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CORPORATIONS WITHOUT REPRESENTATION: THE CONSTITUTIONALITY OF GENDER DIVERSITY MANDATES

Talley Timms Ransil*

Abstract

Biases and structural barriers contribute to the glacial pace at which women are represented on corporate boards. Even though companies with at least one female board of director outperform companies with no female directors, women only held 20% of board of director positions in 2019. Companies nationwide would not reach gender equality in the boardroom for decades without legally enforceable gender diversity requirements. In response, California Senator Jackson proposed SB 826—requiring California-based publicly held corporations to include at least one woman on their board of directors. However, conservative legal organizations filed lawsuits claiming California’s gender diversity mandate violates the California Constitution because the mandate perpetuates sex-based discrimination and is subject to strict scrutiny review. This Note proceeds by examining California’s gender diversity mandate and discussing the constitutionality of SB 826.

This Note finds that SB 826 is constitutional under the Equal Protection Clause and beneficial to qualified female board candidates and the United States economy. SB 826 meets the intermediate scrutiny requirements because the gender diversity mandate is substantially related to a sufficiently important government interest and is narrowly tailored. However, this Note also argues that, paradoxically, if states ratify the Equal Rights Amendment (“ERA”), SB 826 would likely be unconstitutional because the ERA’s ratification will presumably change the standard of review for gender classifications from intermediate scrutiny to strict scrutiny. Under strict scrutiny, the Supreme Court would likely prohibit sex-conscious legislation designed to advance women’s equality. This Note ultimately urges courts to uphold California’s gender diversity mandate as a matter of public policy and law under the current intermediate standard. SB 826 does not question whether women are capable of getting into the boardroom; rather, it ensures that women have an opportunity to earn a spot at the table.

* © 2021 Talley Timms Ransil. Talley Timms Ransil is a third-year law student at the S.J. Quinney College of Law at the University of Utah. Talley has served on the executive board of the Women’s Law Caucus for all three years of law school. As President of the Women’s Law Caucus, Talley established a mentorship program to provide law students with opportunities to learn from upperclassman and attorneys who share career interests. Talley would like to thank Professor Erika George for her mentorship and for providing support in the research stage of this Note. Talley would also like to thank the *Utah Law Review* staff for their help in editing this Note for publication.

I. INTRODUCTION

In the last one hundred years, United States women have earned the right to have equal access to job listings,¹ be paid the same as their male counterparts,² and own a credit card.³ However, women's equality in the workplace is still severely lagging behind men.⁴ In 2019, women made up 57.4% of the United States labor force⁵ and drove “70–80% of all consumer purchasing”⁶ but only held 20.4% of board of director positions.⁷ In California, the number of female board members was even lower; of California's publicly held companies, one-fourth had no female directors on their board, and for “the rest of the companies, women h[eld] only 15.5% of the board seats.”⁸ In response, California Senator Hannah-Beth Jackson proposed Senate Bill No. 826 (“SB 826”)—requiring California-based publicly held corporations to include women on their board of directors.⁹ Senator Jackson

¹ Alanna Vagianos, *14 Rights Women Have Gained Since Earning the Right to Vote*, HUFFPOST (Sept. 27, 2016, 2:24 PM), https://www.huffpost.com/entry/rights-women-have-gained-since-earning-the-right-to-vote_n_57e9ed33e4b0c2407cd93434 [<https://perma.cc/H5SE-KPDW>] (“In 1968, the Equal Employment Opportunity Commission ruled that the standard practice of separating job listings and help wanted ads by sex was unlawful.”).

² *Id.* (“In 1970, a U.S. Court of Appeals ruled in *Schultz v. Wheaton Glass Co.* that an employer owed women the same compensation as men for jobs that are ‘substantially equal’ even if they are not ‘identical.’ This prevented employers from giving women different titles than men in order to pay them less.”).

³ *Id.* (“In 1974, women finally gained the right to get a credit card in their own names with the passage of the Equal Credit Opportunity Act of 1974. The law made credit card companies issue cards to women without a husband's signature, which gave more women power over their personal finances.”).

⁴ See generally *Gender Inequality and Women in the U.S. Labor Force*, INTERNATIONAL LABOUR ORGANIZATION, https://www.ilo.org/washington/areas/gender-equality-in-the-workplace/WCMS_159496/lang--en/index.htm [<https://perma.cc/JH3S-JPFQ>] (last visited June 12, 2021).

⁵ *Women in the Workforce*, CATALYST: WORKPLACES THAT WORK FOR WOMEN (June 5, 2019), <https://www.catalyst.org/research/women-in-the-workforce-united-states/> [<https://perma.cc/T7GT-AJ5W>].

⁶ Bridget Brennan, *Top 10 Things Everyone Should Know About Women Consumers*, BLOOMBERG (Jan. 11, 2018), <https://www.bloomberg.com/company/stories/top-10-things-everyone-know-women-consumers/> [<https://perma.cc/EZ8Q-9NXV>].

⁷ *Women on Boards Gender Diversity Index: 2019 Progress of Women Corporate Directors of Russell 3000 Index Companies by Company Size, State and Industry Sector*, 2020 WOMEN ON BOARDS (2019), https://2020wob.com/wp-content/uploads/2019/10/2020_WOB_Gender_Diversity_Index_Report_Oct2019.pdf [<https://perma.cc/ZU5T-HJPL>] [hereinafter *2019 Women on Boards Gender Diversity Index*] (reporting the progress of women corporate directors of Russell 3000 index companies in 2019); see S.B. 826, 2017-2018 Leg., Reg. Sess., Ch. 954 § 1(e) (Cal. 2018) (outlining that in California, women hold only 15.5% of the board seats and one-fourth of California-based companies have no female directors).

⁸ S.B. 826, 2017-2018 Leg., Reg. Sess., Ch. 954 § 1(e) (Cal. 2018).

⁹ *Id.* § 2(a)–(b) (currently codified at CAL. CORP. CODE § 301.3).

reasoned that “[w]omen should have a seat at the table not just because it is the right thing to do; it also makes good business sense. Bringing women into the boardroom is good for employees, shareholders, and customers. When women lead, we all benefit.”¹⁰

Ultimately, this Note contends that SB 826 is constitutional and a valuable benefit to qualified female board candidates, shareholders of California-based companies, and the United States economy as a whole. Part II of this Note considers the evolution, results, and current status of California’s gender diversity mandate for boards of directors. Part III discusses the constitutionality of SB 826 under the Equal Protection Clause. This Note concludes that courts should uphold California’s gender diversity mandate as a matter of law and public policy.

II. BACKGROUND

This Part provides a brief overview of the evolution, results, and current status of California’s gender diversity mandate for boards of directors. The sections in this Part will outline: (A) the state of corporate governance before the enactment of SB 826; (B) an overview of SB 826 requirements; (C) the benefits of a gender diversity mandate; (D) the outcome after the SB 826 requirement deadline; and (E) the current litigation over the mandate.

A. The State of Corporate Governance Before the Enactment of SB 826

SB 826 is the progeny of progressive California legislation dating back to Senator Jackson’s Senate Concurrent Resolution 62,¹¹ introduced in 2013, which encouraged—but did not legally require—California-based companies to “increase the number of women on their boards of directors” by December 31, 2016.¹² In the following years, numerous investors¹³ pressured companies to increase the number of female directors—or, for many companies, to elect their first female.¹⁴ Investors

¹⁰ CLAIM YOUR SEAT: A PROGRESS REPORT ON WOMEN’S REPRESENTATION ON CALIFORNIA CORPORATE BOARDS, CAL. PARTNERS PROJECT 19, <http://www.insurance.ca.gov/diversity/41-ISDGBD/GBDEExternal/upload/PPP-WOB-Baseline-Report-2020-FINAL.pdf> [<https://perma.cc/B558-A7EM>] (last visited July 7, 2021) [hereinafter CLAIM YOUR SEAT: A PROGRESS REPORT] (quoting Senator Hannah-Beth Jackson).

¹¹ S. Con. Res. 62, 2013-2014 Reg. Sess. (Cal. 2013).

¹² S.B. 826, 2017-2018 Leg., Reg. Sess., Ch. 954 § 1(b) (Cal. 2018).

¹³ The three biggest asset managers—BlackRock, Vanguard, and State Street—have pressured companies with all male boards. Jess Green, *After Adding More Women to Boards, Companies Pivot to Race*, FIN. PLAN. (Aug. 19, 2020), <https://www.financial-planning.com/articles/blackrock-vanguard-state-street-pressured-companies-on-adding-women-to-boards-now-to-focus-on-race> [<https://perma.cc/HPP4-2E2E>].

¹⁴ CLAIM YOUR SEAT: A PROGRESS REPORT, *supra* note 10 (citing *BlackRock Investment Stewardship*, BLACKROCK (2020); *Goldman Sachs’ Commitment to Board Diversity*, GOLDMAN SACHS (2020)) (“BlackRock recommends at least two women directors

also placed significant importance on Environmental Social Governance (ESG) factors, evaluating socially responsible investments alongside traditional financial investments.¹⁵

Conscious and unconscious biases contribute to the glacial pace at which females are represented on corporate boards.¹⁶ When choosing new directors, men often do not “recognize the favoritism inherent in their choices of other white men” because “[w]hen they comb their networks for people they can put forward (which is how 87% of board seats are filled), they find few women executives in their own circles.”¹⁷ Instead they often “claim the lack of gender parity . . . on their boards is due to a lack of qualified women in the pipeline” instead of “a who-you-know problem.”¹⁸ Unfortunately, male leaders often suffer from the bystander effect and fail to take action themselves because they believe someone else will address the

serve on boards of companies in which it invests, and earlier this year Goldman Sachs instituted a policy that requires diversity on the boards of companies that want its support to go public.”); Joshua Schneiderman, *California’s Gender Diversity on Boards Law and Its Broader Implications for Public and Private Companies*, SNELL & WILMER (Feb. 8, 2019), <https://www.swlaw.com/publications/legal-alerts/2587> [<https://perma.cc/J3RW-S9TW>].

