No. 22-15149

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CREIGHTON MELAND,

Plaintiff-Appellant,

v.

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

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of California, Sacramento
Honorable John A. Mendez, District Judge

APPELLANT'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellant states that there are no corporations party to this case.

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JURISDICTIONAL STATEMENT

Plaintiff-Appellant Creighton Meland, Jr., brought this lawsuit in the district court pursuant to 42 U.S.C. § 1983 and the Fourteenth Amendment to the United States Constitution. This appeal arises from the district court's order denying Meland's motion for preliminary injunction. 1-ER-002. The district court entered its judgment on December 27, 2021, *id.*, and Appellant filed a timely Notice of Appeal on February 8, 2022. 3-ER-632. The district court possessed jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a) and this Court has appellate jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

INTRODUCTION

Over thirty years ago, this Court warned that "[t]he notion that women need help in every business and profession is as pernicious and offensive as its converse, that women ought to be excluded from all enterprises because their place is in the home." *Associated General Contractors of California, Inc. v. City and County of San Francisco*, 813 F.2d 922, 941 (9th Cir. 1987). Yet in 2018, California passed a "minimum gender requirement" that applies to every boardroom of every publicly held corporation, across every industry, throughout the entire state. This Woman Quota purports to remedy societal discrimination against women, but it bears no discernable relationship to that end.

SB 826 does not impose the use of sex as one factor in the board nomination or voting process; it makes sex *the* determinative factor for a fixed number of seats on every corporate board. And it applies to all businesses across every industry in perpetuity, notwithstanding female representation in a given business or industry, regardless of whether there is any specific evidence of discrimination, and irrespective of any gains women make in the future. This rigid, broad, and perpetual quota amounts to unconstitutional sex-based balancing. And it relegates women, who were already securing 40% of seats on Fortune 500 boards each year to "quota hires" in the process.

Every year, Appellant is forced to vote for board members under a law which seeks to coerce him into voting on the basis of sex, a serious constitutional violation in a nation that values equality before the law. He is likely to prevail on the merits of his claim that the quota violates the Equal Protection Clause of the Fourteenth Amendment and the district court erred in denying his preliminary injunction.

STATEMENT OF ISSUES

The Fourteenth Amendment promises that no individual will be denied equal protection of the laws. Any sex-based law, including even remedial measures, must therefore be flexible, narrow, limited, and substantially related to an important end.

The issue presented on appeal is whether Plaintiff-Appellant is likely to succeed on the merits of his claim that SB 826, which imposes a rigid, arbitrary, and

broad sex-based quota on all publicly held California corporations into perpetuity, violates the Constitution's promise of equal protection?

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

The relevant statutory and constitutional provisions are SB 826 and U.S. Const. Amend. XIV, both reproduced in their entirety in the addendum.

STATEMENT OF THE CASE

SB 826 and Its Requirements

Despite the consistent gains that women have been making in corporate representation, the California legislature passed SB 826 in 2018 to compel "parity" in the boardroom. *See* SB 826. The law states as its objectives increasing the number of women board members and expanding the purported benefits that are unique to women's working style. *Id.*

Since December 31, 2019, publicly held corporations headquartered in California have been required to have at least one female director on their boards. *Id.* As of December 31, 2021, that number has increased: a corporation with four or fewer directors must have at least one female director; a corporation with five directors must have at least two female directors; and a corporation with six or more directors must have at least three female directors. *Id.* The Secretary of State[1] is

[1] The Secretary of State, Shirley N. Weber, is sued in her official capacity pursuant to *Ex Parte Young*, 209 U.S. 123 (1908).

authorized to impose fines for any violation of the Woman Quota. *Id.* The first violation results in a $100,000 fine to the corporation and any subsequent offense results in a $300,000 fine. *Id.* Each seat not filled by a woman as required by SB 826 constitutes a separate violation. *Id.*

SB 826 further requires corporations to file an annual statement with the Secretary disclosing whether the board complies with the quota. *Id.* A corporation's failure to report or to timely report whether it complies with the quota subjects it to a $100,000 fine. *Id.* The Secretary is required to publish reports on her Office's website listing compliant corporations and may implement any additional regulations necessary to enforce the Woman Quota. *Id.*

