

Los Angeles Superior Court Invalidates California Board Diversity Statute, Rendering It Ripe for Review by the California Court of Appeal

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In [*Crest v. Padilla*](#), No. 20STCV37513 (Cal. Super. Apr. 1, 2022), the [Superior Court of California for the County of Los Angeles](#) (Green, J.) declared that [Section 301.4](#) of the California Corporations Code is unconstitutional under the California state Constitution. Section 301.4 requires publicly held corporations that have their principal executive offices located in California to include “underrepresented communities” on their boards of directors. The trial court granted the taxpayer plaintiffs’ motion for summary judgment, concluding that the statute violated equal protection clause of the California Constitution. The court’s decision renders the constitutionality of Section 301.4 ripe for appellate review by the California Court of Appeal.

On September 30, 2020, California Governor Gavin Newsom signed into law [Assembly Bill 979](#) (AB 979), codified as Section 301.4, which required publicly held corporations that have their principal executive offices located in California to have certain minimum specified numbers of directors from “underrepresented communities” depending on the total size of the board. A director qualifies as being part of an “underrepresented community” if he or she “self-identifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or . . . self-identifies as gay, lesbian, bisexual, or transgender.” Section 301.4 also required the California Secretary of State (“SOS”) to gather and publish information regarding compliance with the bill’s provisions, as well as other information, and permitted the State to implement regulations imposing fines for violations of the law.

Also on September 30, 2020, Judicial Watch sued the California SOS on behalf of three residents in their capacities as California taxpayers seeking a judicial declaration that Section 301.4 violates the equal protection clause in the California state Constitution and a permanent injunction enjoining the expenditure of taxpayer funds on implementation of the law. Plaintiffs filed a motion for summary judgment

The trial court granted plaintiffs’ motion. It concluded that the law “violates the Equal Protection

Clause of the California Constitution on its face” because it “treats similarly situated individuals — qualified potential corporate board members — differently based on their membership (or lack thereof)” in certain listed identity groups. Moreover, “[i]t 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 trial court rejected the State’s claim that it had a compelling interest in regulating diversity on public company boards, concluding that (i) corporate boards are not an arena in which past discrimination has occurred; (ii) the State failed to submit sufficient evidence to show the law would remediate past discrimination; and (iii) the State’s generic interest in healthy businesses and good business practices was not sufficiently specific or immediate to permit the use of suspect classifications. Putting aside these foundational problems, the trial court found that Section 301.4 failed to pass constitutional muster because it was not the “least restrictive means” of achieving the State’s goal of promoting diversity on public company boards.

Although the trial court rejected the State’s arguments, it recognized that it is “intuitively sensical” that a business would benefit from having a diverse board of directors. A diverse board may lead to higher profits as a result of better-decision making because a “diverse board is more likely to generate unique approaches, and to handle their diverse employees in an appropriate way.” The California Superior Court’s decision on Section 301.4 is now ripe for appeal.

It is important to note that AB 979 is the second California legislative measure designed to amplify board diversity. [Senate Bill 826](#) (SB 826), the 2018 California board gender diversity statute, requires that all publicly traded corporations and headquartered in the state of California have a “representative number” of women as members of their board of directors. Judicial Watch also is challenging SB 826 in separate litigation. See [Crest v. Padilla](#), No. 19STCV27561 (Cal. Super. filed Aug. 6, 2019). The constitutionality of SB 826 was submitted to a bench trial and the final outcome remains uncertain pending the judge’s decision.

As SB 826 and AB 979 work their way through the judicial review process, it appears likely that prominent institutional investors and asset managers will continue to privately push public companies to increase the diversity on their boards irrespective of any legal requirement to do so.

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