COURT ORDER

Crest, et al. v. Padilla
20 STCV 37513

TYPE OF MOTION:	(1)-(2): Motion for Summary Judgment, or in the alternative, Summary Adjudication.
MOVING PARTY:	(1): Plaintiffs, Robin Crest, Earl De Vries, and Judy De Vries; (2): Defendant, Shirley N. Weber, in her official capacity as Secretary of State of the State of California.
RESPONDING PARTY:	(1): Defendant, Shirley N. Weber, in her official capacity as Secretary of State of the State of California; (2): Plaintiffs, Robin Crest, Earl De Vries, and Judy De Vries.
HEARING DATE:	Monday, March 14, 2022

When faced with a problem, the immediate temptation is to employ the most obvious and direct solution. In most cases, it isn't even fair to call this impulse a "temptation." It's just a normal and sound approach to life. But sometimes there are constraints which call for additional care. This is one of those times.

This litigation was born because the Legislature spotted an issue: corporate board seats by and large belong to members of one race, sexual orientation, and gender identity. After further investigation, they concluded that this disparity was the result, conscious or unconscious, of a process that leads board members to select replacements who look and feel like them. This meant that qualified members of other groups were, intentionally or unintentionally, being excluded.

In a society based as ours is on inclusion and equal opportunity, these observations were concerning on their own terms. However, the Legislature had also been informed by various experts, businesses, and shareholders that the composition of a corporate board has various knock-on effects. A homogenous board is vulnerable to stagnant thinking and common assumptions; it is also less flexible in responding to challenges. This results in poorer business practices, less innovation, and ultimately less profit. A heterogenous board avoids these pitfalls and generally leads to a healthier business that makes more money.

The Legislature's observations are intuitively sensical. There is nothing outlandish or incredible about the idea that people generally tend to socialize with, and select, other people like themselves. The natural result of this tendency is the exclusion of people who look and act differently. And the natural result of that exclusion is the loss of the acumen that those different people would bring to a conversation, business, or any other group. The underlying premise here is that demographic diversity is a reasonable proxy for differing perspectives and life experiences. That premise is not seriously challenged by anyone involved in this case.

If demographically homogenous boards are a problem, then heterogenous boards are the immediate and obvious solution. But that doesn't mean the Legislature can skip directly to mandating heterogenous boards. The difficulty is that the Legislature is thinking in group terms. But the California Constitution protects the right of *individuals* to equal treatment. Before the Legislature may require that members of one group be given certain board seats, it must first try to create neutral conditions under which qualified individuals from *any* group may succeed. That attempt was not made in this case.

Procedural Posture

On September 30, 2020, Plaintiffs filed their Complaint for Declaratory and Injunctive Relief against Defendant Alex Padilla in his official capacity as Secretary of State of the State of California ("Secretary"). On November 4, 2020, Defendant Secretary filed their Answer.

Bench trial is currently set for May 2, 2022.

Plaintiff now moves this court, per Code of Civil Procedure § 437c, for summary judgment, or in the alternative, summary adjudication on the sole cause of action in the Complaint.

Plaintiffs' initial Request for Judicial Notice is GRANTED as to Exhibits A and D. It is DENIED as to Exhibit E. Plaintiffs' reply Request for Judicial Notice is GRANTED – it consists solely of the report which was discussed in the initial papers and was completed during the briefing period. The parties have had ample opportunity to discuss it and inclusion of the final version changes nothing.

Plaintiff's reply Objections to Evidence are OVERRULED. They are identical copies of the Objections filed in opposition to Defendant Secretary's motion, which are discussed below.

Defendant Secretary's Objections to Evidence are OVERRULED as to No. 1 and SUSTAINED as to No. 2.

Defendant Secretary also moves this court for summary judgment, or in the alternative, summary adjudication of the following issues:

> ISSUE NO. 1: Corporations Code § 301.4[1] does not violate California Constitution article 1, section 31 because it does not discriminate against or grant preferential treatment to any individual or group in the operation of public employment, public education, or public contracting.
>
> ISSUE NO. 2: Plaintiffs cannot challenge the Secretary's compliance with the mandatory reporting obligations in Corporations Code § 301.4, because a taxpayer action cannot be

[1] In their papers, the parties refer to the law at issue by its legislative designation: "AB 979." While there is nothing wrong with that designation, once a bill has proceeded out of the legislature and into the courts as a duly enacted statute, the proper citation is by code and section. Therefore, this discussion will refer to "AB 979" as "Corporations Code § 301.4."

used to attack lawful reporting activity.

ISSUE NO. 3: Plaintiffs' challenge to the Secretary's enforcement of Corporations Code § 301.4 is not ripe for adjudication.

ISSUE NO. 4: Corporations Code § 301.4 does not violate California Constitution article 1, section 7 because the statute satisfies strict scrutiny review.

Defendant Secretary's Request for Judicial Notice is GRANTED.

Plaintiff's Evidentiary Objections is OVERRULED, as discussed more fully in the section on the state of the record.

Ruling

Plaintiff's motion for summary judgment is GRANTED. Defendant Secretary's motion for summary judgment is DENIED. Defendant Secretary's motion for summary adjudication is DENIED as MOOT as to Issue No. 1 and otherwise DENIED. Plaintiff is instructed to serve a proposed form of judgment within 10 days.

The State of the Record

These are cross-motions for summary judgment on a single complaint with only one cause of action, so the evidence presented by both parties is virtually identical. As counsel know, on a motion for summary judgment the court is looking for triable issues of fact. Do the parties disagree about any given fact, and is that fact material to the outcome of the case? What would the trial look like? What would the parties be asking the court to decide?

To answer those questions, the court looks primarily at the opposition separate statement. That document tells the court straight out whether a fact listed by the moving party is disputed by the opposing party. Review of both Plaintiffs' and the Secretary's Opposition Separate Statements reveals no material dispute sufficient to require a trial.

Plaintiffs' Motion

Plaintiffs' motion offers the court 15 alleged material facts which can be summarized as follows. Plaintiffs have paid income taxes. Corporations Code § 301.4 is the law and says what it says. The Secretary will spend taxpayer money gathering and reporting data on whether the corporations subject to Section 301.4 have complied with its provisions. The Secretary retains the ability at any time to impose a fine for non-compliance. Some of the corporations subject to Section 301.4 also have contracts to perform work for the State of California. And finally, the conclusory statement that Section 301.4 "treats differently persons who are similarly situated for the purposes of the statute." (Defendant's Separate Statement in Opposition ["DOSS"] No. 15).

That last point is not a "fact" so much as a legal conclusion – it is the thing that Plaintiff must prove. Naturally, the Secretary disputes it. But the interpretation of a law is not a matter of

fact that requires a trial, it is a legal question – the very thing motions like these were created to resolve.

Some of the other facts are disputed, but the disputes are not material. The Secretary suggests that Plaintiff Robin Crest has not paid income taxes in the relevant time frame but admits that the other two Plaintiffs have. (DOSS No. 1). The Secretary complains about Plaintiffs' evidentiary citations and descriptions but in the same breath admits the basic points asserted. (DOSS Nos. 8-12). Finally, the Secretary disputes both the precise number of companies covered by Section 301.4 and the precise number of those companies that hold state contracts. (DOSS Nos. 13-14). But the numbers themselves are not important. It need only be clear that some companies are subject to Section 301.4, and some subset of those companies hold state contracts. The Secretary does not contest that.