The Legislature expected that the quota would be enforced immediately, estimating it would cost $500,000 each year for the Secretary to "develop regulations, investigate claims, and enforce the violations of this Bill's provisions," in addition to "unknown additional costs for [the Secretary] related to production of the annual report." *See* Senate Rules Committee, SB 826 Senate Floor Analysis.[2] And in fact, the Secretary has taken several actions in furtherance of the quota. On May 31, 2019, the Secretary sent a letter to all publicly held corporations either registered to do business in California or with a California-based headquarters to

[2] *Available at* https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB826#.

inform them of the Woman Quota and the new filing requirements.[3] Then on December 16, 2019, the Secretary sent a letter to all publicly held corporations headquartered in California to inform them of the same.[4] On July 1, 2019, the Secretary published a report that identified more than 500 companies subject to the Woman Quota and that listed the companies that were known to be in compliance.[5] In March of 2020 and March of 2021, the Secretary published updated reports.[6]

Lack of Evidence of Sex Discrimination

The Secretary claims that the Woman Quota is intended to remedy discrimination against women in corporate board membership and largely relies on disparities in representation to substantiate her claims of discrimination. *See* Dist. Ct. Op. at 12, 1-ER-013. But the Secretary's own evidence is full of explanations for any current disparities, including the fact that women continue to secure MBAs at lower rates than men, Konrad Decl. ¶10, 2-ER-327 (women have earned 33% of MBA degrees since 1987 and represented 40% of the incoming class at 12 elite

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[3]Alex Padilla, Letter to Compliance Officers (May 31, 2019), https://bpd.cdn.sos.ca.gov/women-on-boards/CorpDisletter.pdf.

[4] Alex Padilla, Letter to Compliance Officers (Dec. 16, 2019), https://bpd.cdn.sos.ca.gov/women-on-boards/RevCorpDisLetter.pdf.

[5]July 2019 Report, https://bpd.cdn.sos.ca.gov/women-on-boards/final-report.xlsx.

[6]March 2020 Report, https://bpd.cdn.sos.ca.gov/women-on-boards/WOB-Report-04.pdf; March 2021 Report, https://bpd.cdn.sos.ca.gov/women-on-boards/wob-report-2021-02.pdf.

business schools in 2015), hold just 25% of C-suite positions (which is a feeder pool for board membership), Schipani Decl. ¶ 35, 2-ER-111; *see also* Berkhemer-Credaire Decl. ¶ 36, 3-ER-395 ("there are fewer women who hold C-suite positions"), and women are less likely to have prior corporate board experience. *Id.* at ¶ 37.

Moreover, the evidence shows not that the board member selection process is discriminatory, but that it is opaque, insular, and sometimes arbitrary. *See, e.g. id.* at ¶¶ 25–41, 3-ER-393–96. For example, the Secretary's declarants contend that board openings are not openly advertised, *id.* at ¶ 18, 3-ER-392, and that board members choose among their social circles or people known to them when looking for candidates.[7] *Id.* at ¶ 25, 3-ER-395 (calling "existing relationships" the "most critical component of the criteria upon which" potential board members are identified); Meline Decl. ¶ 27, 2-ER-191 (personal connections constitute one of the most "critical" components in how directors are chosen). The Secretary also relies heavily on allegations of gender bias in different professions or in society generally, *see* Konrad Decl. ¶ 17, 2-ER-330, though this evidence is not specific to corporate

[7] According to the Secretary, male board members tend to choose other board members that they socialize and attend sports games with, which the Secretary's declarants characterize as "gendered-activity." Berkhemer-Credaire Decl. ¶ 25, 3-ER-393. The argument is that men hang out with men, attend events (like sports games) that are more suitable for men, and elect men, while women hang out with women, attend events more suitable for women, and elect women.

boards and is not evidence of discrimination in hiring. The Secretary's evidence repeatedly makes conclusory allegations of discrimination with no evidence. *See, e.g.* Rosenblum Decl. ¶ 1, 2-ER-140 (stating that it is "widely understood" that there is discrimination on corporate boards but providing zero evidence of discrimination on the basis of sex).

