated either as representatives of women allegedly denied similar opportunities in the past or as beneficiaries whose appointments redress injuries suffered by women collectively. Surely, that is not what *Connerly* means.

California law does not treat individuals as proxies for others based solely on shared membership in a demographic group.

Moreover, because the corporate board positions set aside by SB 826 may be filled by women from anywhere in the world, the pool of potential beneficiaries is not limited to California residents and has no necessary connection to any identified discrimination in the board selection process in California. Accordingly, there is no basis for presuming that the women who benefit from the statute have suffered discrimination in California. This stands in sharp contrast to public employment and public contracting cases, where beneficiaries are drawn from local candidate pools affected by identified discrimination and may therefore be presumed to have suffered its effects. In those cases, the remedial justification rests on a direct nexus between the beneficiaries and the discrimination being remedied. Here, that nexus is entirely absent. Because the global pool of candidates is untethered to any identified discrimination in California, SB 826 cannot plausibly be characterized as a remedial measure. (*Croson*, *supra*, 488 U.S. at p. 508 [rejecting set aside program because, among other reasons, it allowed MBEs from outside the area to take advantage of the program's preferences without any showing they suffered from the discrimination sought to be remedied, among other reasons].); accord *King County, supra*, 941 F.2d at p. 925 [same].)

SB 826 also is anything but flexible. It sets a fixed number, not a "utilization goal," and there is no waiver if a corporation cannot identify a qualified woman who satisfies the corporation's particular need. The penalty for noncompliance is a fine of up to $300,000. (SB 826 § 2(e)(1)(C).) *Croson* found the absence of a waiver significant in rejecting the set aside program in that case. (*Croson*, *supra*, 488 U.S. at p. 508.) By contrast, "utilization goals" instead of a mandatory standard for minority participation weighed in favor of the program at issue in *Western States Paving Co.*, *supra*, 407 F.3d at p. 994.) The program at issue in *United States v. Paradise*, a case sited by the Secretary, only set contingent goals, not fixed figures, and included a waiver provision if no qualified minority candidates were available. (*Supra*, 480 U.S. at pp. 177-78.)[24] In *Minnick*, another case cited

[24] The Court described the promotion program at issue in *Paradise* as "flexible, waivable, and temporary in application." (*Paradise*, *supra,* 480 U.S. at p. 178.) SB 826's quota is none of these things.

by the Secretary, "[t]here was no evidence that any specific number or percentage of positions were reserved for members of either sex or of any racial or ethnic group." (*Minnick*, *supra*, 95 Cal.App.3d at p. 515.) SB 826's comply-or-be-fined approach could not be more different from far less rigid programs found to be narrowly tailored.

The Secretary's claim that SB 828 is "flexible" also ignores the statute's ratcheting effect. A board comprised of four men that chooses not to replace one of its men with a woman is required to expand its board to add a woman. But adding a woman increases the board size to five, and boards with five directors are required to have two women. The board must increase its size to six. Boards with six are required to have at least three women, which requires the board be expanded to seven to add a third seat reserved for a woman. The same ratcheting effect applies to boards of five men or four men and one woman. SB 826 is anything but flexible.[25]

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[25] The ability of a corporation to change the size of its board is not a feature of SB 826. Corporation have that ability regardless of SB 826.

As to duration, "[a] narrowly tailored remedial program must also include adequate durational limitations." (*Western States Paving Co.*, *supra*, 407 F.3d at p. 994.) SB 826 has none. The Secretary's authority, *Doe v. Kamehameha Schools* (9th Cir. 2006) 470 F.3d 827, is inapposite because it was a Section 1981 case involving purely private action, not an Equal Protection case. The Secretary cites no authority for the proposition that annual reports and the mere possibility that the Legislature might amend or revise SB 826 at some unknown future date is an adequate durational limit. If the ability to amend or repeal a set aside that uses a suspect classification were a sufficient durational limit—it is hard to imagine when that would not be the case—it would be no limitation at all. If anything, the fact that SB 826 requires a fixed number of seats be occupied by women increases the importance of a durational limit. (*Johnson v. Transportation Agency* (1987) 480 U.S. 616, 639-40 ["Express assurance that a program is only temporary may be necessary if the program actually sets aside positions according to specific numbers."].)

With regard to the impact on third parties, there is no dispute that the universe of qualified candidates—men and women—is small. Board members of publicly held corporations are some of the most highly skilled, accomplished professionals in the world. (TR-9-4236:3-28, 4307:14-4309:7; TR-11-5215:23-5218:1.) It takes as many as forty years to gain the experience necessary to be a board member. (TR-7-2775:23-28, 2780:15-18; TR-8-3367:20-3369:27.) There also is no meaningful dispute that the universe of seats is small – approximately 3,600 total. (AOB at 15.) Under the circumstances, the "burden to be borne by innocent individuals" is not diffused among society generally but is borne by this small group of individuals disqualified by their gender from competing for seats reserved for women. (*Wygant*, *supra*, 476 U.S. at p. 282.) The Secretary's assertion that SB 826's impact on male directors and director candidates is negligible not only lacks evidentiary support but also is obviously incorrect.