¹⁵ See generally *ESG 101: What Is ESG?*, MORGAN STANLEY CAP. INT’L, <https://www.msci.com/what-is-esg> [<https://perma.cc/2TY7-49TB>] (last visited June 6, 2021); see Christina Banahan & Gabriel Hasson, *Across the Board Improvements: Gender Diversity and ESG Performance*, HARV. L. SCH. F. ON CORP. GOVERNANCE, (Sept. 6, 2018), <https://corpgov.law.harvard.edu/2018/09/06/across-the-board-improvements-gender-diversity-and-esg-performance/> [<https://perma.cc/4C32-9EHF>] (“Companies with diverse boards receive higher scores on ESG performance metrics more often than those with non-diverse boards.”).

¹⁶ Alfredo Enrione, Donna Finley & Gordon Allan, *Leveraging the Value of Female Directors*, ETHICAL BOARDROOM, <https://ethicalboardroom.com/leveraging-the-value-of-female-directors/> [<https://perma.cc/3Z5F-FABC>] (last visited June 6, 2021) (finding that “biases – either conscious or unconscious – [] adversely affect[] the women’s perceived and actual performance, and hence the overall effectiveness of the board.”).

¹⁷ Coco Brown, *Why Men Still Dominate Corporate Boardrooms*, FORTUNE (June 7, 2017, 1:35 PM), <https://fortune.com/2017/06/07/most-powerful-women-career-advice-corporate-boardroom-diversity-workplace-inequality-favoritism/> [<https://perma.cc/5PSW-7LJP>]; see Boris Groysberg & Deborah Bell, *Dysfunction in the Boardroom*, HARV. BUS. REV. (June 2013), <https://hbr.org/2013/06/dysfunction-in-the-boardroom> [<https://perma.cc/ES3G-7W3T>] (quoting a female director: “I’m not part of the old boys’ network. Directorships go to people who are known. I’ve been so busy leading my company and raising my family that I’m less well known.”); Sunitha Malepati, *The Future (Public Company Boardroom) Is Female: From California SB 826 to a Gender Diversity Listing Standard*, 28 AM. U. J. GENDER SOC. POL’Y & L. 493, 503 (2020) (“When a seat opens, companies prioritize prior board experience in the election of new directors and find candidates from within current board members’ largely male-dominated networks.”).

¹⁸ Brown, *supra* note 17.

problem.¹⁹ As a result, board seats continuously go to older, white men²⁰ who comprise only a minority of employees, customers, or shareholders.

Women also face “structural barriers and discrimination in the workplace, hindering their ability to reach leadership positions” to be considered for board duties.²¹ For example, there is a strong correlation between the gender of a company’s CEO and the gender diversity of its board of directors.²² Female CEOs have an average of 30% women on their boards while male CEOs have an average of 17.3% women on their boards.²³ Male CEOs are also much less likely than their female counterparts to lead companies with gender-diverse boards.²⁴ However, because women only account for thirty-seven out of 500 CEOs for Fortune 500 companies,²⁵ women have fewer leadership opportunities to increase gender diversity on boards. Additionally, studies suggest that women need to be more qualified than men to become a board member and pay a higher personal price; compared to their male counterparts, “fewer female directors were married and had children” and a “larger percentage of the women were divorced.”²⁶ Moreover, even if companies elect women to the board, female directors are often treated as diversity tokens with less influence in substantive deliberations and serve mainly as façades.²⁷

¹⁹ *See id.*

²⁰ Jena McGregor, *Corporate Boards Are Still Mostly White, Mostly Male — and Getting Even Older*, WASH. POST (Apr. 24, 2018, 8:39 AM), <https://www.washingtonpost.com/news/on-leadership/wp/2018/04/24/corporate-boards-are-still-mostly-white-mostly-male-and-getting-even-older/> [https://perma.cc/WWQ9-YRG6] (stating that in 2018, “[d]irectors younger than 50 ma[d]e up [six] percent of the seats on S&P 500 boards — drop the age to 45, and it’s less than [two] percent. There [we]re more directors 75 or older than those 50 or younger.”); Groysberg & Bell, *supra* note 17 (quoting a female director: “Boards still prefer pale, stale, and male!”).

²¹ Malepati, *supra* note 17; *see* Deborah D. Zelechowski & Diana Bilimoria, *Characteristics of Women and Men Corporate Inside Directors in the US*, 12 CORP. GOVERNANCE 337, 341 (2004) (explaining the “pipeline theory”: “there are simply too few women in lower ranks qualified to ascend to the top corporate job.”).

²² *Board Room Diversity: When Women Lead*, 2020 WOMEN ON BOARDS, 2 (2016), <https://2020wob.com/wp-content/uploads/2019/09/2020GDI-2016Report.pdf> [https://perma.cc/TNE3-KUW7] (reporting the progress of women corporate directors of Fortune 1000 companies in 2020).

²³ *Id.*

²⁴ *Id.*

²⁵ Emma Hinchliffe, *The Number of Female CEOs in the Fortune 500 Hits an All-Time Record*, FORTUNE (May 18, 2020, 5:15 AM), <https://fortune.com/2020/05/18/women-ceos-fortune-500-2020/#:~:text=The%20number%20of%20women%20running,are%20led%20by%20female%20CEOs> [https://perma.cc/6MHD-L6NB].

²⁶ Groysberg & Bell, *supra* note 17.

²⁷ Zelechowski & Bilimoria, *supra* note 21, at 341 (“[W]omen may be treated as tokens: peripheral members having less personal influence in deliberations within the executive suite and the boardroom.”); Groysberg & Bell, *supra* note 17 (“Why aren’t more women on boards? One female director offered this explanation: ‘Women are not thought of first as candidates unless a board is looking for gender diversity specifically.’”).

Before California enacted SB 826, “29% of public companies headquartered in California had zero female corporate board directors.”²⁸ Consequently, if women’s growth in workplace leadership were to remain at its current pace, then it would take decades (after most professional women currently in the workforce retire) for companies nationwide to reach gender equality without legally enforceable requirements.²⁹

B. Overview of SB 826 Requirements

SB 826 was established when Senator Jackson took the push to change gender diversity in the boardroom from an encouragement to a requirement under California state law in 2018.³⁰ When Governor Brown signed SB 826 into law,³¹ California became the first state³² to require boards to include female directors.³³ SB 826 states

²⁸ CLAIM YOUR SEAT: A PROGRESS REPORT, *supra* note 10 (citing *The Women Changing California Boardrooms*, KPMG (2020)).

²⁹ S.B. 826, 2017-2018 Leg., Reg. Sess., Ch. 954 § 1(f) (Cal. 2018); *see also id.* § 1(f)(1) (“A 2015 study conducted by the United States Government Accountability Office estimated that it could take more than 40 years for the numbers of women on boards to match men.”).

³⁰ S.B. 826, 2017-2018 Leg., Reg. Sess., Ch. 954 (Cal. 2018).

³¹ Section 2 of SB 826 is codified at Section 301.3 of the California Corporations Code. *See* S.B. 826, 2017-2018 Leg., Reg. Sess., Ch. 954 § 2 (Cal. 2018); CAL. CORP. CODE § 301.3 (Deering 2018).

³² *But see* Michael Hatcher & Weldon Latham, *States Are Leading the Charge to Corporate Boards: Diversify!*, HARV. L. SCH. F. ON CORP. GOVERNANCE, (May 12, 2020), <https://corpgov.law.harvard.edu/2020/05/12/states-are-leading-the-charge-to-corporate-boards-diversify/> [<https://perma.cc/3JXX-NKDC>] (“At least 11 other states have enacted or are considering board diversity legislation. None of the other existing statutes mandate minimum numbers of female directors; instead, those statutes focus on disclosures about diversity on the board of directors, and in some instances, senior management. Many of the enacted bills were originally modeled on the California gender diversity mandates, but were changed to ‘disclosure only’ during the legislative process.”).