The Secretary's evidence shows that the percentage of women on corporate boards was steadily increasing before the passage of SB 826, Grounds Decl. ¶ 34, 2-ER-375, that institutional investors are playing a role in making board member diversity a priority, Nzima Decl. ¶¶ 6–7, 2-ER-182–83, and that "people's attitudes toward women are becoming more egalitarian over time." Konrad Decl. ¶ 19, 2-ER-331. From 2006–2018, the percentage of women holding corporate board seats on California companies nearly doubled, rising from 8.8% to 15.5%, Grounds Decl. ¶ 47, 2-ER-383, and in 2018 the share of women on Fortune 500 boards was 22.5%. *Id.* ¶ 34, 2-ER-375; Schipani Decl. ¶ 21, 2-ER-106–107. That is, between 2006 and 2018, the share of women on corporate boards in California grew by 176%. To put it yet another way, over those 12 years, the percentage of women on California corporate boards grew by an average of 14.6% each year.

Even more relevant are the figures with regards to hiring patterns immediately preceding SB 826: According to a 2019 report by Heidrick and Struggles, between 2009 and 2018, annual female board appointments on Fortune 500 boards grew from

18% of seats per year to 40%—or nearly half—of seats per year, which is more than one would expect given that (1) 60% of 2018 board hires were current or former CEOs (and women hold just 25% of C-suite positions) and (2) 69% of board hires had prior board experience (and women often lack prior board experience).[8] According to another study, the percentage of seats on Russell 3000 boards that went to women annually between 2008 and 2019 grew from 12% to 45%. And as of the second quarter of 2019, before the quota went into effect, women had increased their representation on corporate boards for 7 straight quarters in a row. *See* Or. Arg. Tr. 23:1–25:9, 1-ER-046–48; Dist. Ct. Op, 1-ER-048.[9]

Representation on corporate boards varies dramatically by the size of the board and by the company's market capitalization. Grounds Decl. ¶ 25 (chart), 2-ERA-370. According to SB 826's text, smaller companies are "much more likely to

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[8] *See* Heidrick and Struggles, *Board Monitor U.S. 2019*, at 9, available at https://www.heidrick.com/-/media/heidrickcom/publications-and-reports/board_monitor_us_2019.pdf. The Heidrick & Struggles report was cited in Plaintiff's reply brief in the district court, ECF 46 at 9–10, and discussed at the hearing. Or. Arg. Tr. 23:1–25:9.

[9] The full text of these studies (discussed by the parties in the briefs, at oral argument, and in the opinion) are available at: *U.S. Board Diversity Trends in 2019*, Harvard Law School Forum on Corporate Governance, https://corpgov.law.harvard.edu/2019/06/18/u-s-board-diversity-trends-in-2019; and *Equilar Q2 2019 Gender Diversity Index*, https://www.equilar.com/reports/67-q2-2019-equilar-gender-diversity-index.html. Another study cited by Appellant and discussed at hearing and in the district court opinion shows that women secured 20.1% of Russell 3000 seats in 2015, 21.4% of seats in 2016, 29.4% of seats in 2017, and 35.6% of seats in 2018. *See Equilar Q3 2018 Gender Diversity Index*, https://www.equilar.com/reports/61-equilar-q3-2018-gender-diversity-index.html.

lack female directors." And according to the Secretary's declarants, among the 50 publicly held corporations with the lowest revenue, women held 8.4% of director seats; among the 50 companies with the highest revenue, women held 23.5% of director seats and all 50 had at least one woman on their board. *See* Grounds Decl. ¶¶ 26, 31–34, 46, 2-ER-369, 372–75, 382–83 (noting important distinctions "based on the size of company" and stating that "smaller companies generally, and microcap companies specifically" had fewer women than larger companies); *see also* Schipani Decl. ¶¶ 23, 24, 2-ER-108 (twice as many small California corporations had no women on their boards as large companies).