Finally, SB 826 plainly is a quota, and a rigid one at that. (*Croson*, *supra*, 488 U.S. at p. 499.) A quota is "a fixed number or percentage which must be attained." (*Grutter v. Bollinger* (2003) 539 U.S. 306, 335.) The Secretary's own expert described SB 826 as a quota. (CT-4-1032:17-18.) One legislative report described SB 826 as "essentially a quota system for private corporate boards." (CT-4-1032:21-25.) Another described it as "quota-like." (CT-4-1032:18-21.) Throughout this ligation, the Secretary has not been able to cite an analogous single case in which a quota was found to be narrowly tailored to remedy discrimination. *Paradise* and *United Steelworkers of Am. v. Weber* ("*Weber*") (1979) 443 U.S. 193 are not such cases. At issue in *Paradise* was an Equal Protection challenge to blatant and continuous race discrimination in the promotion of state troopers, not a challenge to a legislative enactment. The court-ordered remedy—which was in the nature of a contempt order—sought to compel the State's compliance with two earlier consent decrees. Even then, the remedy set promotion goals contingent on the availability of qualified minority officers, not fixed numbers. (*Paradise*, *supra*, 480 U.S. at pp. 177-78.) It is not at all analogous to SB 826's legislatively mandated quota. *Weber* was not even an Equal Protection case. It was a Title VII case challenging a private employer's affirmative action program. (*Weber*, *supra*, 443 U.S. at pp. 197-98.) It was not a case challenging a legislative enactment that compelled anyone to discriminate, as is the case here. Finally, in *Davis*, the appellate court agreed with the trial court that the minority hiring and promotion programs at issue set flexible goals, not quotas.[26] (*Davis*, *supra*, 890 F.2d at p. 1447 [citing *United States v. City & County of San Francisco* (N.D. Cal. 1988) 696 F. Supp. 1287, 1309.) The consent decree specifically provided that no provision of its terms should be construed as a quota and, unlike SB 826, included waiver provisions if no qualified candidates could be found. (*United States v. City & County of San Francisco*, *supra*, 696 F. Supp. at p. 1309.) Both *Paradise* and *Davis* also were decided before *Croson* and therefore did not benefit from *Croson*'s Equal Protection framework. Because SB 826 is plainly a quota and no quota appears to have ever survived strict scrutiny, SB 826 fails as well.

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[26] The Court in *Davis* described the years of difficult litigation in that case as "strikingly similar" to *Paradise*. (*Davis*, *supra*, 890 F.2d at 1446.)

CONCLUSION

For the foregoing reasons, the Taxpayers respectfully request that the Court affirm the trial court's judgment.

Dated: June 26, 2026 JUDICIAL WATCH, INC.

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

Attorneys for Plaintiffs and Respondents

CERTIFICATE OF COMPLIANCE

I certify that the foregoing RESPONDENTS' ANSWER BRIEF uses a 13-point Century Schoolbook font and contains 13,976 words.

Dated: June 26, 2026

JUDICIAL WATCH, INC.

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

Attorneys for Plaintiffs and Respondents

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   On behalf of *(name or names of parties represented, if person served is an attorney)*:
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   b. Electronic service address of person served: Kevin.Quade@doj.ca.gov VIA TRUEFILING SYSTEM

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   a. [x] **Mail.** I mailed a copy of the document identified above as follows:

   (1) I enclosed a copy of the document identified above in an envelope or envelopes **and**

   (a) [ ] **deposited** the sealed envelope(s) with the U.S. Postal Service, with the postage fully prepaid.

   (b) [x] **placed** the envelope(s) for collection and mailing on the date and at the place shown in items below, following our ordinary business practices. I am readily familiar with this business's practice of collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service, in a sealed envelope(s) with postage fully prepaid.

   (2) Date mailed: June 26, 2026

   (3) The envelope was or envelopes were addressed as follows:

   (a) Person served:
   (i) Name: HONORABLE MAUREEN DUFFY-LEWIS
   (ii) Address:
   DEPARTMENT 38, STANLEY MOSK COURTHOUSE, 4TH FLOOR, 111 N. HILL STREET, LOS ANGELES CA 90012

   (b) Person served:
   (i) Name:
   (ii) Address:

   (c) Person served:
   (i) Name:
   (ii) Address:

   [ ] Additional persons served are listed on the attached page *(write "APP-009, Item 3a" at the top of the page).*

   (4) I am a resident of or employed in the county where the mailing occurred. The document was mailed from (city and state):

Case Name: Crest et al. v. Alex Padilla	Court of Appeal Case Number: B322276
	Superior Court Case Number: 19STCV27561

3. b. ☐ **Personal delivery.** I personally delivered a copy of the document identified above as follows:

(1) Person served:

(a) Name:

(b) Address where delivered:

(c) Date delivered:

(d) Time delivered:

(2) Person served:

(a) Name:

(b) Address where delivered:

(c) Date delivered:

(d) Time delivered:

(3) Person served:

(a) Name:

(b) Address where delivered:

(c) Date delivered:

(d) Time delivered:

☐ Names and addresses of additional persons served and delivery dates and times are listed on the attached page *(write "APP-009, Item 3b" at the top of the page).*

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

Date: June 26, 2026

Robert Patrick Sticht
(TYPE OR PRINT NAME OF PERSON COMPLETING THIS FORM)

▶ [signature]
(SIGNATURE OF PERSON COMPLETING THIS FORM)