

MARYLAND STATE LEGISLATURE BEFORE THE SENATE EDUCATION, HEALTH AND ENVIRONMENTAL AFFAIRS COMMITTEE: HEARING ON SENATE BILL 301, "Corporations-Board Members and Executive Officers Diversity-Procurement Preference and Reporting." FEBRUARY 3, 2021

Good morning ladies and gentlemen and Chairman Paul G. Pinsky, Vice Chair Cherly C. Kagan, the Senate Minority Leader Bryan W. Simonaire and Members of the Committee. I would also like to acknowledge Senator Charles Sydnor III the sponsor of SB 301. I am pleased to testify in support of SB 301.

I am Gerald D. Jaynes, PhD, and the A. Whitney Griswold Professor of Economics, African American Studies, and Urban Studies at Yale University. I have written extensively on race relations and the economic conditions of African Americans, women, and people of color. I have more than 30 years of experience researching and analyzing race-based preference programs in contracting, employment, education, and housing. I am currently conducting research for a study of health disparities for the State of Connecticut.

My testimony supports SB 301 proposed legislation that is consistent with current trends related to Federal regulations and state government initiatives to address underrepresentation of minorities of color, women, and ethnic minorities on corporate boards. Efforts to promote diversity and inclusion are particularly relevant today given the Biden Administration's initiatives to address racial and gender equality at all levels of American society. This work is a continuing project and SB 301 is a step in the right direction. In a nation where non-Hispanic Whites represent 61 percent of the population, about 84 percent of corporate board seats are held by non-Hispanic Whites. According to a study by The Alliance for Board Diversity in collaboration with Deloitte examining representation of minorities and women on the boards of Fortune 500 Companies, underrepresented minorities on such boards are 8.6 percent African American, 8.8 percent Latinix, and 3.7 percent Asian American and Pacific Islanders ("Missing Pieces Report," 2018).

Diversity and inclusion efforts are not new. Perhaps, the most notable efforts in this direction concern policies related to government contracting and procurement at all levels of government. The origin and evolution of such efforts may be discerned in case law and discrimination studies conducted by the Federal Government and many state and local governments, as well as quasi-governmental entities across the country. As early as 1977, the US Congress enacted legislation mandating a "10 percent set-aside" of contracting activities related to federal public works projects (See Public Law 95-507). Many lawsuits followed, alleging discrimination based on race and violations of the 14<sup>th</sup> Amendment's Equal Protection Clause in the US Constitution.

The most famous cases establishing the parameters for developing Constitutional remedies for past discrimination were Fullilove v. Klutznick 488 U.S. 448 (1980), and City of Richmond v. J.A. Croson Co. 488 U.S. 46 (1989). The first case held the US Congress could constitutionally use its spending power to remedy past discrimination, and the second set out Constitutional strictures that must be met by state and local government jurisdictions setting up such programs. By the late 1990s, private consultant's analyses of various contracting programs became a cottage industry as many governmental entities sought to install new or to rejuvenate existing M/WBE diversity standards and requirements that would pass Constitutional muster. These "disparity studies" were designed to determine whether there was actual statistical and other historical evidence of discrimination to support a compelling governmental

interest in legislating M/WBE goals in contracting and procurement. In addition to serving a compelling governmental interest, such M/WBE programs must be “narrowly tailored” to address the discrimination.

Therefore, it is clear a government can use its resources to remedy past and/or ongoing discrimination as long as there is a compelling reason to do so. The courts have found government actions to promote racial/ethnic diversity a compelling governmental interest in a variety of settings analogous to promoting diversity of corporate boards. As with diversity policies such as those utilized by educational institutions and law enforcement agencies, a remedial measure such as SB 301 could in the future face a court challenge. However, a diversity and inclusion effort related to corporate boards is likely to be found acceptable to the courts if it meets the well-established standards set by the courts. The MD State Legislature should be confident SB 301 is well crafted to withstand scrutiny by the courts.