Female representation also varies by region and by industry. There is as much as a 9% difference in female representation between Los Angeles and San Francisco. *UC Davis Study of California Women Business Leaders 2015-2016* at 13, 2-ER-280. There are also wide disparities between industries. For instance, women represent 13% of directors in healthcare and 28% in utilities. *See* Def. Request for Judicial Notice, Ex. 20 at 8, 2-ER-93. Similarly, a 2015-2016 study noted that 89% of California companies in utilities and telecommunications had at least one woman on their board while only 41% of semiconductor companies had at least one woman on board. *UC Davis Study of California Women Business Leaders 2015-2016* at 11, 2-

ER-286. And in 2018, women secured 38% of seats on consumer boards, 37% of seats in the industrial sector, and 48% of seats in financial services.[10]

The Secretary's evidence relies heavily on stereotypes about women. For instance, the Secretary relies on declarations that women have a certain management style, are more ethical than men,[11] reduce male overconfidence, and are less likely to participate in "gendered" activities like attending sports games or playing golf.[12] Berkhemer-Credaire Decl. ¶ 25, 3-ER-393. The text of SB 826 itself states that women are more "risk-averse," are less likely to carry corporate debt, and have certain views about corporate social responsibility. The declarants also state that both men and women are "homophilic," meaning they tend to hire people of their own sex. Meline Decl. ¶ 28, 2- ER-191.

Plaintiff and OSI

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[10] Heidrick and Struggles *supra n.*8 at 13.

[11] For example, one declarant suggests that the Theranos fraud scandal was a result of having a board that was all-male, apart from CEO Elizabeth Holmes, since men are less ethical. Meline Decl. ¶ 41, 2-ER-197. This is ironic given that another declarant laments that women are held to higher ethical standards than men. Konrad Decl. ¶ 24, 2-ER-334. The Secretary's declarants therefore perpetuate a stereotype while decrying that stereotype. And they minimize the agency of Theranos's infamous female CEO in the process, as if her male counterparts are to blame for her errors. Similarly, a declarant contradictorily claims that men think women do "more talking," Meline Decl. ¶ 34, 2-ER-193, while another praises women's supposed "transformational leadership" style. Konrad Decl. ¶¶ 17, 18, 2-ER-330–31.

[12] These declarations also rely on stereotypes about men. For example, men purportedly tell bawdy jokes at board meetings or dinners, Meline Decl. ¶ 34, 2- ER-193, and choose board members among their golf buddies. *See, e.g.*, Berkhemer-Credaire Decl. ¶ 25, 3-ER-393, Schipani Decl. ¶ 91, 2-ER-132.

Appellant Creighton Meland, Jr., is a shareholder of OSI Systems, Inc. (OSI), a publicly held company that is incorporated in Delaware and headquartered in Hawthorne, California, and subject to the quota. Meland Decl. ¶ 2. He currently owns 65 shares of OSI stock and has voted at past elections. Dist. Ct. Op., 1-ER-008.

OSI's board members can be nominated either by the nomination committee or by individual shareholders. *See* OSI Bylaws.[13] After a shareholder nominates a board member, a Nomination and Governance Committee decides whether to place the nominee on the proxy card that is sent out to shareholders. Sze Depo. Tr. at 69:25–70:14, 3-ER-468–469.[14] Shareholders may put forward candidates and vote for any candidate that has been nominated regardless of whether the Nominating and

[13] OSI's bylaws have been filed with the SEC and are publicly available at https://www.sec.gov/Archives/edgar/data/1039065/000119312510050248/dex32.htm.

