

9th Circuit Revives Lawsuit Challenging One of the Board of Directors Diversity Statutes

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All the way back in 2018, California passed [Senate Bill 826](#) requiring publicly-held corporations with principal executive offices in California to have a certain number of females on their board of directors. Similarly, in 2020, [Assembly Bill 979](#) was passed which required publicly held corporations headquartered in California to diversify their board of directors with “underrepresented communities.”

Both laws have faced legal challenges including taxpayer organizations arguing that the State of California should not be permitted to use tax dollars to enforce the law and from shareholders of covered corporations.

Recently, the 9th Circuit revived a shareholder suit pertaining to Senate Bill 826. The suit was brought by a shareholder of a company covered by the statute. The shareholders of the company are responsible for selecting the corporation’s directors at their annual meeting. The shareholder alleged that the statute discriminates on the basis of sex in violation of the Equal Protection Clause of the 14th Amendment and “seeks to force shareholders to perpetuate sex-based discrimination.”

In December 2019, the company elected a female to fill a vacant board-member seat which meant the company was in compliance with the requirements of the statute. On that basis, the State moved to dismiss the shareholder’s complaint for lack of Article III standing. The district court granted the motion to dismiss reasoning that the shareholder had not suffered any injury in fact, because the penalties imposed under the statute were against non-compliant corporations, not shareholders.

The 9th Circuit reversed finding the shareholder had alleged injury in fact and thus had standing to challenge the statute. Moreover, the appellate court opined in a footnote that the panel is leaving it to the district court on remand to determine whether SB 826 is constitutional.

The ruling does not change the current status of either Senate Bill 826 or Assembly Bill 979, as currently no preliminary injunction to bar enforcement is in place but the ruling could affect the future of both statutes as challenges against the lawfulness continues.

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