

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

ALLIANCE FOR FAIR BOARD  
RECRUITMENT,

Plaintiff,

v.

SHIRLEY N. WEBER, in her  
official capacity as  
Secretary of State of the  
State of California,

Defendant.

No. 2:21-cv-01951-JAM-AC

**ORDER GRANTING PLAINTIFF'S  
MOTION FOR SUMMARY JUDGMENT**

Before the Court is the Alliance for Fair Board Recruitment's ("Plaintiff") motion for summary judgment against Shirley N. Weber ("Defendant"), in her official capacity as California's Secretary of State. See Mot. for Summary Judgment ("Mot"), ECF No. 88. Plaintiff alleges that California Assembly Bill No. 979, which, in part, requires publicly held corporations located in California to have a minimum number of directors from designated underrepresented racial, ethnic and LGBTQ backgrounds, violates the Equal Protection Clause and 42 U.S.C. § 1981. Id. at 9-10. Defendant opposes the motion, asserting that AB 979 satisfies strict scrutiny or, in the alternative, should have its unconstitutional provisions severed from the rest of the bill. See Opp'n, ECF No. 114. Plaintiff replied. See Reply, ECF

1 No. 122. For the reasons set forth below, this Court GRANTS  
2 Plaintiff's motion.<sup>1</sup>

3 I. FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND

4 On September 30, 2020, AB 979 was passed into law, adding  
5 California Corporations Code Sections 301.4 and 2115.6. Compl.,  
6 ECF No. 1, ¶ 38. Proponents of the bill claim that it is  
7 intended to address corporate discrimination against  
8 underrepresented communities. Opp'n at 1. The legislation  
9 required public corporations headquartered in California to have  
10 a minimum number of directors from select identities that are  
11 underrepresented on corporate boards by December 31, 2022. Id.  
12 Specifically, the bill outlined underrepresented groups as those  
13 who identify as "Black, African American, Hispanic, Latino,  
14 Asian, Pacific Islander, Native American, Native Hawaiian, or  
15 Alaska Native . . . gay, lesbian, bisexual, or transgender."  
16 Cal. Corp. Code § 301.4(e). The minimum number of directors  
17 required by AB 979 depends on the size of the corporation's  
18 board, ranging from a minimum of one to three. Cal. Corp. Code  
19 § 301.4(b). Corporations that fail to comply with the statute  
20 are subject to a \$100,000 fine for an initial violation and  
21 \$300,000 for any subsequent violation. Cal. Corp. Code  
22 § 301.4(d). The law contains no sunset provision or expiration  
23 date.

24 Plaintiff, a non-profit membership organization composed of  
25 individuals who do not self-identify into one of AB 979's

---

27 <sup>1</sup> This motion was determined to be suitable for decision without  
28 oral argument. E.D. Cal. L.R. 230(g). The hearing was scheduled  
for April 25, 2023.

1 underrepresented groups, filed suit against Defendant on July 12,  
2 2021. See Compl. With respect to AB 979, Plaintiff alleged  
3 violations of (1) the Equal Protection Clause of the Fourteenth  
4 Amendment, (2) 42 U.S.C. § 1981, and (3) the Internal Affairs  
5 Doctrine. Id. At a hearing on Defendant's motion to dismiss the  
6 complaint, the Court dismissed Plaintiff's Internal Affairs  
7 Doctrine claim and permitted the remaining claims against AB 979  
8 to proceed. Mot. Hearing, ECF No. 70. On March 30, 2022,  
9 Plaintiff filed the operative motion for summary judgment,  
10 alleging that AB 979 constitutes an unconstitutional racial quota  
11 in violation of the Equal Protection Clause and 42 U.S.C. § 1981.  
12 Mot. at 9-10.

13 II. OPINION

14 A. Request for Judicial Notice

15 Plaintiff asks the Court to take judicial notice of sixty-  
16 three documents. See Req. for Judicial Notice ("RJN"), ECF  
17 No. 115.

18 Under Federal Rule of Evidence 201, a district court may  
19 take judicial notice of a fact that is "not subject to reasonable  
20 dispute because it can be accurately and readily determined from  
21 sources whose accuracy cannot reasonably be questioned." Fed. R.  
22 Evid. 201(b)(2). A court may therefore take judicial notice of  
23 court filings and other matters of public record. Reyn's Pasta  
24 Bella LLC v. Visa USA, Inc., 442 F.3d 741, 746 n.6 (9th Cir.  
25 2006).

26 The Court grants Plaintiff's request for judicial notice for  
27 all requested documents pursuant to Rule 201.

28 ///

1 B. Legal Standard

2 Summary judgment is proper "if the pleadings, depositions,  
3 answers to interrogatories, and admissions on file, together with  
4 affidavits, if any, show that there is no genuine issue of  
5 material fact and that the moving party is entitled to judgment  
6 as a matter of law." Fed. R. Civ. P. 56(c). The moving party  
7 bears the initial burden of demonstrating the absence of a  
8 genuine issue of material fact for trial. Anderson v. Liberty  
9 Lobby, Inc., 447 U.S. 242, 248-49 (1986). If the moving party  
10 meets its burden, the burden of production then shifts so that  
11 "the non-moving party must set forth, by affidavit or as  
12 otherwise provided in Rule 56, 'specific facts showing that there  
13 is a genuine issue for trial.'" T.W. Elec. Serv., Inc. v.  
14 Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th  
15 Cir.1987). The Court must view the facts and draw inferences in  
16 the manner most favorable to the non-moving party. United States  
17 v. Diebold, Inc., 369 U.S. 654, 655 (1962).