[14] After Appellant filed his motion for preliminary injunction, the Secretary deposed OSI pursuant to Rule 30(b)(6). The resulting deposition transcript of OSI's General Counsel, Victor Sze, was lodged with the District Court pursuant to Local Rule 133(j) and relied on by the Secretary in her opposition to the preliminary injunction. Citations to many pages of the deposition were also included in Plaintiff-Appellants' reply brief in support of his motion for preliminary injunction. Judge Mendez further asked both parties to discuss aspects of the Sze deposition at the preliminary injunction hearing. 1-ER-032, 034, 035. However, Appellant inadvertently omitted filing a copy of the deposition transcript with his reply brief because he erroneously assumed it had been filed with the Secretary's opposition brief. As it turns out, the Secretary had filed excerpts, but not the entire transcript, and merely lodged the full transcript with the court. Accordingly, Plaintiff-Appellant is concurrently submitting a motion to supplement the record on appeal pursuant to Federal Rule of Appellate Procedure 10(e)(2) with Mr. Sze's full testimony.

Governance Committee decides to place a proposed candidate's name on the proxy ballot. *Id.* at 71:15–21, 3-ER-470. The shareholders of OSI, including Meland, ultimately select who sits on the corporation's board of directors by vote. *See* OSI Bylaws. While OSI has never had a contested election, Sze Depo. Tr. 73:19–74:1, 3-ER-472–73, on at least two occasions shareholders have submitted their own prospective nominations. *Id.* at 72:8–16, 3-ER-471. There is nothing inherent in the structure or bylaws of OSI preventing a contested election. *Id.* at 125:17–25, 3-ER-524. There is evidence from the deposition of OSI's 30(b)(6) witness and general counsel, Victor Sze, that the corporation has taken the Woman Quota into account in its nomination process. *Id.* at 135:3–136:14, 3-ER-534–35; 153:1–154:7, 3-ER-552–53.

Prior to December 2019, OSI had a seven-member, all-male board. Sze Decl. ¶ 2, 2-ER-97–98. In December 2019, at its Annual Meeting of Stockholders, the shareholders of OSI voted to place Ms. Keli Bernard, a woman, on the Board to fill a spot vacated by another board member. *Id.* Because of the Board's size, the quota requires shareholders to add two more female board members to its board in order to comply with the Woman Quota.

Procedural History

Meland filed this lawsuit on November 13, 2019. 3-ER-623. On April 20, 2020 Judge Mendez granted Defendant's Motion to Dismiss for lack of standing.

ECF No. 16, 3-ER-638. On June 21, 2021, this Court reversed and remanded, ruling that Meland has standing because "SB 826 requires or encourages him to discriminate on the basis of sex[.]" *Meland v. Weber*, 2 F.4th 838, 842 (9th Cir. 2021).

Meland's motion for preliminary injunction followed soon after the case was reopened to enjoin the law from operating prior to the next OSI board election. ECF No. 23, 3-ER-618. Meland argued that he was likely to succeed on the merits because SB 826 imposes a rigid, arbitrary, overly broad, poorly tailored, and perpetual quota. Dist. Ct. Op. at 18–21, 1-ER-019–22. In opposition, the Secretary once again argued that Meland lacked standing because it claimed that his low amount of shares meant he could vote without affecting the election. *Id.* at 6, 1-ER-007.

Judge Mendez held a hearing on October 22, 2021, ECF No. 57, 3-ER-641, and issued a written decision on December 27, 2021. Dist. Ct. Op. at 1, 1-ER-002. Judge Mendez rejected the Secretary's arguments regarding standing and ruled that this Court's earlier opinion on standing controlled because regardless of how many shares Appellant owns or the results of any one election, the quota "encourages" him to act on the basis of sex. *Id*. at 6, 1-ER-007. However, he found that Meland was unlikely to succeed on the merits because the Woman Quota would satisfy intermediate scrutiny. *Id.* at 21, 1-ER-022. This timely appeal followed.

STANDARD OF REVIEW

To secure a preliminary injunction, a plaintiff must show that he is "likely to succeed on the merits, that [he is] likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [his] favor, and that an injunction is in the public interest." *Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). The Ninth Circuit also employs a "sliding scale" variant of this standard, "such that where there are only 'serious questions going to the merits,' . . . a preliminary injunction may still issue so long as 'the balance of hardships tips sharply in the plaintiff's favor' and the other two factors are satisfied." *Short v. Brown*, 893 F.3d 671, 675 (9th Cir. 2018).