Defendant Secretary's Motion

The Secretary's motion offers the court some 228 material facts.[2] An exhaustive summary of those facts is not particularly feasible here. But neither is it necessary, as Plaintiffs only disputed 17 of those facts. What Plaintiffs have done with many of the remaining facts is concede that each fact is undisputed, and then follow that concession with a reference to a specific evidentiary objection. In almost every instance[3] the objection is "hearsay." All these statements are admissible for non-hearsay purposes, so the objections are OVERRULED. The court can only conclude that they were filed in an effort to clarify the purpose for which the evidence is admitted.

The 17 facts which Plaintiffs chose to dispute were Nos. 3, 11-16, 20-22, 97-98, 124, 186, 217-218 and 220. (See generally Plaintiffs' Opposition Separate Statement ["POSS"]). Of these, Nos. 3 and 186 involved a disagreement over how to construe the Complaint, while Nos. 11-16 and 20-22, involved a disagreement over how to describe the actions taken by the Secretary.[4] None of these things presents a factual question. Plaintiffs' response to Nos. 217-218 and 220 cites no evidence, it simply reads "Disputed; argumentative; not a fact." Only Plaintiffs' responses to Nos. 97-98 and 124 produce even the hint of a triable issue. But these responses mainly refer the court to the Secretary's own evidence; where they add anything more, they point only to the piece of evidence cited in Plaintiff's Additional Fact No. 247. (POSS No. 247).

That final "fact," No. 247, brings the parties as close as they ever come to a real, material dispute. It reads: "Plaintiffs' expert, Dr. Jonathan Klick, demonstrates that the studies and expert opinions on which Defendant relies are not reliable." (POSS No. 247). The evidence cited in support is, of course, the Declaration of Dr. Jonathan Klick, Ph.D., J.D.

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[2] Plaintiff adds 19 "Additional Facts," of which 18 were culled directly from the Secretary's evidence and thus cannot represent true disputes. The 19th is Fact No. 247, addressed later in this section.

[3] For Objection Nos. 60, 64, and 65, the objection was relevance. That objection too is OVERRULED. An independent discussion of these three exceptions is not required.

[4] Plaintiffs' responses to Nos. 11-16 simply refer the court to the Secretary's own statement in No. 10. Plaintiffs introduce no evidence of their own.

Dr. Klick is an eminently qualified statistician with an impressive academic and practical pedigree. He provides a robust academic critique of certain studies and opinions produced by the Secretary's experts. But there are several reasons why this does not create a triable issue of fact sufficient to defeat summary judgment. First, as discussed below, there are limits on the extent to which the court can substitute its own evidentiary judgment for that of the legislature. Second (also discussed below) the existence of an evidentiary basis for the legislature's conclusions is merely the beginning of the inquiry. Third, by Plaintiffs' own admission, the Declaration of Dr. Klick was only introduced to challenge the Secretary's data regarding the state's interest in the *economic* benefits of diversity; it does not challenge the state's interest in remediating discrimination.[5] (Reporter's Transcript of Proceedings, March 14, 2022 ["RT"] p. 50:27-51:9).

Neither party believes that there is a triable issue here. Neither party has asked for more time to produce more evidence. The Secretary is convinced that they should win based on the current record. (RT p. 39:18-28). So are the Plaintiffs. (RT p. 57:14-59:8). Plaintiffs concede in their Reply that there is no dispute of fact. (Plaintiff's Reply p. 1:14-18). The disputes are "really" only "about characterizations of evidence." (Id. p. 1:11). The information presented by Dr. Klick was produced purely as insurance – to be used if the court decided that general economic benefits were a compelling state interest. (Id. p. 1:16-18; RT p. 50:27-51:11). For the reasons explained below, that contingency has not come to pass.

The Challenged Law

Corporations Code § 301.4 says, in full:

> (a) No later than the close of the 2021 calendar year, a publicly held domestic or foreign corporation whose principal executive offices, according to the corporation's SEC 10-K form, are located in California shall have a minimum of one director from an underrepresented community on its board. A corporation may increase the number of directors on its board to comply with this section.
>
> (b) No later than the close of the 2022 calendar year, a publicly held domestic or foreign corporation whose principal executive offices, according to the corporation's SEC 10-K form, are located in California shall comply with the following:
>
> > (1) If its number of directors is nine or more, the corporation shall have a minimum of three directors from underrepresented communities.
> > (2) If its number of directors is more than four but fewer than nine, the corporation shall have a minimum of two directors from underrepresented communities.
> > (3) If its number of directors is four or fewer, the corporation shall have a minimum of one director from an underrepresented community.
>
> (c) No later than March 1, 2022, and annually thereafter, the Secretary of State shall include in its report required by subdivision (d) of Section 301.3, at a minimum, all of the

[5] The Declaration of Dr. Klick specifically addresses only the testimony of Drs. Alison Konrad, J. Yo-Jud Cheng, and M.V. Lee Badgett. It does not attack the testimony of Dr. Jessica N. Grounds, or any other witness.

following:

(1) The number of corporations subject to this section that were in compliance with the requirements of this section during at least one point during the preceding calendar year.
(2) The number of publicly held corporations that moved their United States headquarters to California from another state or out of California into another state during the preceding calendar year.
(3) The number of publicly held corporations that were subject to this section during the preceding year, but are no longer publicly traded.

(d)(1) The Secretary of State may adopt regulations to implement this section. The Secretary of State may impose fines for violations of this section as follows:

(A) For failure to timely file board member information with the Secretary of State pursuant to a regulation adopted pursuant to this paragraph, the amount of one hundred thousand dollars ($100,000).
(B) For a first violation, as described in paragraph (2), the amount of one hundred thousand dollars ($100,000).
(C) For a second or subsequent violation, as described in paragraph (2), the amount of three hundred thousand dollars ($300,000).

(2) For the purposes of this subdivision, both of the following apply:

(A) Each director seat required by this section to be held by a director from an underrepresented community, which is not held by a director from an underrepresented community during at least a portion of a calendar year, shall count as a violation.
(B) A director from an underrepresented community having held a seat for at least a portion of the year shall not be a violation.
(3) Fines collected pursuant to this section shall be available, upon appropriation by the Legislature, for use by the Secretary of State to offset the cost of administering this section.

(e) For purposes of this section, the following definitions apply:

(1) "Director from an underrepresented community" means an individual who self-identifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or who self-identifies as gay, lesbian, bisexual, or transgender.
(2) "Publicly held corporation" means a corporation with outstanding shares listed on a major United States stock exchange.

The Nature of This Case

"California's Constitution, unlike its federal counterpart, does not contain a "case or

controversy" limitation on the judicial power." Connerly v. State Personnel Bd. (2001) 92 Cal.App.4th 16, 29. In the ordinary course of litigation, that difference between the two constitutions doesn't matter much. Almost all the cases this court handles involve persons who have suffered a real, individual injury (or who seek to prevent such an injury) which was caused by some other named person. But here there is neither an injured plaintiff, nor a named defendant who has caused harm. There is no corporation seeking to avoid compliance. There is no prospective board member seeking an order awarding them a vacant seat. Instead there are three taxpayers seeking a (necessarily abstract) determination that a law is facially unconstitutional.