³³ Daniel Greene, Vincent J. Intintoli & Kathleen M. Kahle, *Do Board Gender Quotas Affect Firm Value? Evidence from California Senate Bill No. 826*, 60 J. OF CORP. FIN. 1, 1 (2020). Additionally, on September 30, 2020, Governor Newsom signed AB 979 into law which lawmakers designed after SB 826. In response to the social unrest in the United States over systemic racial equality, AB 979 requires that publicly held corporations whose principal executive office are located in California must have at least one director from an “underrepresented community” by the end of 2021. Additionally, by the end of 2022, these corporations with more than four directors must have a minimum of two directors from “underrepresented communities” and corporations with nine or more directors must have a minimum of three directors from “underrepresented communities.” A 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.” Just like California’s gender diversity mandate, California is the first state to establish a mandate for “underrepresented communities” on corporate boards. Assemb. B. 979, 2019-2020 Gen.

that “a publicly held . . . corporation whose principal executive offices . . . are located in California³⁴ shall have a minimum of one female director on its board” by the end of 2019.³⁵ Additionally, by the end of 2021, corporations with five directors “shall have a minimum of two female directors,”³⁶ and corporations with six or more directors “shall have a minimum of three female directors.”³⁷ A corporation is subject to the requirements of Section 301.3 if the corporation is “publicly held,” meaning that it has “shares listed on a major United States stock exchange.”³⁸

SB 826 defines ‘female’ as “an individual who self-identifies her gender as a woman, without regard to the individual’s designated sex at birth,”³⁹ meaning that SB 826 is mandated based on gender rather than sex and is inclusive of transgender women.⁴⁰ Notably, to comply with Section 301.3, any “corporation may increase the number of directors on its board,” rather than replace existing board members, meaning that the gender requirement includes women in addition to, not instead of, male directors.⁴¹ As long as a female holds a board position “for at least a portion of the year,” a corporation will not violate Section 301.3.⁴² Corporations that fail to comply with the requirement are subject to a \$100,000 fine for a first violation and \$300,000 for any subsequent violations.⁴³

Assemb., Reg. Sess., Ch. 316 (Cal. 2020) (currently codified at CAL. CORP. CODE § 301.4); Cydney Posner, *California Mandates Board Diversity for “Underrepresented Communities,”* COOLEY PUBCO (Oct. 1, 2020), <https://cooleypubco.com/2020/10/01/california-mandates-board-diversity-underrepresented-communities/> [<https://perma.cc/RAA6-7FRV>]; *but see* Jacqueline Concilla, *A Glimmer of Hope for California’s “Well-Intentioned” Attempt to Put More Women in the Boardroom*, 93 S. CAL. L. REV. 603, 628 (2020) (“SB 826, a program that would clearly be unacceptable in the race context, is permissible as a gender-based classification.”).

³⁴ Six hundred two companies—over 12% of all public U.S. companies—“are headquartered in California, so the mandate affects a large and diverse set of firms with a combined market capitalization of over \$5 trillion.” Greene et al., *supra* note 33, at 2.

³⁵ CAL. CORP. CODE § 301.3(a) (Deering 2018); *see id.* § 301.3(f)(2) (explaining that a corporation is considered publicly held if it has “shares listed on a major United States stock exchange”).

³⁶ *Id.* § 301.3(b)(2).

³⁷ *Id.* § 301.3(b)(1).

³⁸ *Id.* § 301.3(f)(2).

³⁹ *Id.* § 301.3(f)(1).

⁴⁰ *Definitions*, TRANS STUDENT EDUC. RES., <http://www.transstudent.org/definitions/> [<https://perma.cc/DQT9-2ABK>] (last visited June 16, 2021) (defining transgender as “[a]n umbrella term for people whose gender identity differs from the sex they were assigned at birth”).

⁴¹ CAL. CORP. CODE § 301.3(a) (Deering 2018).

⁴² *Id.* § 301.3(e)(3).

⁴³ *Id.* § 301.3(e)(1)(B-C). *But see* Cydney Posner, *New Report Looks at Board Gender Diversity in California*, COOLEY PUBCO (Oct. 15, 2020), <https://cooleypubco.com/2020/10/15/report-board-gender-diversity-california/#page=1> [<https://perma.cc/YR26-Y763>] (“Note that, although fines are authorized under SB 826 for violations of the law, no regulations have yet been adopted to implement fines.”); *see generally* John N. Oest,

C. Benefits of a Gender Diversity Mandate

When Senator Jackson introduced SB 826 to the California Legislature, she argued that a gender diversity requirement would “boost the California economy, improve opportunities for women in the workplace, and protect California taxpayers, shareholders, and retirees”⁴⁴ Such gender-diverse boards significantly increase company value.⁴⁵ Based on a report by Credit Suisse, which examined over 2,000 global companies for six years, companies with women on their boards had a net income growth four percent higher than companies with no female directors⁴⁶ and “outperformed shares of comparable businesses with all-male boards by 26%.”⁴⁷ Additionally, a five-year study found that companies “with three or more female directors reported earnings per share that were 45% higher than those companies with no female directors at the beginning of the period.”⁴⁸

Companies with female boards of directors are more profitable because women bring a “greater diversity of viewpoints,” to an otherwise all male board, which improves the “quality of board deliberations . . . because different perspectives can increase the amount of information available.”⁴⁹ Additionally, female directors are more likely to push the CEO to consider a broader range of options when making

Negotiating the Loan Agreement: The Borrower’s Perspective, Part II, AMERICAN BAR ASS’N (May 31, 2011), https://www.americanbar.org/groups/business_law/publications/blt/2011/05/03_oest/ [<https://perma.cc/9QXE-YQW7>] (explaining that corporations are required to disclose non-compliance with laws to investors, which is an equally motivating factor for companies to comply with SB 826).

⁴⁴ S.B. 826, 2017-2018 Leg., Reg. Sess., Ch. 954 § 1(a) (Cal. 2018).

⁴⁵ See Greene et al., *supra* note 33, at 3 (first citing Ronald C. Anderson, David M. Reeb, Arun Upadhyay & Wanli Zhao, *The Economics of Director Heterogeneity*, 40 FIN. MGMT. (2011); then citing Gennaro Bernile, Vineet Bhagwat & Scott Yonker, *Board Diversity, Firm Risk, and Corporate Policies*, 127 J. FIN. ECON. 588 (2018)); MARY CURTIS, CHRISTINE SCHMID & MARION STRUBER, CREDIT SUISSE RSCH. INST., GENDER DIVERSITY AND CORPORATE PERFORMANCE (Aug. 2012).

⁴⁶ CURTIS ET AL., *supra* note 45.

⁴⁷ CLAIM YOUR SEAT: A PROGRESS REPORT, *supra* note 10 (citing CURTIS ET AL., *supra* note 45).

⁴⁸ S.B. 826, 2017-2018 Leg., Reg. Sess., Ch. 954 § 1(c)(1) (Cal. 2018). *But see* Jena McGregor, *After Years of ‘Glacial’ Change, Women Now Hold More Than 1 in 4 Corporate Board Seats*, WASH. POST (July 17, 2019, 9:01 AM), <https://www.washingtonpost.com/business/2019/07/17/after-years-glacial-change-women-now-hold-more-than-corporate-board-seats/> [<https://perma.cc/MB4N-CMT9>] (explaining that “other explanations [for company success] could be at play: Good financial outcomes could prompt boards to be more concerned about social norms and garner more resources to then hire more female directors.”).

⁴⁹ Jie Chen, Woon Sau Leung, Wei Song & Marc Goergen, *Research: When Women Are on Boards, Male CEOs Are Less Overconfident*, HARV. BUS. REV. (Sept. 12, 2019), <https://hbr.org/2019/09/research-when-women-are-on-boards-male-ceos-are-less-overconfident#:~:text=Women%2C%20on%20average%2C%20made%20up,the%20CEOs%20in%20our%20sample.&text=In%20other%20words%2C%20male%20CEOs,when%20exercising%20would%20yield%20profits> [<https://perma.cc/GP5V-V5JF>].

business decisions because female directors “tend to be less conformist and more likely to express their independent views than male directors because they do not belong to old-boy networks.”⁵⁰ Female directors’ diverse viewpoints also help companies manage risk effectively and balance long-term priorities.⁵¹ For example, during the financial crisis of 2007 to 2009, “female board representation reduced the negative impact of the crisis . . . because CEOs of firms with female board representation were less likely to adopt aggressive strategies that made their firms more vulnerable to the crisis.”⁵² On the other hand, companies “that did not have female board representation suffered a greater drop in performance.”⁵³

In addition to increasing profits, gender diversity on boards benefits companies in non-monetary ways, like attracting talented workers, increasing customers, and benefiting female employees. Generation Z and Millennials—the largest generations in the workforce⁵⁴—care about diversity and seek work with new and innovative leaders.⁵⁵ Similarly, female directors help companies “meet the expectations of their customers in a world where customers increasingly ‘shop their values.’”⁵⁶ For example, sustainability is an influential factor for many consumers,⁵⁷ and “companies with women on their boards are more likely to ‘create a sustainable future’ by . . . instituting strong governance structures with a high level of transparency.”⁵⁸ In addition to benefitting companies, gender diversity mandates are

⁵⁰ *Id.*

⁵¹ CLAIM YOUR SEAT: A PROGRESS REPORT, *supra* note 10 (citing Banahan & Hasson, *supra* note 15).

⁵² Chen et al., *supra* note 49.

⁵³ *Id.* (examining how female board members affect company performance, researchers “looked at differences in accounting and stock performance for 516 firms during the financial crisis of 2007 to 2009.”).

⁵⁴ CLAIM YOUR SEAT: A PROGRESS REPORT, *supra* note 10 (citing *Millennials Are the Largest Generation in the U.S. Labor Force*, PEW RSCH. CTR. (2018)).

⁵⁵ *Id.* (citing *The Millennial Majority Is Transforming Your Culture*, DELOITTE UNIV. (2015)).

⁵⁶ *Id.* (citing *All In: How Inclusion and Diversity Drive Shoppers’ Behavior*, ACCENTURE RSCH (2019)).