A decision denying a preliminary injunction is reviewed for abuse of discretion. *Arc of California v. Douglas*, 757 F.3d 975, 983 (9th Cir. 2014). It is an abuse of discretion if the district court relied "on an erroneous legal standard or clearly erroneous finding of fact." *Id.* This includes when "the court misapprehended the law with respect to the underlying issues in the litigation." *Walczak v. EPL Prolong, Inc.*, 198 F.3d 725, 730 (9th Cir. 1999). This Court reviews "the underlying issues of law" de novo to determine whether "the district court bases its decision on an erroneous legal standard." *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 817 (9th Cir. 2013).

SUMMARY OF THE ARGUMENT

SB 826 imposes a sex-based quota on every publicly held corporation headquartered in California. To say that aloud is striking. Such an all-encompassing quota is obviously unconstitutional and cannot survive the heightened scrutiny that is required when the government mandates sex-based discrimination.

The constitutional question is straight forward: is a quota on all publicly held corporations headquartered in California substantially related to an important government objective? It is not. The Secretary's interest here—remedying discrimination against women in the boardroom—is based on conjecture and hyperbole, yet that is the stronger of her constitutional arguments. Most obviously, SB 826 lacks any semblance of constitutional tailoring. It is neither flexible, nor narrow, and it is neither industry-specific nor time-limited. It is a rigid and broad sex-based quota on all publicly held corporations. And it lasts forever.

SB treats all publicly held corporations as a monolith despite the wide disparities between companies of different sizes, locations, and industries. SB 826 demands this unequal treatment even though women were already securing 40% of open Fortune 500 board seats annually. The quota also imposes a mandate on private parties for the purpose of remedying societal discrimination. Each of these leaps render it unconstitutional. SB 826 wildly exceeds any sex-based remedial measure

previously permitted by this Court. *See, e.g.*, *Assoc. Gen. Contractors of Cal.*, 813 F.2d 922, *Coral Const. Co. v. King Cty.*, 941 F.2d 910, 924 (9th Cir. 1990).

The district court acknowledged that the quota was not well-tailored, but ruled that the law nevertheless satisfied intermediate scrutiny despite these deficiencies. Such a ruling waters down the level of judicial review far below the "demanding" standard established by the Supreme Court. *See United States v. Virginia*, 518 U.S. 515, 555 (1996). For example, the lower court ruled that quotas may survive intermediate scrutiny, that establishing a "critical mass" of women on corporate boards is tailored to remedying discrimination, and that time limitations on sex-based classifications are not required. *But see Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Gratz v. Bollinger*, 539 U.S. 244, 293 (2003); *Grutter v. Bollinger*, 539 U.S. 306, 309 (2003); *City of Richmond v. J.A. Croson Co.,* 488 U.S. 469, 499 (1989). That decision must be reversed. Where a law lacks the requisite nexus to remedying discrimination, it turns into a blatant mandate for sex-based balance for the sake of it, which is an undeniably unconstitutional end.

The history of quotas "is a history of subjugation, not beneficence." *J.A. Croson Co*., 488 U.S. at 527 (Scalia, J., concurring). Here, the state relies on stereotypes about women to justify its own sex-based quota. According to SB 826, women are risk-averse, law-abiding, and have a particular leadership style. And by ignoring the very real progress women have made in recent years, the quota creates

a new stereotype in the process: the idea that women can't make it without government help. Perhaps in the future, this "gallantry" will reveal itself as it really is—"Victorian condescension." *See* Amicus Br. of the ACLU, 1976 WL 181333 at *18, *Craig v. Boren*, 42 U.S. 190 (1976) (authored by future-Justice Ruth Bader Ginsburg) (citation omitted).