To summarize, current trends at the federal level and among the states related to efforts to increase diversity and inclusion on corporate boards range in scope from actual mandates requiring minimum representation minorities and women to legislation requiring corporations doing business in the state merely report the representation of minorities and women on their boards. The US Securities Exchange Commission (SEC) recently approved a rule change directed at corporate diversity on NASDAQ listed companies. Under the proposed rule change, NASDAQ filed a proposal with the SEC to “adopt listing rules related to board diversity.” Rule 5605 (f) (Diverse Board Representation), which would require NASDAQ listed companies, subject to certain exceptions, (A) to have at least one director who self-identifies as a female, and (B) to have at least one director who self identifies as Black or African American, Hispanic, Latino, Asian, Native American or Alaska Native or Pacific Islander, two or more races or ethnicities, or as LBGTQ+, or (C) explain why the company does not have at least two directors on its board who self-identify in the categories listed above.” In addition, the new Rule 5606 (Board Diversity Disclosure), would require NASDAQ listed companies to provide statistical information related to these rule changes. The NASDAQ report cited the “social justice movement as a reason for encouraging greater commitment to diversity and inclusion by public companies. While the NASDAQ is not the focus of this hearing, it clearly is a barometer of the future as it relates to public companies and the broader issue of corporate diversity and inclusion.

The states led by California are in the forefront of this issue and have undertaken their own initiatives to address corporate diversity and inclusion. Twelve States, including California, Illinois, New York, Washington, Massachusetts, Michigan, Ohio, Hawaii, Pennsylvania, Colorado and Maryland have either enacted legislation or have legislation pending that requires large corporations report their efforts to promote diversity on their boards (See “State Gender Diversity Legislation Status Update, Cogency Global, Joan Helwis, November 6, 2020.) Unconvinced that simply requiring corporations to report their board diversity will improve the situation, Governor Newsome of the State of California recently signed Assembly Bill 979 that mandates publicly held corporations in California “to have at least one director from an under-represented community by 2021. Moreover, by 2022 boards with 4-9 members must have 2 people and boards with more than nine members must have 3 people (See “Newsome signs mandatory diversity in California corporate boardrooms”, *Los Angeles Times*, by Patrick Mc Greevy, September 30, 2020). Newsome said, “the mandate under the bill is necessary to promote diversity in corporate board rooms.” Of course, the State of California and other states will need to collect data to determine the extent to which such measures promote corporate board diversity and inclusion.

In contrast to the California mandate and similar legislation by other states, SB 301 proposes to use the State of Maryland’s massive procurement system to incentivize corporations doing business with the

State to diversify their boards and executive officers. The incentive provision of SB 301 is based on giving corporate bidders whose boards meet designated diversity thresholds a price preference in the bidding process. Maryland Procurement officials must apply a corporate diversity percentage to a responsive bid, if the responsible bidder meets the diversity threshold. The percentage price preference cannot exceed 5 percent. The price preference given bidders whose corporate boards meet certain thresholds is similar to the many existing bid price preference systems used by state and local procurement systems across the nation to incentivize businesses to diversify their subcontractors. As in those bid price preference policies, the goal of SB 301 is to use government tax funded procurement to address a compelling state interest, the redressing of centuries of discrimination in employment and business practices that underly the underrepresentation of minorities and women on corporate boards.

SB 301 represents a proactive approach to achieving greater corporate board diversity and inclusion on the boards of corporations doing business with the State of Maryland. To the extent such businesses are based in Maryland and/or employ Maryland residents, the promotion of corporate board diversity will serve another compelling state interest related to altered corporate employment policies likely to better reflect the diversity of Maryland's population. SB 301 represents the shifting paradigm in social attitudes towards corporate board diversity and inclusion and in the evolving standards related to corporate governance, accountability, and transparency. Thank you.

Gerald D. Jaynes