⁵⁷ Tensie Whelan & Randi Kronthal-Sacco, *Research: Actually, Consumers Do Buy Sustainable Products*, HARV. BUS. REV. (June 19, 2019), <https://hbr.org/2019/06/research-actually-consumers-do-buy-sustainable-products> [<https://perma.cc/Y5PU-SPRC>] (“[P]roducts marketed as sustainable grew 5.6 times faster than those that were not. In more than 90% of the CPG categories, sustainability-marketed products grew faster than their conventional counterparts.”).

⁵⁸ CLAIM YOUR SEAT: A PROGRESS REPORT, *supra* note 10 (citing KELLIE A. MCELHANEY & SANAZ MOBASSERI, UC BERKELEY HAAS SCH. OF BUS., *WOMEN CREATE A SUSTAINABLE FUTURE* (2012)).

also beneficial to female workers. Gender diversity on boards results in “lower pay gap[s] between male and female executives”⁵⁹ and reduces gender segregation in the workplace.⁶⁰

D. Outcome After SB 826 Requirement Deadline

The rollout of SB 826 was largely successful in bringing women to the corporate table. At the beginning of 2019, about one-third of California-based companies had all-male boards and needed to add at least one female director by 2020⁶¹ (meaning that “1,275 women needed to be added to public company boards in California.”).⁶² Moreover, to meet the additional requirements by 2022, more than 88% of California-based companies needed to add one or more female directors in the next three years.⁶³ However, after the SB 826 deadline, the number of companies with all-male boards dropped from 183 companies to fifteen (just three percent of all public companies with principal executive offices in California).⁶⁴ As a result, 97% of the 625 “impacted corporations” comply with SB 826.⁶⁵

Although the number of women added to boards of public companies with principal offices in California has naturally increased over the years (87 women added in 2016, 121 women in 2017, and 176 women in 2018), after California signed SB 826 into law, the number of women added to boards almost doubled from 2018 with 346 new women added in 2019.⁶⁶ Without a mandatory requirement for female directors, it is unlikely that these same companies would have promoted women to

⁵⁹ Greene et al., *supra* note 33, at 3 (citing Mary Ellen Carter, Francesca Franco & Mireia Gine, *Executive Gender Pay Gaps: The Roles of Female Risk Aversion and Board Representation*, 34 CONTEMP. ACCT. RSCH. 1232 (2017)); see Alison Cook, Alicia R Ingersoll & Christy Glass, *Gender Gaps at the Top: Does Board Composition Affect Executive Compensation?*, 72 HUM. REL. 1292, 1296 (2018) (“[W]omen’s service on the board is likely to have direct and indirect benefits for compensation equity between women and men executives.”).

⁶⁰ Cook et al., *supra* note 59.

⁶¹ Mikayla Kuhns, Rudy Kwack & Kosmas Papadopoulos, *California Dreamin’: The Impact of the New Board Gender Diversity Law*, THE CLS BLUE SKY BLOG: COLUMBIA LAW SCHOOL’S BLOG ON CORPORATIONS AND THE CAPITAL MARKETS (Jan. 4, 2019), <https://clsbluesky.law.columbia.edu/2019/01/04/california-dreamin-the-impact-of-the-new-board-gender-diversity-law/> [<https://perma.cc/3TLT-7TH9>].

⁶² CAL. PARTNERS PROJECT, GENDER EQUITY: INCREASE REPRESENTATION OF WOMEN ON CORPORATE BOARDS, <https://www.calpartnersproject.org/justthefacts> [<https://perma.cc/V3UW-4E9R>] (last visited June 6, 2021).

⁶³ *Id.*; Greene et al., note 33, at 2 (explaining that California companies will need to add over 1,000 additional female directors by 2021).

⁶⁴ Posner, *supra* note 43 (citing CLAIM YOUR SEAT: A PROGRESS REPORT, *supra* note 10).

⁶⁵ See *id.*; ALEX PADILLA, SEC’Y OF STATE, WOMEN ON BOARDS: MARCH 2020 REPORT CORPORATIONS CODE SECTION 301.3, (Mar. 2020), <https://bpd.cdn.sos.ca.gov/women-on-boards/WOB-Report-04.pdf> [<https://perma.cc/6LFD-3P8M>].

⁶⁶ Posner, *supra* note 43.

boards at the same rate. In total, women gained 42% of the new board seats for Russell 3000 Index companies in 2019.⁶⁷ SB 826's 2019 requirement is responsible for some of the increase in female directors in 2019.⁶⁸ However, in the first six months of 2020, only 147 women⁶⁹ had been added to boards, meaning women only gained 36% of the new seats for Russell 3000 Index companies, down from 42% in 2019.⁷⁰ This decline is likely because the next deadline for SB 826 is not until the end of 2021.⁷¹ This could indicate that companies are less willing to add women to their board voluntarily, suggesting that a mandatory requirement for female directors is vital if the United States is to achieve gender parity sometime before the year 2055.⁷²

Of the 5,225 total board seats at all public companies with principal executive offices in California, “766 were held by women in 2018, while 1,275 were held by women in June 2020—an increase of 66.5%.”⁷³ Now, 97% of public companies in California have at least one woman director on their board.⁷⁴ Additionally, in 2020, California had 349 companies with 20% or more board seats held by women—3.6% more companies than the prior year and more than any other state.⁷⁵ Consequently, women now hold 22.6% of board seats⁷⁶ nationwide, increasing from 17.7% in 2018.

However, even after California's mandatory gender diversity requirement, female directors only make up 22.6% of the director positions in the country, a dismal percentage given that women make up 57.4% of the United States labor

⁶⁷ 20% BY 2020, 2020 WOMEN ON BOARDS GENDER DIVERSITY INDEX 3 (2020), <https://2020wob.com/wp-content/uploads/2020/10/2020-GDI-FINAL.pdf> [<https://perma.cc/ZNZ9-QHJC>] [hereinafter 2020 PROGRESS OF WOMEN CORPORATE DIRECTORS] (reporting the progress of women corporate directors of Russell 3000 index companies in 2020).

⁶⁸ *Id.* (noting that “California, which passed the historic Women on Boards law in 2018 has the greatest number of W companies and saw the biggest increase of women directors” in 2019).

⁶⁹ Posner, *supra* note 43.

⁷⁰ 2020 PROGRESS OF WOMEN CORPORATE DIRECTORS, *supra* note 67.

⁷¹ CAL. CORP. CODE § 301.3(b) (Deering 2018) (stating that corporations with five directors “shall have a minimum of two female directors” and, corporations with six or more directors “shall have a minimum of three female directors”).

⁷² S.B. 826, 2017-2018 Leg., Reg. Sess., Ch. 954 § 1(f)(2) (Cal. 2018); *see also id.* § 1(f)(1) (“A 2015 study conducted by the United States Government Accountability Office estimated that it could take more than 40 years for the numbers of women on boards to match men.”).

⁷³ Posner, *supra* note 43 (citing CLAIM YOUR SEAT: A PROGRESS REPORT, *supra* note 10); *see also* Greene et al., *supra* note 33, at 2 (“The aggregate number of board seats held by female directors increase[d] by 23% (143 board seats) from pre- to post-SB 826.”).

⁷⁴ GENDER EQUITY: INCREASE REPRESENTATION OF WOMEN ON CORPORATE BOARDS, *supra* note 62.

⁷⁵ 2020 PROGRESS OF WOMEN CORPORATE DIRECTORS, *supra* note 67.

⁷⁶ *Id.*; *see also* 2019 Women on Boards Gender Diversity Index, *supra* note 7, at 2 (reporting the progress of women corporate directors of Russell 3000 index companies in 2019 and 2020).

force.⁷⁷ Moreover, women drive 70–80% of consumer purchasing and should be represented in a company’s leadership because “companies with gender-balanced teams have a higher ROI.”⁷⁸ Nonetheless, SB 826 will continue to decrease the gender gap on corporate boards. To comply with SB 826’s requirement for the end of 2021, “467 companies (71.8%) need one or more women to join their boards by the end of 2021 to meet the gender requirement of SB 826.”⁷⁹

E. Current Litigation over the Mandate

Governor Brown’s signing of SB 826 into law was not without controversy. He acknowledged that “serious legal concerns ha[d] been raised” about the gender diversity mandate but, “[g]iven all the special privileges that corporations have enjoyed for so long,” he argued that it was “high time corporate boards include the people who constitute more than half the ‘persons’ in America.”⁸⁰ Subsequently, legal scholars anticipated a flood of lawsuits challenging SB 826.⁸¹ Despite legal scholars’ expectations, the vast majority of companies appear to have accepted SB 826 and have not filed suit, perhaps to prevent public scrutiny or perhaps from “feeling the pressure from large asset managers”⁸² Yet, two conservative legal organizations, each challenging on separate grounds, filed lawsuits challenging SB 826.⁸³

The first of these groups, Judicial Watch, filed *Crest v. Padilla* to prevent California from spending taxpayer money on SB 826 in August 2019.⁸⁴ The plaintiffs claim SB 826 violates the California Constitution because the “legislation’s quota system for female representation on corporate boards employs express gender classifications” and, as a result, is subject to strict scrutiny review, which cannot be justified by a narrowly tailored compelling governmental interest.⁸⁵ In response, the defendant—California Secretary of State Alex Padilla—filed a demurrer, arguing that the plaintiffs do not have standing and the action is not ripe because it is “sheer guesswork” that a corporation will fail to comply with SB 826

⁷⁷ *Women in the Workforce*, *supra* note 5.