Such actions are expressly allowed by Code of Civil Procedure § 526a, which says in relevant part as follows:

> "(a) An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a local agency, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax that funds the defendant local agency, including, but not limited to, the following:
> (1) An income tax.
> ...
> (d) For purposes of this section, the following definitions apply:
> (1) "Local agency" means a city, town, county, or city and county, or a district, public authority, or any other political subdivision in the state."

The Secretary argues that *statewide* elected officials running *statewide* departments are not a "*local* agency" under section 526a(d)(1). Therefore, they say, the Secretary of State cannot be a defendant in a taxpayer action.

The trouble with this argument is that a long line of cases has "expanded the right to bring a taxpayer action to include suit against state government."[6] Cornelius v. Los Angeles County Metropolitan Transportation Authority (1996) 49 Cal.App.4th 1761, 1776 (collecting cases). The primary procedural question in taxpayer actions, until very recently, wasn't whether a suit could properly be brought against this or that particular defendant. It was whether the plaintiff needed to pay property taxes to have standing, or whether some other form of tax payment would suffice. See e.g. Weatherford v. City of San Rafael (2017) 2 Cal.5th 1241, 1251.

It is true that in 2018, the Legislature amended Section 526a to answer that question. The amendment enumerated specific types of tax payments that would confer standing. It also added subdivision (d)(1), which provides the specific definition of "local agency" on which the Secretary now relies. However, the Legislative Digest for the amendment indicates that the intent of the Legislature was to "expand" the scope of taxpayer actions. 2018 Cal. Legis. Serv. Ch. 319 (A.B. 2376). And when the Legislature passes a bill, it is presumed to know the current state of the law. Estate of McDill (1975) 14 Cal.3d 831, 837-838. This court can hardly conclude that the Legislature meant to "expand" taxpayer actions by shrinking the number of possible defendants and overturning a large body of case law in the process.

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[6] The Secretary has acknowledged this case law, though they question whether it should be followed.

In the absence of some appellate authority suggesting that the 2018 amendments to section 526a created a new limitation, this trial court must follow the existing rules.

The Nature of the Expense

It is undisputed that the Secretary has spent some taxpayer money[7] on gathering and disseminating information related to corporate compliance with Corporations Code § 301.4. Reporting forms have been updated, informational letters have been mailed out, a new page has been added to the Secretary's web site, and an annual report is being prepared. The Secretary argues that these expenditures are not "illegal" under Section 526a because they merely report or disclose information.

The law is a little subtler than that. The issue isn't the Secretary's collection of information. The issue is the purpose for collection. Where the purpose for disclosure and reporting requirements is simply for the interest value of the information itself, there is no constitutional violation. Connerly, *supra*, 92 Cal.App.4th at 56. But where the purpose of disclosure and reporting requirements is to secure or measure compliance with some specific stated goal, there may well be a constitutional violation even if there is no monetary penalty for failure to comply. Id. at 52.

Plaintiffs' complaint is that Section 301.4 imposes an improper duty on corporations to have a certain number of directors from certain demographic groups. The Secretary is enforcing that duty by collecting and preparing to publish compliance information. If Plaintiffs are right that this statute imposes an unconstitutional duty, then the Secretary's efforts to discover and publicize non-compliance are enforcement efforts. The presence or absence of "real teeth," in the form of a monetary or other penalty, does not matter.

Ripeness

The foregoing discussion also resolves the parties' ripeness arguments. The Secretary contends the controversy here is not ripe because (a) Section 301.4(d)(1) makes the imposition of a monetary penalty discretionary and (b) the Secretary has not yet exercised its discretion to impose such a penalty. Leaving aside the cold nature of that comfort, monetary penalties are not the only means of enforcing an unconstitutional duty. The Secretary is already engaged in such enforcement by instructing corporations to comply and preparing public reports on their compliance. The controversy is indeed ripe.

Public Contracting

Plaintiffs argue that Section 301.4 violates Article 1, Section 31 of the California Constitution. It does not.

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[7] The Secretary does contend that the money spent wasn't *all* taxpayer money, but this is immaterial. There is no requirement that the challenged conduct be exclusively tax-funded. It is enough that the defendant entity be partially funded by tax dollars.

The relevant portions of Article 1, Section 31 of the California Constitution read as follows:

> "(a) The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."

Plaintiffs' motion flatly asserts that Section 301.4 falls afoul of Article 1, Section 31 because some of the corporations subject to Section 301.4 currently hold public contracts. That argument is suspect in the extreme. In none of their papers do Plaintiffs cite any authority to support it. Section 301.4 does not condition the award of public contracts on compliance with its provisions. It doesn't mention public contracting at all. There is no reason that a constitutional provision governing the award of public contracts should affect laws in other subject areas simply because those laws regulate the behavior of some companies that also happen to have a public contract. By its plain terms, Article 1, Section 31 applies to the hiring of public employees, the operation public schools, and the award of public contracts. Section 301.4 affects none of those things. There is no violation of Article 1, Section 31.

However, given the following discussion, the court's answer to this question is MOOT. Judgment cannot be awarded in favor of the Secretary because, as explained in the next section, Section 301.4 *does* violate Article 1, Section 7 of the California Constitution. Therefore, the Secretary's motion for summary adjudication on Issue No. One is DENIED as MOOT.

Equal Protection

Article 1, Section 7 of the California Constitution says that

> "(a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws...
> (b) A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens. Privileges or immunities granted by the Legislature may be altered or revoked."[8]

"A legislative classification satisfies equal protection of law so long as persons similarly situated with respect to the legitimate purpose of the law receive like treatment." Connerly, *supra*, 92 Cal.App.4th at 32. "Legislative classifications generally are entitled to judicial deference... However, judicial deference does not extend to laws that employ suspect classifications, such as race. Because suspect classifications are pernicious and are so rarely relevant to a legitimate governmental purpose [citation], they are subjected to strict judicial scrutiny; i.e., they may be upheld only if they are shown to be necessary for furtherance of a compelling state interest and they address that interest through the least restrictive means available." Id. at 33.

[8] Section 7(a) contains a rather lengthy amendment, dating from the 1970s, discussing school busing programs. Those provisions are not relevant to this case.

Facial Challenge

Plaintiffs argue that Corporations Code § 301.4 is, on its face and without regard to any individual application, in violation of Article 1, Section 7. To succeed on this type of challenge, Plaintiffs must show that Section 301.4 "inevitably pose[s] a present total and fatal conflict" with Article 1, Section 7. Arcadia Unified School Dist. v. State Dept. of Education (1992) 2 Cal.4th 251, 267. That is exactly the sort of conflict present here.

Section 301.4 clearly applies suspect categories: it imposes a duty on corporations to use such categories in the selection of their board members. It requires corporations to have a specific number of directors who are members of certain listed races, or else have certain listed sexual orientations or gender identities.[9] People of other races, orientations, and identities are necessarily excluded from those board seats.

In an effort to avoid this plain and obvious issue, the Secretary suggests ever more complex possible scenarios, searching for a situation where compliance with Section 301.4 would *not* conflict with Equal Protection. They search in vain.

The Secretary suggests that a corporation could use an anonymized selection process that "should" produce a compliant board. But the Secretary has no way of knowing what an anonymized selection process would produce. What if the anonymized process does not produce a compliant board? Well, says the Secretary, repeat the process until it *does* produce a compliant board. (Defendant's Opposition p. 17:1-2). This gives the game away. The object is to use an apparently neutral method to achieve a non-neutral, pre-determined outcome.

