

## California Court Overturns Board Gender Diversity Statute

A Los Angeles Superior Court judge struck down California's board gender diversity statute on May 13, 2022. The court found that [Senate Bill 826](#) violated the California Constitution's Equal Protection Clause.

### SB 826 Requires Corporations to Include at Least One Female Director on Their Boards

SB 826 was signed into law in 2018. The bill required public corporations whose principal executive offices are located in California to include a certain number of female board directors, depending on the overall board size. [1] By December 31, 2019, all public corporations were required to have at least one female director on their board. By December 31, 2021, public companies were required to have at least (1) two female directors if the board had five directors and (2) three female directors if the board had six or more directors. Financial penalties applied to corporations that failed to meet the requisite number of female directors. A first violation resulted in a \$100,000 fine, and subsequent violations resulted in \$300,000 fines. Each director seat required to be filled by a female director, which was not filled by a female director, counted as a single violation. The California secretary of state's website is required to publish reports on the status of compliance with the requirements of SB 826.

### Crest v. Padilla

In *Crest v. Padilla I*, Case No. 19STCV27561, the plaintiffs challenged SB 826 on the basis that it violates Equal Protection under Article I, Section 7 (Equal Protection Clause) of the California Constitution. The Equal Protection Clause states that a "person may not be...denied equal protection of the laws." Cal. Const., art I, § 7(a). Because under California law, classifications based on gender are considered "suspect" classifications, the court applied the strict scrutiny equal protection analysis.

The court found that the plaintiffs carried their initial burden to show that men and women are similarly situated for the purposes of SB 826's gender-based quota. The burden then shifted to the state to demonstrate that SB 826 satisfied strict scrutiny. To satisfy strict scrutiny, the state was required to show: (1) a compelling state interest, (2) that the law was necessary, and (3) that SB 826 was narrowly tailored to serve that compelling state interest.

The plaintiffs sought a judgment declaring the spending of taxpayer funds to enforce SB 826 as illegal and enjoin the California secretary of state from spending taxpayer funds for the purposes set forth in SB 826.

### General Goal of Gender Parity Is Not a Compelling State Interest

The state advanced three state interests as compelling:

1. SB 826 was passed to eliminate and remedy discrimination in the director selection process for publicly held corporate boards in California.
2. SB 826 was passed to increase gender diversity on the boards of publicly held corporations to benefit the public and the state economy.
3. SB 826 was passed to increase gender diversity on publicly held corporations headquartered in California to benefit and protect California taxpayers, public employees, pensions, and retirees.

The court found that SB 826's goal was to achieve gender equity or parity and not, as argued by the state, to boost the economy or protect California's taxpayers, public employees, pensions, and retirees. Absent specific evidence of discrimination against a woman by a specific corporation, the court found these interests to be insufficient, as "there is no compelling governmental interest in remedying societal discrimination." Further, there is "no compelling governmental interest in remedying generalized, non-specific allegations of discrimination."

### **Gender-Based Classification Is Not Necessary to Achieve State Interests**

The court also found that SB 826's use of gender-based classification is not necessary to boost California's economy, improve opportunities for women in the workplace, or protect California taxpayers, public employees, pensions, and retirees. The court also noted that the state's cited studies on causation were unreliable because they failed to "sufficiently address discrimination and/or causality" and did not use "the most sophisticated, econometric methodologies and current statistical analysis available[.]" The lack of causation evidence led the court to conclude that the legislature's actual purpose was gender parity, not remedying discrimination.

### **SB 826 Is Not Narrowly Tailored**

Last, the court held that the state presented no evidence that the legislature considered gender-neutral alternatives to achieve the state's goals, including amending existing anti-discrimination laws or enacting new anti-discrimination laws focusing on the board selection process. Further, the state did not prove that the gender-based classification was limited in scope and duration or that it was actually remedial.

Finding that the state failed to demonstrate that SB 826 could withstand strict scrutiny, the court enjoined the implementation and enforcement of the statute.

### **Takeaways for Employers**

The ruling in *Padilla I* suggests that California may not enforce SB 826. However, California secretary of state, Shirley Weber, has directed counsel to file an appeal.

In the meantime, while still considering investor, consumer, and client demands for diverse workplaces and businesses, employers should also be mindful that implementing quotas for persons with particular protected characteristics could run afoul of rulings similar to the one in *Padilla I*. Employers should carefully analyze their approach to filling board seats, and consult with experienced legal counsel if there are any questions.

### **Endnote**

[1] "Female" means an individual who self-identifies her gender as a woman, without regard to the individual's designated sex at birth.

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