⁷⁸ Brennan, *supra* note 6.

⁷⁹ GENDER EQUITY: INCREASE REPRESENTATION OF WOMEN ON CORPORATE BOARDS, *supra* note 62.

⁸⁰ Cydney Posner, *California Mandates Quotas for Board Gender Diversity—Will It Fuel a Movement?*, COOLEY PUBCO (Sept. 30, 2018), <https://cooleypubco.com/2018/09/30/california-mandates-quotas-for-board-gender-diversity/> [<https://perma.cc/X58T-U44V>].

⁸¹ Cydney Posner, *Federal District Court Dismisses a Challenge to California Board Gender Diversity Statute*, COOLEY PUBCO (Apr. 21, 2020), <https://cooleypubco.com/2020/04/21/court-dismisses-challenge-to-sb-826/> [<https://perma.cc/486R-X6YK>] [hereinafter Posner, *California Board Gender Diversity Statute*].

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Amended Complaint at 1, *Crest v. Padilla*, Superior Court of the State of California, County of Los Angeles, Case No. BC 19STCV27561 (filed Sept. 20, 2019).

⁸⁵ *Id.* at 4.

and have to pay a fine.⁸⁶ A jury trial is set for October 25, 2021. Until then, it is unknown how a court will rule on the constitutionality of SB 826.⁸⁷

Pacific Legal Foundation, the second of the two conservative legal organizations to challenge SB 826, filed *Meland v. Padilla* in November 2019, arguing that SB 826 violates the Equal Protection Clause.⁸⁸ When Pacific Legal Foundation filed the complaint, the company it represented, OSI Systems, Inc., had no women on their board.⁸⁹ The plaintiff—a shareholder of OSI Systems—argued that SB 826 injures his “right to vote for the candidate of his choice” and forces “shareholders to perpetuate sex-based discrimination.”⁹⁰ The plaintiff also argued that SB 826 facially discriminates based on sex without serving an “important government interest” and that the statute relies on “improper gender stereotypes, such as the belief that women board members bring a particular ‘working style’ which will impact corporate governance.”⁹¹ The judge dismissed the Pacific Legal Foundation’s complaint based on a lack of standing and concluded that the injury is only hypothetical, reasoning that if the plaintiff “prefers a male board member nominee, there is nothing in SB 826 preventing him from casting a vote in favor of that nominee.”⁹² The plaintiff filed an appeal to the Ninth Circuit.⁹³ Consequently, the constitutionality of SB 826 has yet to be determined by a court.

III. ANALYSIS

In this Part, section (A) argues that SB 826 is constitutional under the Equal Protection Clause because gender classification is subject to intermediate scrutiny, and SB 826 is not a strict quota that excludes men from board positions. Next, section (B) argues that if states ratify the Equal Rights Amendment (ERA), the gender diversity mandate of SB 826 would likely be an unconstitutional violation of the Equal Protection Clause because the ERA’s ratification will likely change the standard of review for gender classifications from intermediate scrutiny to strict scrutiny.

⁸⁶ Keith Paul Bishop, *Secretary of State Declares Enforcement of Gender Quota Law to be “Entirely Speculative” and Casts Doubt on Rulemaking*, NAT’L L. REV. (Nov. 12, 2019) <https://www.natlawreview.com/article/secretary-state-declares-enforcement-gender-quota-law-to-be-entirely-speculative-and> [<https://perma.cc/MU9H-S233>].

⁸⁷ *Crest Docket*, Case No. BC 19STCV27561; Keith Paul Bishop, *First Legal Test of Female Board Quota Law Will be on Monday*, NAT’L L. REV. (Mar. 6, 2020), <https://www.natlawreview.com/article/first-legal-test-female-board-quota-law-will-be-monday> [<https://perma.cc/XDC3-279C>].

⁸⁸ Complaint at 6, *Medland v. Padilla*, 2020 U.S. Dist. LEXIS 69114 (E.D. Cal. Apr. 20, 2020) (No. 2:19-cv-02288-JAM-AC).

⁸⁹ Posner, *California Board Gender Diversity Statute*, *supra* note 81.

⁹⁰ Complaint, *supra* note 88, at 5.

⁹¹ *Id.* at 6.

⁹² *Id.* at 11.

⁹³ Brief of Petitioner-Appellant, *Meland v. Padilla*, No. 20-15762 (9th Cir. 2020).

A. SB 826 Is Constitutional Under the Equal Protection Clause

The constitutionality of SB 826 depends on whether the gender classification is subject to intermediate scrutiny or strict scrutiny. This Note argues SB 826 is a constitutional gender classification under intermediate scrutiny. The challenges lodged against SB 826 do so on the grounds established in the Equal Protection Clause. The Equal Protection Clause of the Fourteenth Amendment states: “[n]o State shall make or enforce any law which shall . . . deny to any person . . . the equal protection of the laws.”⁹⁴ To determine whether a government action is constitutional, courts subject potential Equal Protection violations to three levels of scrutiny: strict scrutiny, intermediate scrutiny, and rational basis review. Strict scrutiny applies when the government facially discriminates against a suspect class (such as race).⁹⁵ For the law to be upheld under strict scrutiny, the government must prove that the classification is necessary to promote a compelling purpose.⁹⁶ Additionally, the government’s law must be the least restrictive means of achieving the purpose.⁹⁷ On the other hand, intermediate scrutiny occurs “when a law discriminates based on a quasi-suspect classification” such as sex.⁹⁸ For the law to be upheld under intermediate scrutiny, the government’s classification must be substantially related to an important purpose.⁹⁹ Lastly, when no suspect class is involved (discrimination based on disability, age, wealth, etc.), courts apply a rational basis test. For the law to be upheld under rational basis review, the government’s classification only needs to be rationally related to a legitimate purpose (the law’s actual purpose or hypothetical purpose is sufficient to meet this standard).¹⁰⁰

The plaintiffs in *Crest v. Padilla* argued that the appropriate standard of review for SB 826 is strict scrutiny on the basis that the law requires a quota of women to occupy board seats.¹⁰¹ A quota occurs when “a certain fixed number or proportion of opportunities are ‘reserved exclusively for certain minority groups.’”¹⁰² Under the

⁹⁴ U.S. CONST. amend. XIV, § 1.

⁹⁵ *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973).

⁹⁶ *United States v. Pickard*, 100 F. Supp. 3d 981, 1003 (E.D. Cal. 2015).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ In *Craig v. Boren*, 429 U.S. 190, 210 (1976), the Court declared a statute that allowed women to buy low level alcohol at 18 but prohibited men from buying the same alcohol until 21 a denial of equal protection of the laws. The Court reasoned that, although traffic safety is an important purpose, the distinction in gender was not substantially related to the objective because only 2% of men drink and drive. *Id.* at 199. In *United States v. Virginia*, 518 U.S. 515, 557–58, (1996), the Court invalidated a program that an all-male military program proposed for women at a different college because Virginia had not shown that it established the school with a goal of diversifying educational approaches. *Id.* at 539.

¹⁰⁰ *Id.*

¹⁰¹ Amended Complaint at 1, *Crest v. Padilla*, Superior Court of the State of California, County of Los Angeles, Case No. BC 19STCV27561 (filed Sept. 20, 2019).

¹⁰² *Grutter v. Bollinger*, 539 U.S. 306, 335 (2003) (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989)).

Equal Protection Clause, classifications of race and gender receive different levels of scrutiny. Race-based quotas are subject to a strict scrutiny analysis¹⁰³ and, if not narrowly tailored for a compelling government purpose, are unconstitutional under the Equal Protection Clause.¹⁰⁴ For example, in *Regents University of California v. Bakke*, the court held that a quota-based system that reserved 16 of the 100 special admissions positions for racial minority applicants to the medical school was an unconstitutional quota.¹⁰⁵

On the other hand, in *Craig v. Boren*, the Supreme Court agreed that intermediate scrutiny is the appropriate level of review for gender classifications.¹⁰⁶ The Supreme Court established that “[t]o withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”¹⁰⁷ The Supreme Court reaffirmed *Craig* and applied intermediate scrutiny in *United States v. Virginia*, by stating “[p]arties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action.”¹⁰⁸

¹⁰³ Anisa A. Somani, *The Use of Gender Quotas in America: Are Voluntary Party Quotas the Way to Go?*, 54 WM. & MARY L. REV. 1451, 1474 (2013).

¹⁰⁴ Creighton R. Meland, Jr., *Should Courts Uphold Corporate Board Diversity Statutes?*, 53 CREIGHTON L. REV. 15, 27 (2019) (“The *Gratz* Court invalidated the University of Michigan’s undergraduate admissions program that awarded points for minority status.”); see *Grutter*, 539 U.S. at 335 (stating that a quota occurs when a fixed number is reserved for certain minority groups).

¹⁰⁵ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 265 (1978).

¹⁰⁶ 429 U.S. 190, 197 (1976) (creating the intermediate scrutiny test to provide a standard of review less rigorous than strict scrutiny but stricter than rational basis review). Until 1976, the Supreme Court applied the rational basis test to gender discrimination. In *Reed v. Reed*, 404 U.S. 71 (1971), the Supreme Court ruled for the first time that sex discrimination is unconstitutional under the Equal Protection clause. 404 U.S. 71 (1971). Professor Ruth Bader Ginsburg wrote the brief for the appellant in *Reed* and argued that “discrimination grounded on sex, for purposes unrelated to any biological difference between the sexes, ranks with legislative discrimination based on race, another congenital, unalterable trait of birth, and merits no greater judicial deference.” Brief for Appellant at 5, *Reed*, 404 U.S. 71 (No. 70-4). However, the Court rejected her argument for strict scrutiny and applied rational basis review. *Reed*, 404 U.S. at 76.