Another idea is to expand the size of the board, so no current director need be displaced. But that does not cure the problem: each new board seat would necessarily belong only to one of the groups on the list and to no one else. On the flip side, the Secretary suggests that some boards would be compliant if they were smaller – corporations in that situation might simply refuse to fill seats as members from the excluded groups leave. But again, that strategy only works if the person leaving is *not* a member of one of the groups on the list. Even then, the corporation would be failing to choose a replacement for one of two reasons: either because it did not want to hire someone from the listed groups, or because it was afraid it might select someone from an unlisted group.

Finally, the Secretary observes that corporations are, and have always been, free to act themselves to increase their own diversity. Of course. But so what? Voluntary action, by definition, is not compliance with a statutory mandate. In that scenario, both Section 301.4 and the Equal Protection clause would simply be out of the picture. The fact that the constitution and laws *permit* an action does not mean that the government is free to *command* it.

Plaintiffs have properly brought a facial challenge to this law.

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[9] It is not disputed that these are all suspect classes for the purposes of the Equal Protection clause of the California Constitution.

Similarly Situated

The Secretary argues that the classification contained in Section 301.4 is justified because the listed groups and the unlisted groups are not "similarly situated." As noted above, an Equal Protection challenge can only succeed if "similarly situated" people are treated differently. Conversely, if the people treated differently are *not* similarly situated, there is no Equal Protection claim.

The Secretary claims that the listed groups are not "similarly situated" to anyone else because they are "underrepresented" and have been subjected to discrimination. But Equal Protection rights are individual rights, not group rights. Taking Offense v. State (2021) 66 Cal.App.5th 696, 725 (quoting Woods v. Horton (2008) 167 Cal.App.4th 658, 671). Thus, the statement that a certain *group* is (or has been) the subject of discrimination is not conclusive about a given set of *individuals*. Accepting the Secretary's contention would short-circuit the Constitutional analysis; a legislative finding of fact regarding group discrimination could prevent the court from ever applying strict scrutiny in the first place. Arguments regarding discrimination against certain groups belong in the analysis of compelling government interests, which comes later.

The relevant set of individuals here is those who are qualified to sit on corporate boards. There are many people of all identities who are ready, able, and willing to serve in that capacity. No party to this case disputes the existence of large pools of qualified talent, no matter what group one looks at. Therefore, individual members of both the listed groups and unlisted groups are similarly situated when it comes to board seats. The only difference between them is that members of certain groups will look around the boardroom and see far fewer faces that look like theirs. Why that is, and what can be done about it, come in at the next step.

But before moving on to that topic, it is worth noting that the groups selected for preference by the statute are not inclusive of all numeric minorities. In a written inquiry, the court asked specifically why these groups were chosen. The court also asked why two different types of minorities (ethnic and sexual orientation/identity) were included while other types of minorities (such as religious minorities) were excluded. In their Reply (at footnote 7), the Secretary stated that these were the groups that had statistical discrepancies and no other group asked to be included. In effect, the included groups were included simply because they asked to be. Excluded groups were excluded because they didn't show up.[10]

At oral argument, the court and counsel had a focused discussion on the decision to include Asians, who were *not* originally one of the groups selected for preference. (Reply p. 11 fn.7). The Secretary argued that Asians should be a preferred group because Asians are highly represented in "managerial" positions but are not highly represented on boards.[11] (RT 23:25-

[10] Counsel for the Secretary also suggested that any confusion about the categories was an additional reason that the controversy is unripe; they offered that the Secretary might issue future regulations regarding how to read the categories. (RT p. 30:8-25). It is hard to see what the Secretary could change by regulation. The language of the statute is straightforward – a board member must self-identify with one of the listed labels. That's it. There is no room there for the Secretary to tinker with the definitions of any given category.

[11] The findings made by the Legislature at the time of passage also include a reference to a report by the Ascend

25:4). There are at least two problems with that argument. First, it relies on a significant ambiguity in the term "managerial." It is true that, nationwide, 54% of Asians work in what the Bureau of Labor Statistics calls "management, professional, and related occupations." (Defendant's RJN Exhibit 1, Section 1(a)). But that might include anything from running a big box store to civil engineering to the practice of medicine. It doesn't mean that 54% of Asians are presently qualified to sit on a major corporate board.

Second, the Secretary's comparison relies on nationwide statistics, rather than focusing on California. As explained below, the information relevant to a California law is the state of play in California. Legislators in the Golden State cannot use discrimination beyond our borders to justify the use of racial categories within our borders. And the California numbers included in the Legislature's own findings show that 42% of corporations subject to this law already have at least one Asian member. (Defendant's RJN Exhibit 1, Section 1(e)). The next closest listed minority was African-Americans, who are represented on 16% of covered corporate boards. (Id.).

The foregoing two paragraphs illustrate the hazards of deciding to lump every preferred minority group (other than women) into a single, exclusive list. A justification must be produced for every group.[12] And it leaves pregnant the question of what to do if a minority group that was excluded from the initial list wants to be added later. Does the Equal Protection clause compel the addition of any subsequently-identified group? Can the boundaries of these groups be policed in any rational way, given that the statute determines membership solely by self-identification? Finally, there is the practical fact that every group added to the list waters down the benefits for the other groups. If a corporation need fill only a certain small number of seats with members of these communities, then it may do so by hiring only from one of the minorities on the list.[13] None of these things are direct reasons to find Section 301.4 unconstitutional, but they do suggest several of the more serious problems discussed above and below, chief among them the lack of focus on a specific, definable target issue.

Compelling Interest

When the state uses a suspect classification, its action is not entitled to the presumption of constitutionality that courts would ordinarily apply. Connerly, *supra*, 92 Cal.App.4th at 36. In

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Foundation, to the effect that Asian Americans "were the least likely to be promoted to manager or executive positions in California." (Defendant's RJN Exhibit 1, Section 1(l)). That seems to contradict the Secretary's statement that Asians are overrepresented in managerial positions. But in any event, the study referred to was not submitted to the court and is not itself part of the present record, so it cannot be evaluated.

[12] See Connerly, *supra*, 92 Cal.App.4th at 38-39: "[T]he remedy must be designed as nearly as possible to restore the victims of specific discriminatory conduct to the position they would have occupied in the absence of such conduct. Random inclusion of racial groups without individualized consideration whether the particular groups suffered from discrimination will belie a claim of remedial motivation. The 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." (Internal citations omitted).

[13] For example, a corporation that wished to avoid hiring members of a different ethnicity might hire members of the LGBT community instead.

fact, the reverse is true – the burden is on the state to demonstrate a justification. Id. The state must identify a compelling interest "with some degree of specificity." Id. at 36-37. This specificity requirement is meant to ensure that the state's reasons are clear and concrete – an abstract desire to remedy some general social problem is not a compelling interest.[14] See Id. at 36; see also Shaw v. Hunt (1996) 517 U.S. 899, 909-910; City of Richmond v. J.A. Croson Co. (1989) 488 U.S. 469, 505-506; Wygant v. Jackson Bd. of Educ. (1986) 476 U.S. 267, 276. The state has to say precisely what it means to fix so that it can properly craft (and others can properly evaluate) the remedy. Shaw, *supra*, 517 U.S. at 909; Croson, *supra*, 488 U.S. at 507.

