



Assembly Bill 979, California's Board Diversity Statute, Ruled Unconstitutional

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On May 15, 2023, the Eastern District of California ruled that California Assembly Bill No. 979 ("AB 979") violates the Equal Protection Clause of the U.S. Constitution's Fourteenth Amendment and 42 U.S.C. § 1981. As enacted, California's Board Diversity Statute, required public companies with headquarters in the state to include a minimum number of directors from "underrepresented communities" or be subject to fines for violating the statute. AB 979 defines a "director from an underrepresented community" as "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."

The plaintiff in the case, the Alliance for Fair Board Recruitment (the "Alliance"), alleged that because AB 979 imposes racial classifications and establishes a "minimum number of directors from a select racial and ethnic pool," the statute "constitutes a race-based quota" and is a facial violation of the Equal Protection Clause and 42 U.S.C. 1981, a U.S. federal statute governing equal rights under the law. The state of California countered, arguing that while AB 979 "constitutes a racial classification," such classification only sets a "flexible floor for diversity" and is permissible because it attempts to remedy legacy racial and ethnic discrimination. California also asked the court to sever the impermissible portions of the statute to the extent it agreed with the Alliance's position.

In his ruling granting the Alliance's motion for summary judgment, Senior Judge John A. Mendez agreed with the Alliance, finding that racial and ethnic quotas are "facially invalid" based on applicable U.S. Supreme Court precedent. In particular, Senior Judge Mendez found that despite California's attempt to "semantically cast this requirement as flexible," AB 979 "is

a racial quota as it requires a certain fixed number of board positions to be reserved exclusively for certain minority groups.” The court also found that plaintiffs were entitled to summary judgment on its statutory challenge to AB 979. The court concluded that it did not need to rule on the question of whether strict scrutiny was the appropriate analytical framework to evaluate AB 979, given the judge’s ruling on the facial challenge. Finally, Senior Judge Mendez denied California’s request to sever from the statute the unlawful provisions on the basis that to do so would render the statute incoherent.

The court’s ruling finding AB 979 unconstitutional follows state court rulings from last year, which found the statute’s gender diversity requirements unconstitutional. In that case, *Robin Crest, et al. v. Alex Padilla*, the court ruled that AB 979 violated California’s constitution, finding that the statute treated individuals differently on the basis of race, sexual orientation and gender identity and could not justify such disparate treatment by any compelling purpose. In a companion case, *Padilla II*, a Los Angeles Superior Court struck down California Corporations Code Section 301.4 on the basis that it violated the equal protection clause of the California constitution. We write about *Padilla I* and *Padilla II* [here](#).

Relatedly, the Alliance is also challenging boardroom diversity rules adopted by the Nasdaq and approved by the U.S. Securities and Exchange Commission. That challenge remains *sub judice* before the U.S. Court of Appeals for the 5th Circuit. Interested parties, including Akin on behalf of an ad hoc group of Nasdaq-listed companies, filed amicus [briefs](#) in support of Nasdaq’s rule.

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