¹⁰⁷ *Craig*, 429 U.S. at 197.

¹⁰⁸ 518 U.S. 515, 531 (1996). However, in a footnote in *United States v. Virginia*, Justice Ginsburg wrote that “[t]he Court has thus far reserved [strict] scrutiny for classifications based on race or national origin.” *Virginia*, 518 U.S. at 533 n.6. Justice Scalia and other legal scholars suggest that Justice Ginsburg predicts, and invites, future changes to the standard of review for sex-based discrimination. *Id.* at 574 (quoting *Virginia*, 518 U.S. at 532 n.6 (majority opinion)) (Scalia, J., dissenting); Bridget L. Murphy, *The Equal Rights Amendment Revisited*, 94 NOTRE DAME L. REV. 937, 950 (2018). Ruth Bader Ginsburg has been a longtime advocate for applying strict scrutiny to gender-based discrimination. In her brief for the appellant in *Reed v. Reed*, 404 U.S. 71 (1971), Ruth Bader Ginsburg devoted 46 pages to arguing for the court to adopt a strict scrutiny analysis and only seven pages for her fallback argument of rational basis review. Murphy, *supra* at 949 n.68 (citing Brief for

Although the Court has yet to rule directly on gender quotas, the court has not “closed the door to gender parity,”¹⁰⁹ which means that a “gender based affirmative action measure may survive constitutional challenge when a race-based program may not.”¹¹⁰ The Supreme Court “has indicated that gender classifications benefiting women will be allowed when they are designated to remedy past discrimination or differences in opportunity.”¹¹¹ For example, the *Bakke* Court contrasted unconstitutional racial quotas with gender quotas by stating, “[g]ender-based distinctions are less likely to create the analytical and practical problems present in preferential programs premised on racial and ethnic criteria,”¹¹² thus meriting only the lower intermediate scrutiny when challenged. Again, in *Johnson v. Transportation Agency*, the Supreme Court upheld a quota-like gender diversity affirmative action plan which granted promotion preference to a woman, reasoning that the program did not violate the Equal Protection Clause because sex was only “taken into account for the purpose of remedying underrepresentation.”¹¹³ The Court further reasoned that the “affirmative action plan . . . represents a moderate, flexible, case-by-case approach to effecting a gradual improvement in the representation of . . . women in the . . . work force.”¹¹⁴ Overall, the intermediate standard of review “for sex-based classifications under the Equal Protection Clause has been applied repeatedly and is increasingly viewed as a settled question.”¹¹⁵ As such, “the Court has shown a greater tolerance for sex-based action, articulating a need to protect women or acknowledge gendered differences.”¹¹⁶

Critics of the Supreme Court’s tolerance for sex-based discrimination argue that affirmative action programs for women rest on the “condescending belief that

Appellant at 5, *Reed*, 404 U.S. 71 (No. 70-4)). Ironically, the application of strict scrutiny to gender classifications would likely make affirmative action efforts like SB 826 unconstitutional—as discussed in more detail in Part III.B.

¹⁰⁹ Tracy A. Thomas, *Reconsidering the Remedy of Gender Quotas*, 40 HARV. J.L. & GENDER ONLINE 1, 20 (2016).

¹¹⁰ Somani, *supra* note 10, at 1474103.

¹¹¹ ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 798 (5th ed. 2015); *See, e.g.*, *Califano v. Webster*, 430 U.S. 313, 317 (1977) (holding that sex classifications are an appropriate goal to “redress[] our society’s longstanding disparate treatment of women.”) (quoting *Califano v. Goldfarb*, 430 U.S. 199, 209 n.8 (1977)).

¹¹² *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 302–03 (1978) (explaining that gender-based classification create less problems than racial classifications because “there are only two possible classifications There are no rival groups which can claim that they, too, are entitled to preferential treatment. Classwide questions as to the group suffering previous injury and groups which fairly can be burdened are relatively manageable for reviewing courts.” However, racial-based classifications present more problems because “the perception of racial classifications as inherently odious stems from a lengthy and tragic history that gender-based classifications do not share.”).

¹¹³ 480 U.S. 616, 634 (1987).

¹¹⁴ *Id.* at 642.

¹¹⁵ Martha F. Davis, *The Equal Rights Amendment: Then and Now*, 17 COLUM. J. GENDER & L. 419, 431 (2008).

¹¹⁶ Thomas, *supra* note 109, at 17109.

women aren't capable of getting into the boardroom unless the government opens the door for them."¹¹⁷ However, SB 826 does not question whether women are capable of getting into the boardroom; rather, it ensures that women have an opportunity to earn a spot at the table.

SB 826 is almost certainly constitutional not only because it is subject to the lesser intermediate scrutiny but also because the female requirement is not a fixed and rigid quota system that excludes men from current or future board positions.¹¹⁸ Unlike *Bakke*, which reserves a set number of positions for racial minorities,¹¹⁹ SB 826 does not limit the number of positions available for boards. SB 826 states that any "corporation may increase the number of directors on its board to comply with" Section 301.3.¹²⁰ Thus, the gender requirement includes women in board representation in addition to, not instead of, male directors. In fact, since the passage of SB 826, "[60%] of the women in board positions took the job when new seats were created by expanding boards, not by replacing male directors."¹²¹ This demonstrates that SB 826 does not employ an unconstitutional quota-based system.

¹¹⁷ *California's "Woman Quota" Targeted in New Lawsuit*, PAC. LEGAL FOUND. (Nov. 13, 2019), <https://pacificlegal.org/press-release/californias-woman-quota-targeted-in-new-lawsuit/> [<https://perma.cc/B6WP-LAEF>] (quoting Anastasia Boden, a senior attorney at Pacific Legal Foundation, a nonprofit organization representing the plaintiff in *Meland*).

¹¹⁸ *But see* *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 17, 485 P.2d 529, 539 (1971) (invalidating a law that excluded most women from bartending because the state equal protection clause "compels the application of the strict scrutiny standard of review, first, because the statute limits the fundamental right of one class of persons to pursue a lawful profession, and, second, because classifications based upon sex should be treated as suspect").

¹¹⁹ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 265 (1978).

¹²⁰ CAL. CORP. CODE § 301.3(a) (Deering 2018).

¹²¹ Anne Stych, *Women's Representation on Boards Reaches a Milestone*, BIZWOMEN (Sept. 12, 2019, 2:07 PM), <https://www.bizjournals.com/bizwomen/news/latest-news/2019/09/womens-representation-on-boards-reaches-a.html?page=all> [<https://perma.cc/XYC2-39RG>]; *see also* Greene et al., *supra* note 33, at 3 ("Of the 136 firms that add a female director, 40% replace male directors while 60% expand the board."); 2020 PROGRESS OF WOMEN CORPORATE DIRECTORS, *supra* note 67 ("Sixty percent of the seats gained by women were additional board seats and did not require men to give up their seats to make room for women."); Martha Groves, *How California's 'Woman Quota' Is Already Changing Corporate Boards*, CALMATTERS (Dec. 19, 2019), <https://calmatters.org/economy/2019/12/california-woman-quota-corporate-board-gender-diversity/> [<https://perma.cc/7UDZ-SEC3>] (reporting that Skechers named "Katherine Blair . . . as its first female director . . . br[inging] the nine-member board to 10").

Notably, SB 826's classification is based on gender identity¹²² rather than sex¹²³ because, under the code, a female board member is an individual who self-identifies as a woman, regardless of the individual's designated sex at birth.¹²⁴ Accordingly, SB 826 is inclusive of transgender¹²⁵ people and is mandated based on gender rather than sex.¹²⁶ Section 301.3's definition of female is not beneficial towards only persons of the female sex because it does not prohibit persons of the male sex from fulfilling the gender diversity requirements. A person physically born of the male sex can still fulfill SB 826's gender requirement if they self-identify with the female gender. Thus, the gender-inclusive language of SB 826 "circumvent[s] the argument that the law is beneficial toward only one protected class of persons, people of the female sex."¹²⁷ Consequently, the gender diversity requirement of SB 826 does not violate the Equal Protection Clause because it does not facially identify who the law applies to using an explicit facial classification, like race or sex.¹²⁸

To pass constitutional muster under intermediate scrutiny, SB 826's gender classification needs to be "substantially related to a sufficiently important governmental interest."¹²⁹ Previous courts have found that sex classifications may be constitutionally used to: (1) compensate women "for particular economic disabilities [they have] suffered,"¹³⁰ (2) to "promote[] equal employment opportunity,"¹³¹ and (3) "to advance full development of the talent and capacities of our Nation's people."¹³² However, sex classifications may not be used "to create or

¹²² *Understanding Gender*, GENDER SPECTRUM, <https://www.genderspectrum.org/articles/understanding-gender> [<https://perma.cc/44DR-UZLB>] (last visited June 6, 2021) ("Gender identity is our internal experience and naming of our gender. It can correspond to or differ from the sex we were assigned at birth.").