The Secretary offers two possible compelling interests here. First, they say that the state has a compelling interest in remedying discrimination in corporate board selection. Second, they say that the state has a compelling interest in obtaining various public benefits that would come from diverse boards: more profitable corporations that lead to better investment returns for public pension plans and more tax revenue for the state, better corporate integrity and oversight, more inclusive workplaces, and so forth. Each of these proffered interests is discussed, in turn, in the following two subsections.

Remediation

It is true that remediating discrimination may be a compelling interest. See Taking Offense, *supra* 66 Cal.App.5th at 717; Connerly, *supra*, 92 Cal.App.4th at 37. However, as previously noted, it is not enough for the state to broadly offer an intent to address general discrimination. The state must identify a specific arena in which discrimination has occurred. "A generalized assertion that there has been discrimination in a particular industry or region is insufficient." Connerly, *supra*, 92 Cal.App.4th at 38.

Specific Arena

What is a properly focused arena, and where exactly is the line which divides a proper target from an improper target? As with so many things in the law, it is easier to identify the cases at the extremes than to articulate a rule that provides guidance moving forward.[15] But the phrasing of Connerly and a survey of the cases it cites (such as Wygant and Croson) suggest an answer. As quoted in the previous paragraph, Connerly forbids general assertions of discrimination "in a particular industry *or* region." (Emphasis added). In other words, it is not enough to say, 'there has been discrimination in the construction trade' or 'there has been discrimination in California.' But where discrimination can be pegged to a particular industry *and* region, then the issue has sufficient definition to be addressed – the hiring of teachers in a given district (as in Wygant) or the construction business in a given city (as in Croson).

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[14] There is another aspect to this, not relevant here – the proffered interest must have been the 'actual purpose' behind the action. The state cannot use a facially innocuous purpose to serve as a stalking horse for their real motives. There is no dispute in this case as to the motives of the Legislature in passing Section 301.4.

[15] On the one hand, per the cases quoted above, general societal discrimination is not a sufficiently specific, definable target. On the other, a particular unit of municipal government (Wygant, *supra*, 476 U.S. at 274-275) or a single industry within a given city (Croson, *supra*, 488 U.S. at 504-505) *is* a sufficiently definable target.

Here, the arena in which discrimination has occurred is "in corporate board selection." That is neither confined nor specific. It covers the entire nation and all industries.[16] True, Section 301.4 is limited to California companies, but that limitation is born of jurisdictional concerns, not any evidence that Californian boards are particularly bad. The evidence considered by the Legislature and presented by the Secretary ranges across all sorts of categories, from the Fortune 100, Fortune 500, and Russell 3000 indexes to the various insurance companies that fall under the regulation of California's Insurance Commissioner. This is not the sort of concrete area in which the state interest in fixing discrimination can become compelling.

At oral argument, the Secretary emphasized that by confining Section 301.4 to corporations listed on a major stock exchange and headquartered in California, the Legislature would only be regulating .7% (or .07%) of the stock companies in California. (RT p. 24:5-11). The raw number of companies is over 600, give or take a few. As a number, that may not seem like much. But an arena doesn't become focused simply because numbers feel small. Taking a thin slice off the top of an economy as large and dynamic as California is a bit like taking a thin slice off the top of a fruitcake. What you're likely to get is a wide variety of quite different ingredients.

No one has presented evidence to tell this court who the regulated companies are. They almost certainly include some of the tech companies of Silicon Valley, perhaps entertainment companies from Hollywood, pharmaceutical companies from San Diego, maybe agriculture and/or lumber companies from the Central Valley and the North Coast. The list is surely *not* confined to any one industry or geographic region.

What's more, the persons qualified to be on the board of a tech company are probably not equally qualified to sit on the board of an agribusiness, or an entertainment venture. The lack of focus on a given industry probably has a meaningful impact on the pool of qualified candidates. Of course, the court has no way of knowing that for sure because, as discussed more fully below, no attempt has been made to define that pool. Which leads back to the specificity requirement: if the Legislature cannot define the pool of qualified candidates, how can it say that it has properly focused its efforts on a specific arena of discrimination?

"Convincing Evidence" Required

Even if the state could meet the specificity requirement, there is also an evidentiary requirement. As Connerly, *supra*, 92 Cal.App.4th at 37 describes it, the state must "have convincing evidence" that their remedial action is necessary. That rule poses interesting questions for the interaction of the judicial system with the other branches of government.

It is not immediately clear how the courts are supposed to determine if the Legislature has "convincing evidence" that their action was necessary. Are they merely checking to make sure that the Legislature's findings were not a sham? Or are they supposed to substitute their own

[16] When this court questioned the Secretary on its use of certain national statistics instead of California statistics, counsel replied that national statistics were appropriate because the corporations subject to Section 301.4 "draw from a national pool." (RT p. 29:1-15). It is hard to see how the measure is confined to a specific arena when it is being justified by national statistics and is intended to have a national effect.

judgment for that of the Legislature and hold a trial to see if there really is discrimination that needs to be remediated? The prospect of an *un*elected branch of government simply telling an *elected* branch that they were wrong about certain social facts...is not particularly palatable. Courts are not well-situated to make broad-based investigations of societal issues, as they are confined to the evidence and arguments presented by counsel and cannot make their own independent inquiries into the facts.

Neither party presented written argument on this issue. When questioned at oral argument, both parties agreed that the court should not re-weigh the evidence and substitute its own judgment for that of the Legislature. The Secretary suggested, relying in part on Hiatt v. City of Berkely (1982) 130 Cal.App.3d 298, that the court would just look to see if there was some basis to support the Legislature's conclusions.[17] (RT p. 42:1-43:5). The Plaintiffs suggested that the court should establish a cut-off point in time – the date the bill was passed – and only consider facts that were put in the legislative record prior to that date. (RT p. 43:14-44:17). Those facts would either be in line with Connerly or they wouldn't.

The Secretary's citation to Hiatt is not terribly helpful; the phrase "convincing evidence" is nowhere to be found in the opinion, which simply relied on a trial court finding that the City of Berkeley had no evidence at all to support its conclusions. And the Plaintiff's suggestion that the Secretary cannot use post-passage evidence to bolster the Legislature's position is untenable. If this court refused to consider evidence generated after passage, it would risk invalidating Section 301.4 based on an inadequate record even the facts to make an *adequate* record were already before it. See Coral Const. Co. v. King County (9th Cir. 1991) 941 F.2d 910, 920-921.[18] Put a little more plainly, the court would only be sending the matter back to the Legislature so that the Legislature could put the Secretary's evidence packet into the record and send the matter back to the court. That sort of interbranch ping-pong should be avoided.

Further reading of Connerly suggests a solution to the court's quandary. During its consideration of individual programs, the panel made the following observations:

> "Under equal protection principles, the use of statistical underutilization to establish hiring goals suffers from a fatal flaw. The scheme can be viewed in only two ways. It may represent a decision to assure participation of some specified percentage of a particular group merely because of race or gender, which would be impermissible discrimination. Or the use of statistical underutilization to establish hiring goals may be viewed as the establishment of a conclusive presumption of prior discrimination based upon statistical disparity. The problem with this is that, while statistical underutilization may serve as significant evidence of prior discriminatory hiring practices, it is not conclusive and is not, in itself, proof of discrimination. There may be explanations other than discrimination for statistical variations, and detailed consideration of past hiring

[17] The Secretary also suggested that this court should conduct an unbounded "totality of the circumstances" evaluation, citing to Washington v. Davis (1976) 426 U.S. 229, 242. (Reply p. 10:7-8; RT P. 25:5-11). But that case was talking about how to determine whether the government was using a facially neutral test to serve the ulterior motive of a desired racial outcome. That is not a mystery the court faces here.