ARGUMENT

I. Appellant is likely to succeed on the merits of his claim that the Woman Quota violates equal protection of the laws

Under the Equal Protection Clause, sex-based classifications are subject to intermediate scrutiny, meaning they must be substantially related to an important state interest. *United States v. Virginia*, 518 U.S. at 555. Courts afford legislatures no deference when it comes to sex-based laws, *id.* at 555, and the "demanding" burden rests "entirely with the state." *Id.* at 533. The government's justification must be "exceedingly persuasive," *id.*, because even those laws intended to benefit women often have the opposite effect. As the Supreme Court has recognized, sex-based classifications often operate to put women "not on a pedestal, but in a cage." *See Frontiero v. Richardson*, 411 U.S. 677, 684 (1973)

Sex-based remedial measures must be flexible, narrow, and time-limited. *See, e.g.*, *Mallory v. Harkness*, 895 F. Supp. 1556, 1562 (S.D. Fla. 1995); *Mississippi University for Women v. Hogan*, 458 U.S. 718, 729 (1982); *Ensley Branch,*

N.A.A.C.P. v. Seibels, 31 F.3d 1548, 1581 (11th Cir. 1994); *Back v. Carter*, 933 F. Supp. 738, 759 (N.D. Ind. 1996). SB 826 is none of those things. It is rigid, broad, and lasts in perpetuity, thereby creating a permanent interest in outright sex-based balancing. Moreover, because it explicitly incorporates stereotypes about female behavior (i.e., women have a distinctive leadership style, are risk-averse, law-abiding, and have certain views about corporate responsibility), it impermissibly relies on "overbroad generalizations about the different talents, capacities, or preferences of males and females." *U.S. v. Virginia*, 518 U.S. at 516. Because SB 826 lacks any of the characteristics required under intermediate scrutiny, Appellant is likely to succeed on the merits.

A. The Quota is rigid

Quotas are the "hallmark" of an impermissible "inflexible affirmative action program." *See W. States Paving Co. v. Wash. State Dep't of Transp.*, 407 F.3d 983, 994 (9th Cir. 2005). SB 826 is impermissibly rigid in two ways. First, it makes sex, alone, determinative. It does not offer merely a preference, and it forbids consideration of board candidates on a "case-by-case basis." These are vital safeguards for ensuring that those benefitted have actually "suffered from the effects of past discrimination" and that innocent parties are not unnecessarily burdened. *J.A. Croson Co.*, 488 U.S. at 508; *Coral Const. Co.*, 941 F.2d at 924. Under SB 826, a candidate's background, perspective, experience, or skill set, are irrelevant unless

the candidate is a woman. Such a regime cannot be squared with equal protection, which demands the government treat people as individuals—not as fungible members of a group. *See Coral Const. Co.*, 941 F.2d at 924 (holistic requirements are "less problematic from an equal protection standpoint because they treat all candidates as individuals rather than as members of their group") (citing *Croson*, 488 U.S. at 507–08).

Second, SB 826 does not contain opt-out, waiver, or good faith provisions. *See, e.g., Coral Const. Co.*, 941 F.2d at 924 (noting that a valid remedial program "should include a waiver system that accounts for both the availability of qualified [applicants]" *and* whether those applicants "have suffered from the effects of past discrimination"); *Fullilove v. Klutznick*, 448 U.S. 448, 487 (1980) (noting the importance of the law's waiver provision). Instead it imposes an inflexible quota on all boardrooms regardless the relevant labor pool, an applicant's circumstances, or a corporation's good faith efforts to comply. Because it applies to all publicly held corporations headquartered in California unforgivingly, the quota is overly rigid.

In the district court, Appellant argued that SB 826 was a rigid quota, which under Supreme Court precedent is a per se illegitimate means of achieving any end. *See, e.g., Bakke*, 438 U.S. 265; *Gratz*, 539 U.S. at 293; *Grutter*, 539 U.S. at 309; *J.A. Croson Co.,* 488 U.S. at 499; *see also Coral Const. Co*., 941 F.2d at 924 (upholding the challenged program because it was "simply not a quota"). The court declined to

reach whether SB 826's "minimum gender requirement" established a quota because the only binding precedent on quotas relates to race. Dist. Ct. Op. at 19, 1-ECF-20. However, SB 826 is a quota, and, given the special threat it presents to equality before the law, there is no reason to find that a gender quota is any more permissible than a quota based on race.