18 C. Analysis

19 1. Claim One: Equal Protection Clause

20 a. Facial Challenge

21 Plaintiff contends that AB 979 must be invalidated because  
22 it is unconstitutional on its face. Mot. at 10-12. Plaintiff  
23 states that Defendant concedes that the bill imposes racial  
24 classifications and requires covered corporations to have a set  
25 minimum number of directors from a select racial and ethnic pool,  
26 which constitutes a race-based quota despite Defendant's semantic  
27 argument that it only sets a "flexible floor" for diversity. Id.  
28 at 10-11. Plaintiff argues that such quotas are *per se*

1 unconstitutional according to established Supreme Court  
2 precedent. Id. at 11-12.

3 Defendant concedes that AB 979 constitutes a racial  
4 classification but argues that it is permissible because it is  
5 aimed at remedying past discrimination. Opp'n at 22. Defendant  
6 also claims that AB 979 does not create preferred racial and  
7 ethnic classes because no individual is insulated from  
8 competition with others and each candidate must still go through  
9 an individualized consideration process. Id. Furthermore, AB  
10 979 expressly permits corporate boards to expand to accommodate  
11 as many candidates as they wish so no director or director  
12 candidate not included in one of the bill's preferred groups  
13 would be forced to lose their board position. Id.

14 The Court finds that Plaintiff's facial challenge to AB 979  
15 must be affirmed. The Supreme Court defines a quota as "a  
16 program in which a certain fixed number or proportion of  
17 opportunities are 'reserved exclusively for certain minority  
18 groups.'" Grutter v. Bollinger, 539 U.S. 306, 335 (2003). The  
19 Supreme Court has rejected racial and ethnic quotas and has  
20 declared them "facially invalid." Regents of Univ. of California  
21 v. Bakke, 438 U.S. 265, 307 (1978). Depending on the size of the  
22 covered corporation, AB 979 requires corporate boards to have, at  
23 minimum, one or three board members who self-identify with select  
24 racial and ethnic groups. Despite Defendant's attempt to  
25 semantically cast this requirement as flexible, the Court finds  
26 that it is a racial quota as it requires a certain fixed number  
27 of board positions to be reserved exclusively for certain  
28 minority groups; in this case, those who identify as "Black,

1 African American, Hispanic, Latino, Asian, Pacific Islander,  
2 Native American, Native Hawaiian, or Alaska Native.” Cal. Corp.  
3 Code § 301.4(e). In the absence of a genuine issue of material  
4 fact, the Court finds that AB 979 is unconstitutional on its face  
5 and Plaintiff is entitled to summary judgment in its favor as a  
6 matter of law.

7 b. Strict Scrutiny

8 The Court does not reach the parties’ strict scrutiny  
9 arguments because the facial challenge to AB 979 is dispositive.

10 2. Claim Two: 42 U.S.C. § 1981

11 The Supreme Court has stated that a violation of the Equal  
12 Protection Clause of the Fourteenth Amendment also constitutes a  
13 violation of § 1981. Gratz v. Bollinger, 539 U.S. 244, 276 n.23  
14 (2003). In light of the Court’s grant of summary judgment in  
15 Plaintiff’s favor on its Equal Protection challenge to AB 979,  
16 the Court, accordingly, finds that Plaintiff is entitled to  
17 summary judgment in its favor on this count as a matter of law.

18 3. Severability

19 Defendant asks the Court to sever AB 979 to exclude the  
20 particular groups whose inclusion violates the Equal Protection  
21 Clause. Opp’n at 24-25. Defendant argues that severing  
22 individual groups will not adversely affect the meaning of  
23 “underrepresented communities” or AB 979’s basic operation. Id.  
24 at 25. Plaintiff responds that severance would be inappropriate  
25 in this case and notes that AB 979 does not include a  
26 severability clause. Reply at 14-15. The Court agrees.

27 When a state statute faces a constitutional challenge, the  
28 Court’s severability analysis is guided by state law. Costco

1 Wholesale Corp. v. Maleng, 522 F.3d 874, 886 (9th Cir. 2008).  
2 Under California law, severance is proper if (1) severance will  
3 not affect the wording or coherence of the remainder of the  
4 statute; (2) the remainder of the statute "is complete in  
5 itself," and (3) the legislature would have adopted the remainder  
6 of the statute "had it foreseen the partial invalidation of the  
7 statute." Cal. Redev. Ass'n v. Matosantos, 53 Cal. 4th 231, 270-  
8 71 (2011). The Court finds that removing AB 979's racial and  
9 ethnic classifications would adversely affect the coherence of  
10 the remaining provision regarding those who identify as gay,  
11 lesbian, bisexual, or transgender because the statute's language  
12 is almost exclusively cast in racial and ethnic terms and  
13 figures. Also, the Court finds that (1) the language of the  
14 statute, (2) Defendant's opposition brief, which argues that AB  
15 979's main purpose is to remedy racial and ethnic discrimination,  
16 and (3) the lack of a severability clause collectively indicate  
17 that the legislature would not have adopted the remainder of AB  
18 979 had it foreseen its partial invalidation. Therefore, the  
19 Court declines to sever AB 979.

20 III. ORDER

21 For the reasons set forth above, this Court GRANTS  
22 Plaintiff's motion for summary judgment.

23 IT IS SO ORDERED.

24 Dated: May 15, 2023

25  
26   
27 JOHN A. MENDEZ  
28 SENIOR UNITED STATES DISTRICT JUDGE