[18] Overruled on unrelated grounds by Board of Trustees of Glazing Heath and Welfare Trust v. Chambers (9th Cir. 2019) 941 F.3d 1195.

practices may rebut the inference suggested by statistical evidence. Constitutional rights cannot be foreclosed through the use of presumptions rather than proof. Accordingly, statistical anomalies, without more, do not give a governmental entity the legal authority to employ racial and gender classifications." Connerly, *supra*, 92 Cal.App.4th at 55-56.

Based on this discussion, when the court is looking for "convincing evidence" it is checking to see what kind of investigation has been done, either before passage of the bill or since. It is looking for a "detailed consideration" of past practices in the affected arena. Statistical evidence is "significant" but by itself insufficient to support a finding of discrimination. Likewise, anecdotal evidence in the form of testimony from individuals who have observed discrimination in the defined arena is not by itself sufficient to prove discrimination. See Coral Const., *supra*, 941 F.2d at 919. However, when combined, anecdotal evidence may 'bring statistical numbers to life'; conversely, statistics may show that anecdotes are more than just a few unfortunate anomalies. See Id.

The Evidence Offered

So, what evidence has been produced? On the anecdotal front, the Secretary has presented the declarations of Guy Primus, Sukhinder Singh Cassidy, Virgil Roberts, Oswaldo Gromada Meza, Fabrice Houdart, Lawrence Low, Coco Brown, and Catherine A. Halligan. The court has reviewed these declarations and found that they are of the type which could, when combined with proper statistics, support a finding of discrimination.

On the statistical front, the ground is shakier. The sort of numeric anomaly which will support a finding of discrimination has been carefully defined by both Connerly and the Supreme Court cases it cites. There must be a disparity between the demographic make-up of *the qualified talent pool* and those who hold positions in the targeted arena. See Connerly, *supra*, 92 Cal.App.4th at 55-56 and Wygant, *supra*, 476 U.S. at 274-275 (both citing Hazelwood School Dist. v. U.S. (1977) 433 U.S. 299, 311-313).

There was a study[19] done by the Latino Corporate Directors Association ("LCDA"), prior to passage of Section 301.4, which used 10-K filings to identify the directors of publicly held California corporations and then used other publicly-available information to determine the racial and ethnic identification of each director. (Declaration of Jessica N. Grounds ¶¶ 16-18). This supplies a reasonably accurate comparison point: the demographics of those holding directorial positions in publicly held California corporations, prior to the law's passage. But that data point means little without something to compare it to. And that is where both the Legislature and the Secretary have come up short.

No one in the record appears to have made any effort to identify, define, or survey the qualified talent pool for director positions.[20] Instead, the numbers produced by the LCDA study

[19] The Secretary has presented other studies, of course. But these studies miss the required level of precision on both sides. They are either national in scope (and thus too broad to justify a state-level measure) or local to places like Silicon Valley (and thus too narrow to justify a statewide measure).

[20] Some of the experts have identified common feeder positions (such as "C-Suite" executive roles) and academic

are compared to the general population. (Declaration of Jessica N. Grounds ¶¶ 22-26; Declaration of Alison Konrad ¶ 10). But the general population is manifestly not the qualified talent pool for corporate board seats. While anyone off the street might someday *become* the sort of person who sits on boards, it is absurd to suggest that any member of society, selected at random, would *presently* fit that bill. Therefore, the evidence currently presented to the court fails to show the required statistical disparity between actual directors and the set of people qualified to be directors.

At oral argument, prompted by this court, the Secretary offered two other types of evidence for consideration. First, they offered evidence to show that there is an issue in the pipeline – that the "C-Suite" executive jobs which are the most common "feeders" for board positions belong disproportionately to straight, cisgender white males. (See e.g. Declaration of Jessica Grounds ¶¶ 27, 36). This is not evidence of discrimination in *board* selection. It may well be evidence of discrimination in the selection of C-Suite executives. That is not before this court – perhaps it should be. But a person is not necessarily engaging in discrimination when they look at a talent pool full of white people and pick a white person.[21]

Second, the Secretary offered evidence to show that the board selection process is secretive, exclusive, and dependent on the personal networks of those already holding board positions. This is indeed proof of a structural problem which could viably be traced to past discrimination. (RT p. 25:24). If overt discrimination in years gone by placed a certain segment of the population on boards, and new board members are selected by old board members, and old board members make their choices from their own social networks – then it is easy to see how people who are not from the entrenched segment of society would be excluded. People tend (though it is far from a categorical rule) to build social networks that resemble themselves.

The trouble with that argument is the assumption it requires. For the logic to hold, the court must assume that at some unspecified point in the past California corporations overtly discriminated against every group listed in Section 301.4. That assumption is probably safe. It would certainly be unsurprising. But it is still an *assumption*, based on our knowledge of general

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qualifications (such as an MBA), but there appears to be no one single "gatekeeping" qualification that could be used to define the pool in the way that a license might for lawyers and medical professionals, or a credential might for teachers.

[21] There is a definitional issue to flag here. As overt, conscious, and express discrimination recedes, it may leave behind structural distortions in society and unconscious biases. Both the tide of discrimination and the jetsam it leaves behind may have the same practical effects and get called by the same name, but that does not make them quite the same thing. At oral argument, Plaintiffs pushed to define only conscious, deliberate action as "discrimination." It is not clear that the law shares their semantic rigidity. As the Secretary pointed out in response, and as explained above, the law will conclude that discrimination exists without necessarily identifying and proving a case with a specific perpetrator or victim.

It is also worth pointing out that any robust notion of cultural pluralism requires a factfinder to at least consider the possibility that the presence or absence of a given group in a given industry is the product of benign cultural preferences. Of course, that may not be the case. But this is the question posed by the existence of statistical disparities: are we seeing a result of invidious discrimination, or benign cultural differences? The same evidence which raises the question cannot also conclusively answer it.

societal discrimination. And as explained above, general societal discrimination is not something that will justify the use of a suspect category in a particular context. The bill that enacted Section 301.4 contained no findings of historical discrimination on California corporate boards. (Defendant's RJN Exhibit 1). Nor has the Secretary produced any such evidence.

Summation

In short, the law has not properly defined a sufficiently specific arena in which discrimination is to be remediated. And even if it had, the Secretary has not produced evidence of discrimination which this court could find "convincing" under Connerly. Their statistics do not have a proper comparison group – they have no measurement of the qualified talent pool, and thus they cannot show a proper statistical disparity. The Secretary's anecdotal evidence is all right as far as it goes, but it cannot be convincing *by itself.* It needs the support of either (1) a properly established statistical disparity or (2) a properly traced statistical history showing that, from a time of formal discrimination until now, the composition of boards has remained unchanged. Because the law does not define a sufficiently specific arena, and is not supported by convincing evidence of discrimination, the state's interest in remediating discrimination cannot be used to justify this measure.

Public Benefits

The Secretary conducts their discussion of this alleged interest by spelling out all the benefits that a business gets from having a diverse board. Diverse boards lead to better decision-making and higher profits, says the Secretary, because people from different backgrounds are likely to see problems in different ways. Returning to the premise that minority status is a reasonable proxy for differing perspectives and experiences, the Secretary posits that people with different backgrounds are probably going to question each other's assumptions rather than share them. A diverse board is more likely to generate unique approaches, and to handle their diverse employees in an appropriate way.