¹²³ In the 1970s, when the Court was deciding the controlling case—like *Johnson and Webster*—on gender classifications that benefit women, the Court used the terms gender and sex interchangeably. In 2021, most people refer to sex and gender as two distinct things. Sex refers to the sex someone was assigned at birth whereas gender refers to someone's internal identity.

¹²⁴ CAL. CORP. CODE § 301.3(f)(1) (Deering 2018).

¹²⁵ TRANS STUDENT EDUC. RES., *supra* note 40.

¹²⁶ Teal N. Trujillo, *Do We Need to Secure a Place at the Table for Women? An Analysis of the Legality of California Law SB-826*, 45 J. LEGIS. 324, 328 (2018); Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 953 (2019) ("The recognition that some people's genders are not binary does not render unadministrable laws that would require, for example, that corporate boards include one or more self-identified women.").

¹²⁷ Trujillo, *supra* note 126, at 328.

¹²⁸ The Supreme Court has not yet broadened the definition of "sex" to include new categories that are beyond the facial female/male binary. Even in *Bostock v. Clayton County*—where the Court held that an employer cannot discriminate against an employee for being transgender—the Court stated that "sex" "refer[s] only to biological distinctions between male and female." 140 S. Ct. 1731, 1739 (2020).

¹²⁹ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985).

¹³⁰ *Califano v. Webster*, 430 U.S. 313, 320 (1977).

¹³¹ *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 289 (1987).

¹³² *United States v. Virginia*, 518 U.S. 515, 533 (1996).

perpetuate legal, social, and economic inferiority of women.”¹³³ In this case, SB 826 is substantially related to the vital governmental interests of “women’s non-representative lack of power, continued subordination, lack of autonomy, . . . equity, proportional representation, and balanced power”¹³⁴ Similar to *Califano v. Webster*, SB 826 is substantially related to the important governmental interest of “redressing our society’s longstanding disparate treatment of women.”¹³⁵ Additionally, SB 826 is a vital government interest because, as discussed in Part II.C, corporations with diverse gendered leadership are more profitable for the economy.

California’s previous legislation (Senate Concurrent Resolution 62) was not mandatory and had no enforceable consequences, and, as a result, fewer than 20% of California-based companies implemented “the minimum number of women directors” called for in the resolution.¹³⁶ Thus, SB 826’s mandatory requirements and enforceable consequences are substantially related to the important governmental interest of allowing businesses to conduct themselves as they see fit while achieving gender parity—an outcome that SCR 62’s voluntary goals could not achieve. Another way in which SB 826 substantially relates to governmental interests is that it requires that corporations have a female director only “for at least a portion of the year.”¹³⁷ This flexible time requirement allows corporations to fire female directors who do not perform adequately and to make appropriate business decisions without the threat of violating SB 826.

Thus, SB 826 is substantially related to the important purpose of meeting California’s goal of diversifying the gender of boards of directors to reflect the general and consumer population. The Supreme Court will most likely rule that SB 826 is a constitutional gender classification under an intermediate standard of review.

B. Constitutionality of SB 826 If States Ratify the Equal Rights Amendment

A unique paradox exists for gender equality. On the one hand, many feminist activists advocate for states to ratify the ERA to provide equal protection to all people, regardless of sex. On the other hand, the ERA’s ratification threatens the constitutionality of gender-conscious legislation aimed at leveling the playing field for women.

¹³³ *Id.*

¹³⁴ Thomas, *supra* note 109, at 18109; *see also* *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 728 (1982) (“[G]ender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened.” (citing *Schlesinger v. Ballard*, 419 U.S. 498 (1975))).

¹³⁵ *Califano v. Webster*, 430 U.S. 313, 317 (1977).

¹³⁶ Patricia Brown Holmes, *All Aboard: What Effect Is California’s New Law Mandating More Women in Corporate Boardrooms Likely to Have?*, BEST LAWYERS (Apr. 18, 2019, 10:39 AM), <https://www.bestlawyers.com/article/california-s-mandatory-gender-diversity/2379> [<https://perma.cc/75X6-NMYL>].

¹³⁷ CAL. CORP. CODE § 301.3(e)(3) (Deering 2018).

The ERA provides that “[e]quality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.”¹³⁸ The ERA does not specify a standard of review. So, it is not guaranteed that the ERA would change gender discrimination from intermediate scrutiny to strict scrutiny.¹³⁹ Nonetheless, legal scholars believe that by “adding a specific reference to sex equality to the Constitution, the amendment would result in strict scrutiny for governmental policies that discriminate based on sex and lead to a greater consideration of the particular impact of decisions on women even in the private sector.”¹⁴⁰

States that have amended their constitutions to include an equal rights amendment offer insight on how the federal ERA would affect the standard of review for sex discrimination. Twenty-five states have complete or partial guarantees of equal rights based on sex in their state constitutions.¹⁴¹ Most states have used their state equal rights amendments to apply strict scrutiny on sex-based classifications—a higher degree of judicial scrutiny than the degree of scrutiny currently provided under the federal Constitution.¹⁴² State courts have concluded

¹³⁸ H.R.J. Res. 208, 92d Cong. (1972).

¹³⁹ Murphy, *supra* note 108, at 951.

¹⁴⁰ Davis, *supra* note 115, at 422; *see also* Murphy, *supra* note 108, at 951; Collin O’Connor Udell, *Signaling a New Direction in Gender Classification Scrutiny: United States v. Virginia*, 29 CONN. L. REV. 521, 527 n.39 (1996) (“The Equal Rights Amendment (ERA) was ratified by the legislature in 1972 and would have codified strict scrutiny for gender classifications.”); Ilya Somin, *Be Careful What You Wish For*, 30 LEGAL TIMES 1, 1 (2007) (“If the ERA passes, courts will almost certainly subject all laws with gender classifications to at least the strict-scrutiny standard.”); *see* *Frontiero v. Richardson*, 411 U.S. 677, 692 (1973) (Powell, J., concurring).

¹⁴¹ *See* ALASKA CONST. art. I, § 3; CAL. CONST. art. I, § 7(a), § 8, § 31(a); COLO. CONST. art. II, § 29; CONN. CONST. art. I, § 20; DEL. CONST. art. I, § 21; FLA. CONST. art. I, § 2; HAW. CONST. art. I, § 3; ILL. CONST. art. I, § 18; IOWA CONST. art. I, § 1; LA. CONST. art. I, § 3; MD. CONST. DECL. OF RTS. art. 46; MASS. CONST. pt. I, art. I; MONT. CONST. art. II, § 4; NEB. CONST. art. I, § 30; N.H. CONST. pt. I, art. II; N.J. CONST. art. X, ¶ 4; N.M. CONST. art. II, § 18; OR. CONST. art. I, § 46; PA. CONST. art. I, § 28; R.I. CONST. art. I, § 2; TEX. CONST. art. I, § 3(a); UTAH CONST. art. IV, § 1; VA. CONST. art. I, § 11; WASH. CONST. art. XXXI, § 1; WYO. CONST. art. I, § 3.

¹⁴² Purvi S. Patel, *Equal Protection*, 8 GEO. J. GENDER & L. 145, 173–75 (2007) (“Texas has viewed the implementation of an equal rights amendment as an indication that strict scrutiny should be used only in challenges brought under the Equal Rights Amendment itself.”); *see, e.g.*, *Arp v. Workers’ Comp. Appeals Bd.*, 563 P.2d 849, 855 (Cal. 1977); *Page v. Welfare Comm’r*, 365 A.2d 1118, 1122 (Conn. 1976); *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993) (plurality opinion); *Estate of Hicks*, 675 N.E.2d 89, 93 (Ill. 1996); *Giffin v. Crane*, 716 A.2d 1029, 1037 (Md. 1998); *Att’y Gen. v. Mass. Interscholastic Athletic Ass’n*, 393 N.E.2d 284, 291 (Mass. 1979); *N.M. Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 853–55 (N.M. 1998); *Peters v. Narick*, 270 S.E.2d 760, 765–67 (W. Va. 1980); *Lens Express v. Ewald*, 907 S.W.2d 64, 69 (Tex. App. 1995); *Messina v. Texas*, 904 S.W.2d 178, 180–81 (Tex. App. 1995).

that, like race, the “immutable” characteristic of sex¹⁴³ subjects sex classifications to strict scrutiny.¹⁴⁴ Thus, the standard that states have adopted for their ERAs suggests that a federal ERA would also subject sex-based classifications to the strict scrutiny standard.¹⁴⁵

The Supreme Court’s predictions about the ERA further foreshadow how a future court may handle a sex classification under the ERA. In *Frontiero v. Richardson*, four justices suggested, in dicta, that the ERA would require strict scrutiny for sex-based classifications.¹⁴⁶ At the time *Frontiero* was decided, “there was every indication that the ERA would garner sufficient support in the states.”¹⁴⁷ Justice Powell stated that the “Equal Rights Amendment, which, if adopted, will resolve the substance of this precise question, has been approved by the Congress and submitted for ratification by the States.”¹⁴⁸ If the current Supreme Court treated the ERA like the *Frontiero* Court, it would likely apply strict scrutiny to a gender classification.