All of this makes intuitive sense.[22] Two heads are better than one. And a pairing of one head from San Francisco and one from Fresno may well be better than a pairing of two heads from San Diego. Plaintiffs do not dispute the internal validity of the reasoning. What they dispute is whether this sort of generic interest in healthy business can constitute a compelling state interest. It cannot.

Healthy businesses are obviously a good thing. But the state's generic interest in healthy businesses is not sufficiently specific or immediate to permit the use of suspect classifications. It is not difficult to accept the proposition that diverse boards may be "good for business." Nor is it hard to believe that the knock-on effects of strong businesses include more tax revenue, better performance for pension funds, and better workplaces with happier employees. But if these downstream, indirect effects were to be compelling interests, there is no limit to what might be allowed, provided the economic data were properly massaged.

[22] It is akin to the rationale that justifies the jury system, in which 12 laypersons representing a broad cross-section of the community are called on to decide the facts of a case.

The Secretary's cited cases do not support their position. McGlynn v. State of California (2018) 21 Cal.App.5th 548, 564-565 involved the technical administration of a judicial pension fund; the plaintiffs' claims to certain vested pension rights had direct effects upon the balance sheets of that pension fund. West Corp. v. Superior Court (2004) 116 Cal.App.4th 1167, 1180 didn't involve Equal Protection at all; it involved the court's ability to assert personal jurisdiction over a given defendant. On the federal side, Grutter v. Bollinger (2003) 539 U.S. 306, 328 found a compelling interest in the diversity of the student body on a college campus. And Larsen v. U.S. Navy (D.D.C. 2007) 486 F.Supp.2d 11, 29-30 deferred to the national Navy in its assertion that a diverse officer and chaplain corps was essential to its national security goals.

None of these cases stands for the proposition that general economic health or good business practices are a compelling state interest in this context. They address very specific and narrow situations: the size and extent of pension benefits,[23] the administration of a public university, and the composition of a particular subsection of the armed forces. The state's interest in farming taxes is not compelling for constitutional purposes.

During the hearing, the Secretary essentially conceded this point. Counsel said that "it's critically important that [the economic interest] is not by itself...the very fundamental and well-recognized interest is in remedying discrimination." (RT p. 35:10-15). If the economic interest is not compelling by itself but becomes compelling by joining with another interest that *is already* compelling by itself...then the economic interest is simply not compelling. Defendant Secretary has failed to establish any compelling interest which would justify Section 301.4.

Narrow Tailoring

However, even if this court were to find that the Secretary had shown a compelling interest, they would still have to establish that the remedy chosen is narrowly tailored to suit that interest. "Only the most exact connection between justification and classification will suffice." Connerly, *supra*, 92 Cal.App.4th at 37. "The classification must appear necessary rather than convenient, and the availability of nonracial alternatives—or the failure of the legislative body to consider such alternatives—will be fatal to the classification." Id. Narrow tailoring does not require the state to try *every* alternative which may occur (after the fact) to the active imaginations of hostile parties or musing judges. See Grutter, *supra*, 539 U.S. at 339; Coral Const., *supra*, 941 F.2d at 923. But it does require serious consideration of race-neutral steps which are plainly available and not obviously impractical. See Grutter, *supra*, 539 U.S. at 339; Coral Const., *supra*, 941 F.2d at 923.

Despite the relatively short discussion of narrow tailoring in the Secretary's moving and opposition papers, this is where Section 301.4 rests on the thinnest ice. It is true that the minimum requirements are not a "quota" in the strictest sense of the term – there is no specific percentage of directors that must be met. A company with a board of nine complies when three directors are from the listed groups; a company with a board of ninety would likewise comply

[23] If Section 301.4 was truly intended to help state pension plans, it should have been targeted at companies whose stock the pension plans hold. It does the pension plans no good to improve the profitability and stock prices of businesses they *don't* hold.

with only three directors from the listed groups. Nevertheless, even a requirement like this (which the Secretary repeatedly calls a "flexible floor") reserves a certain number of seats for directors from the listed groups, necessarily excluding anyone else from those seats.

A numeric requirement is certainly the most direct path to the Legislature's desired result. But there is precious little indication that the Legislature seriously considered or attempted other intermediate and race-neutral measures. It is worth noting here that the Secretary has submitted many of the legislative materials for Corporations Code § 301.3, which deals solely with gender discrimination. That statute is not at issue in this case. While these materials are relevant for their discussion of network effects and how statistical disparities come to exist, they are less revealing on the issue of alternative methods for dealing with race, sexual orientation, or gender identity discrimination.

Counsel for the Secretary suggested that the approach of creating a numeric goal came from Wygant. (RT 39:6-9). The Court in that case said that firing people to achieve racial parity among employees in a school district would not be narrowly tailored – a "hiring goal" would be a better idea. Wygant, *supra*, 476 U.S. at 283-284. However, the Court did *not* order the school district to expand the number of positions available so that the new jobs could be filled by members of a certain group. That is the only option available to corporations who (1) were not already in compliance with Section 301.4, (2) wish to comply with Section 301.4, and (3) do not want to fire any current board members. Wygant does not support the position that this measure is narrowly tailored.

The Secretary's primary evidence that lesser measures would fail is the California Department of Insurance's attempt to get insurance companies to diversify their boards. The Declaration of Dave Jones details those efforts, which were composed of voluntary surveys, seminars, and other initiatives of a similar nature. But when the Insurance Commissioner wished to go farther than simple cajolery, when he wanted to publicly disclose the board composition of the companies under his jurisdiction, the Legislature *declined.* (Declaration of Dave Jones ¶ 19). The former Commissioner attributes that rejection to a strong lobbying effort from the companies involved. (Id. ¶ 18).

For some years, the state maintained a "Registry" of capable and qualified women and minorities who wanted to sit on boards. (Declaration of Dana Loewy). This Registry required that individuals pay $200 biennially to be listed, and it required that corporations pay $500 for access to the list. (Id.). Only28 corporations joined, and it appears the Registry was ultimately abandoned. (Id.). The two largest state pension funds likewise created a database of diverse potential board candidates. (POSS Nos. 201-202). This got a somewhat larger buy-in – possibly due to the pension funds' shareholder status in certain companies. (Id.). And in 2013 the Legislature also passed a concurrent resolution calling on corporations to add diverse members to their boards. (POSS No. 197). The response to these various initiatives was not satisfactory to the Legislature.[24]

[24] There is also evidence that, prior to the passage of Section 301.4, individual Legislators went to have personal meetings with unidentified business leaders about the issue of diverse boards. (POSS No. 207-212). It is not clear that this can be counted as an initiative of the Legislature since it involved no official acts, but it is worth noting.

According to the Secretary, the Legislature had finally had enough of asking. Now it was time for telling. Their frustration is somewhat sympathetic. But by escalating from somewhat blasé and voluntary requests straight to a numeric mandate, they skipped over several possible intermediate and neutral steps, some of which were obvious even to their own experts, members, and counsel. The most prominent of these is a disclosure requirement that would compel corporations to reveal the demographic information of their board members.

One of the Secretary's experts, Ms. Jessica N. Grounds, put it thus at paragraph 35 of her declaration:

> "Another external barrier for underrepresented groups to appointments on California company boards is the lack of transparency in data collection, particularly in the case of demographic leadership data related to race, ethnicity, sexual orientation, and gender identity. For example, a recent report found that for the 2021 proxy season, only 26.9% of Russell 3000 companies included information on the racial/ethnic composition of their board. Like many things in business, you cannot measure or set goals for things that you do not track. When there is a lack of a baseline, it is hard to know where you stand, and oftentimes your assumptions are inaccurate without solid data. For example, a study conducted by McKinsey and LeanIn of 70,000 employees and eight-two companies in the United States found that over 50% of men surveyed thought that women were well-represented in their company's leadership positions, when, in fact, women held only in 1 out of 10 leadership positions. Based in my experience, this misperception is applie[d] in a similar manner to other underrepresented groups enumerated in AB 979. In my expert opinion, the lack of data collection itself, is a structural barrier to board service for underrepresented groups."

In a hearing conducted after Section 301.4 was enacted, several of the participants echoed the catchphrase "what gets measured gets done," emphasizing the necessity of getting corporations to disclose the demographics of their directors. (Declaration of Sonya Ledanski Hyde Exhibit 4, p. 31:22ff). This would allow Legislators to understand the terrain they may need to regulate, and it would allow shareholders likewise to understand the composition of boards and take whatever action they deem appropriate.

Not only has the Legislature not attempted this, but as noted above, they rebuffed the efforts of the former Insurance Commissioner to do so. The Secretary has gone through a few possible alternatives (such as the NFL's "Rooney Rule") and tried to explain why they wouldn't work. And perhaps the Secretary is right about those alternatives. But the Legislature did not take the simplest and most obvious next step: a disclosure requirement. That approach was not tried and found ineffective. It was found politically difficult and left untried.

The obscurity of the board selection process forms a central part of the rationale behind Section 301.4. On page 8 of their Reply, Plaintiffs have made a helpful collection of the evidence regarding how board members are selected: the existing board gets together in a confidential setting, comes up with candidates which are contacted at some point, and ultimately proposes a person to the shareholders, who then vote.[25] In a memorable sentence, the Secretary has

[25] What this means is that people who have been considered and rejected may never even know they've been

described that process as "a highly subjective, secretive, and insular decision making process that relies on social networks dominated by white, straight, cisgender men and...infected with in-group bias." (Defendant's Opening Memorandum p. 9:24-10:1). According to the Secretary's arguments and experts, it is this process which leads, even unintentionally and subconsciously, to the exclusion of minorities from board seats.

As already noted, the Secretary believes that a neutral process "should" produce a board which would comply with Section 301.4; they urge that companies could and should use such a process. If that is the state's position, then another obvious step (aside from disclosure requirements) would be to alter the board selection process. If the process is the problem, why not change it? Yet the state has made no attempt to do so.

When this court posed the possibility, the Secretary responded by citing two pieces of evidence: a footnote in the declaration of their expert stating that boards generally meet confidentially, and a line from a trial transcript in another case where an expert speculates that an open process might affect the stock price of the company or personally embarrass the people under consideration for the seat. (Defendant's Reply p. 12:15 [citing the Declaration of Darren Rosenblum at fn. 5 and the Declaration of Anthony V. Seferian, Exhibit 3]). But the fact that boards generally *do* meet confidentially doesn't mean that they always *should*. And the idea that stock prices might fluctuate based on new information about company leadership is hardly alarming; that is how the market is supposed to work. As for the speculation that a person might be embarrassed to have their candidacy known...suffice it to say that the personal modesty of the successful (where such modesty exists) is a true ornament to their personality, but not a reasonable basis on which to formulate public policy.

In sum, even if the Secretary had established a specific, compelling interest, Corporations Code § 301.4 is not narrowly tailored to serve that interest. It is not the least restrictive means available for accomplishing the goals the Legislature had in mind. There are other obvious and neutral measures suggested by the legislators themselves, their experts, their witnesses, and even the statements of their lawyers. These measures were not attempted. Worse, in at least one instance they were rejected. That is fatal to the mandate of Section 301.4.

Conclusion

Corporations Code § 301.4 violates the Equal Protection Clause of the California Constitution on its face. The statute treats similarly situated individuals – qualified potential corporate board members – differently based on their membership (or lack thereof) in certain listed racial, sexual orientation, and gender identity groups. It requires that a certain specific number of board seats be reserved for members of the groups on the list – and necessarily excludes members of other groups from those seats.

The Secretary has not identified a compelling interest to justify this classification. The broader public benefits produced by well-run businesses do not fit that bill. On the other hand, while remediation of discrimination *can* be a compelling interest, the state must define a specific

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considered. The only way to be aware of your consideration is to either (a) be contacted by an existing board member or (b) find out about a vacancy some other way and take affirmative steps to lobby for the spot.

arena in which the discrimination has occurred, such as a school district or a specific industry within a particular local jurisdiction. Corporate boards are not such an arena – they cover all industries and all parts of the country. The Legislature did not even attempt to limit its investigation or its findings to California corporations, though jurisdictional restrictions ensured that only California corporations would be covered by the law. And even supposing that corporate boards were a sufficiently specific arena, neither the Legislature nor the Secretary has produced the combination of (a) valid statistical comparisons and (b) anecdotal testimony which could serve as "convincing evidence" of discrimination in that arena.

Furthermore, Section 301.4 is not narrowly tailored to meet the compelling interest the Secretary offers. The Legislature made no attempt to conduct a demographic survey of the qualified talent pool of potential board members. It made no attempt to obtain disclosure from California corporations regarding the current demographics of their boards. In fact, when asked to do so by the Insurance Commissioner, the Legislature refused. The Legislature and the Secretary blame a "secretive, insular" selection process for the problem with current board compositions. Yet there has been no attempt to improve that process, nor has any good explanation been offered for that lack of effort.

Because Section 301.4 treats similarly-situated individuals differently based on race, sexual orientation, and gender identity, because that use of suspect categories is not justified by any compelling interest, and because the statute is not narrowly tailored to serve the interests offered, Section 301.4 violates the Equal Protection Clause of the California Constitution. Plaintiffs are entitled to a judgment declaring as much and an injunction preventing the expenditure of taxpayer funds on implementation of the measure.

A member of the public, whom all three branches of government serve, might wonder at this result, given some of the concessions made in the record. If the Legislature has identified a social problem, how can the court stand in the way of the obvious and direct approach to solving it? There are two complementary answers to the question.

The first comes from the differing functions accorded to the different branches. It is the function of the judicial branch to resolve disputes. Courts serve that function, in part, by maintaining the continuity of rules even against the will of a majority. Residents of all stripes can feel more at home and at peace with one another if they know the rules are stable, even when they don't like those rules.

The second is that fundamental values, whether personal or social, must be guarded. Equal treatment and opportunity, of and for all individuals regardless of how they look or identify, is one of this state's basic commitments. Sometimes and in some places the citizens of this state will not live up to that ideal. But the thing that caused the problem is not always the right tool to fix the problem. Only in very particular cases should discrimination be remedied by more discrimination. And that should only happen after obvious alternative measures have been tried. Sometimes the direct approach should be the last resort, not the first.

Plaintiffs' motion for summary judgment is GRANTED. Defendant's motion for summary judgment, and their alternative motion for summary adjudication, is DENIED. Plaintiff

is directed to submit a proposed form of judgment within 10 days.

Dated: 4/1/22

Judge of the Superior Court
Terry A. Green