Under a strict scrutiny review, a government action that makes distinctions based on suspect classifications¹⁴⁹ will “only be upheld if the state can demonstrate that the classification serves a compelling government interest and is ‘narrowly tailored’ to accomplish that government interest.”¹⁵⁰ Additionally, the government’s law must be the least restrictive means of achieving the purpose.¹⁵¹ So, if the ratification of the ERA changes the standard of review for gender classifications from intermediate scrutiny to strict scrutiny, the Supreme Court “would likely

¹⁴³ The “immutable” characteristic of sex also includes transgender people because gender identity is an immutable and fundamental characteristic. See § 5:54. *Gender identity*, L. OF ASYLUM IN THE U.S. § 5:54 (2020 ed.) (citing Victoria Neilson, *Uncharted Territory: Choosing an Effective Approach in Transgender-Based Asylum Claims*, 32 FORDHAM URB. L.J. 265, 266, 277 (2005)); M. Dru Levasseur, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science Is Key to Transgender Rights*, 39 VT. L. REV. 943, 1003 (2015); Lauren R. Deitrich, *Transgender and the Judiciary: An Argument to Extend Batson Challenges to Transgender Individuals*, 50 VAL. U. L. REV. 719, 755 (2016).

¹⁴⁴ Patel, *supra* note 142, at 174; *Peters v. Narick*, 270 S.E.2d 760, 765–66 (W. Va. 1980) (“Gender is biologically permanent. It is an obvious and easily recognizable characteristic which, like race, can carry with it a stigma of inferiority.”) (internal citations omitted).

¹⁴⁵ Davis, *supra* note 115, at 433.

¹⁴⁶ *Id.* at 435 (“The Court’s plurality opinion, written by Justice Brennan but signed by only three other Justices, concluded that the sex-based law should be struck down under the Fourteenth Amendment and applied strict scrutiny comparable to that used to review racial classifications.”).

¹⁴⁷ *Id.* at 459.

¹⁴⁸ *Frontiero v. Richardson*, 411 U.S. 677, 692 (1973).

¹⁴⁹ As of now, the Supreme Court only considers race, alienage, and national origin to be suspect classifications. Patel, *supra* note 142, at 148 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *Korematsu v. United States*, 323 U.S. 214, 216 (1944)).

¹⁵⁰ *Id.* (citing *Grutter v. Bollinger*, 539 U.S. 306 (2003)).

¹⁵¹ Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1268, 1326 (2007).

prohibit [the] government from adopting policies designed to advance women's equality."¹⁵² Nonetheless, the Supreme Court may uphold a gender diversity mandate like SB 826 under a strict scrutiny standard of review. However, it is much more difficult for a classification to pass a strict scrutiny analysis than the current intermediate scrutiny standard.

For women's equality, the application of strict scrutiny is a double-edged sword: "on the positive side, it might prevent courts from taking at face value claims that 'benign' sex classifications were motivated by a desire to ameliorate discrimination; on the negative side, it could curtail efforts at 'genuine' affirmative action."¹⁵³ The Supreme Court's current intermediate scrutiny standard for gender classifications upholds proactive policies—like SB 826—to benefit women and bolster equal opportunity. However, the ERA would likely prohibit sex-conscious legislation by elevating sex-based legislation to strict scrutiny and cause the government to ignore sex inequality.¹⁵⁴ Prohibiting sex-conscious legislation would disservice gender equality because gender discrimination is still prevalent, especially on corporate boards. Without legally enforceable requirements, board seats will continuously go to men.¹⁵⁵

If states ratify the ERA, it is still possible that SB 826 may survive a strict scrutiny standard of review. Race-conscious admission policies meet the "narrow tailoring" requirement under strict scrutiny if the policy is "limited in time."¹⁵⁶ Although SB 826 does not have a cessation date, Senator Jackson cited a study claiming "it could take more than 40 years for the numbers of women on boards to

¹⁵² Kim Forde-Mazrui, *The ERA's Threat to Sex Equality*, THE GENDER POL'Y REP. (July 14, 2020), <https://genderpolicyreport.umn.edu/the-eras-threat-to-sex-equality/> [<https://perma.cc/J4MA-HSPN>]. *But see* Serena Mayeri, *A New E.R.A. or A New Era? Amendment Advocacy and the Reconstitution of Feminism*, 103 NW. U. L. REV. 1223, 1247 (2009) (explaining that, compared to the "absolute" standard advocated by legal scholars, "[s]trict scrutiny at least theoretically left open the possibility that any sex-based classification might be upheld if the government's asserted objective was sufficiently compelling and the means used to achieve that goal were necessary.").

¹⁵³ Mayeri, *supra* note 152, at 1266.

¹⁵⁴ Forde-Mazrui, *supra* note 152. Like "color-blind" policies, "sex-blind" policies ignore the systematic inequalities women have faced which, ultimately, leads to more inequality. Helen A. Neville, Germaine H. Awad, James E. Brooks, Michelle P. Flores & Jamie Bluemel, *Color-Blind Racial Ideology: Theory, Training, and Measurement Implications in Psychology*, 68 AM. PSYCH. 455, 455 (2013) ("[R]acial color-blindness is unattainable, reinforces racial prejudices and/or inequality, and is actually an expression of ultramodern notions of racism among White Americans and of internalized racism or the adoption of negative racial stereotypes among people of color.").

¹⁵⁵ Brown, *supra* note 17; Groyberg & Bell, *supra* note 17; S.B. 826, 2017-2018 Leg., Reg. Sess., Ch. 954 § 1(f)(1) (Cal. 2018) ("A 2015 study conducted by the United States Government Accountability Office estimated that it could take more than 40 years for the numbers of women on boards to match men.").

¹⁵⁶ Sam Erman & Gregory M. Walton, *Stereotype Threat and Antidiscrimination Law: Affirmative Steps to Promote Meritocracy and Racial Equality in Education*, 88 S. CAL. L. REV. 307, 362–63 (2015) (quoting *Grutter*, 539 U.S. at 309).

match men” as a significant reason for enacting SB 826.¹⁵⁷ If gender equality in the board room is met in the next few decades, “SB 826’s female board member requirements will no longer be necessary,” and the legislation “will be rendered moot, having no practical significance.”¹⁵⁸ Thus, if the requirements under SB 826 would become no longer necessary, the law may meet the “limited in time” requirement of strict scrutiny.¹⁵⁹

Until the ERA is ratified and a gender classification is challenged, it is uncertain which standard of review the Supreme Court would apply to a gender classification under the ERA. Until then, if the Supreme Court reviews SB 826, it will most likely analyze it under an intermediate standard of review.

III. CONCLUSION

If a court takes an opportunity to rule on whether SB 826 violates the Equal Protection Clause, it is likely to uphold the gender diversity mandate under the Equal Protection standard. SB 826’s gender classification easily meets the intermediate scrutiny requirements because the gender diversity mandate is “substantially related to a sufficiently important government interest”¹⁶⁰ and is narrowly tailored.¹⁶¹ Moreover, SB 826 does not exclude men from current and future board positions.

In addition, SB 826 is showing results. By the year-end deadline, the amount of California-based companies with all-male boards dropped from nearly 30% to three percent.¹⁶² Nonetheless, SB 826’s future requirements to increase the number of female board members for companies with five or more directors¹⁶³ are vital to the representation of women in leadership because “attaining critical mass, going . . . to at least three women directors,¹⁶⁴ creates an environment where women are no longer seen as outsiders”¹⁶⁵ and can effectively contribute to board discussions and decisions. Moreover, if “all of the companies in the Russell 3000 followed

¹⁵⁷ S.B. 826, 2017-2018 Leg., Reg. Sess., Ch. 954 § 1(f)(1) (Cal. 2018).

¹⁵⁸ Concilla, *supra* note 33, at 625.

¹⁵⁹ *Id.*

¹⁶⁰ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985).

¹⁶¹ Brooke E. Condran, *New California Law Imposing Gender Diversity on Boards of Publicly Held Corporations Raises Constitutional Concerns*, GREENBERGTRAUIG (Oct. 15, 2018), <https://www.gtlaw.com/en/insights/2018/10/new-california-law-imposing-gender-diversity-on-boards-of-publicly-held-corporations-raises> [<https://perma.cc/F4FG-ZTP6>].

¹⁶² Posner, *supra* note 43 (citing CLAIM YOUR SEAT: A PROGRESS REPORT, *supra* note 10).

¹⁶³ CAL. CORP. CODE § 301.3(b)(1-2) (Deering 2018).

¹⁶⁴ See Yilmaz Arguden, *Why Boards Need More Women*, HARV. BUS. REV. (June 7, 2012), <https://hbr.org/2012/06/why-boards-need-more-women> (citing Deborah D. Zelechowski & Diana Bilimoria, *Characteristics of Women and Men Corporate Inside Directors in the US*, 12 CORP. GOVERNANCE 337 (2004)) (“Studies show that the presence of at least three women is necessary to change boardroom dynamics.”).

¹⁶⁵ S.B. 826, 2017-2018 Leg., Reg. Sess., Ch. 954 § 1(g)(1) (Cal. 2018).

California's lead, over 3,500 women's voices would be added to corporate governance."¹⁶⁶

SB 826 is constitutional and benefits women who are qualified to sit on boards but have been overlooked due to their gender, as well as the shareholders of California-based companies and the United States economy as a whole. Other states should follow in California's footsteps and enact legislation similar to SB 826 to shatter the glass ceiling in the corporate board room.

¹⁶⁶ CLAIM YOUR SEAT: A PROGRESS REPORT, *supra* note 10 (citing *Wanted: 3,732 Women to Govern Corporate America*, BLOOMBERG BUSINESSWEEK (2019)).