SB 826 takes a number of seats off the table and reserves them for one sex without exception. That's a quota. *Bakke*, 438 U.S. at 289, one of the several cases rejecting quotas, involved a minimum seat set aside like SB 826. When the school argued the policy was not a quota because its policy merely set a floor and did not establish fixed percentages by race, Justice Powell ruled that such a "semantic distinction" was "beside the point." *Id.* The relevant consideration was that the policy disqualified individuals with certain traits from competition for a certain number of seats. It told applicants that "[n]o matter how strong their qualifications … including their own potential for contribution to … diversity, they are never afforded the chance to compete with applicants from the preferred groups" for purposes of certain spots. *Id.* at 319. It's of no importance that a corporation can increase the size of its board, or can exceed the minimum. SB 826 establishes a quota. *See also F. Buddie Contracting Co. v. City of Elyria, Ohio*, 773 F. Supp. 1018, 1032 (N.D. Ohio 1991) ("[c]alling a quota a goal will not convert a quota into a goal. A quota is a quota no matter what it is called").

And even if the existence of a quota is not itself determinative, SB 826's use of a quota weighs heavily against its constitutionality. Quotas are a "divider of society" and a "creator of caste," *J.A. Croson Co.*, 488 U.S. at 527 (Scalia, J., concurring) (citation omitted) and therefore presumptively unconstitutional. That's true under any level of scrutiny, even if it doesn't doom the Woman Quota outright.

B. The Quota is arbitrary

The Secretary has not answered key questions about the scope of discrimination she is trying to remedy, including the relevant labor pool or the level of representation she believes would exist in the absence of discrimination. The declarants say there are a "significant" amount of qualified women, Meline Decl. ¶ 26, 2-ER-191, a "substantial" amount of qualified women, *id.* at ¶ 22, 2-ER-189, "countless women," *id.* at 3-ER-391, a "robust" amount of women, Meline Decl. ¶ 22, 2-ER-189, and "thousands" of women.[15] *See, e.g.*, Schipani Decl. ¶ 41, 2-ER-113. Granted, establishing the labor pool at such a broad level as "eligibility for corporate board membership in California" is a difficult thing to do, but such is the hazard when a quota applies so broadly. The "administrative headache" of

[15] The Secretary cannot rely on the percentage of women in the general population given that there are "special qualifications necessary to fill the job." As the Supreme Court has said, it "completely unrealistic" to assume individuals will choose a particular trade "in lockstep proportion to their representation in the local population. *Croson*, 488 U.S. at 507. The Secretary must establish the labor pool with particularity.

identifying the relevant labor pool cannot relieve the state of its obligations. *J.A. Croson Co.*, 488 U.S. at 504. And these vague statements about the labor pool offer no guidance for courts to evaluate whether the disparities the Secretary has identified suggest discrimination, or whether the quota is an adequately tailored remedy.

In fact, the evidence suggests that some disparity would exist in the absence of discrimination because women comprise a lower percentage of MBA grads and just 25% of C-suite positions, which are feeders for corporate boards. Schipani Decl. ¶ 35 2-ER-111, Berkhemer-Credaire Decl. ¶ 36, 3-ER-395; s*ee also* Konrad Decl. ¶ 10, 2-ER-327–28 (women have comprised 33% of MBAs since 1986 and represented 40% of the incoming class at 12 top tier business schools in 2015). Nor has the Secretary indicated why the quota's particular demands (one woman for boards of four or fewer members, two women for boards of four members, and three women for boards of five or more) are an appropriate remedy or what they are aimed at, especially given that smaller boards are known to have much larger disparities and yet are subject to a lower quota. The Secretary never explains. The Secretary's "amorphous" claim that there has been past discrimination cannot justify the use of an "unyielding" and rigid quota. *See J.A. Croson*, 488 U.S. at 499.

The district court rejected Appellant's arguments that the quota was arbitrary on the theory that the quota was substantially related to creating a "critical mass" of women on corporate boards. Dist. Ct. Op. at 18, 1-ER-019. That's a bait and switch.

Critical mass has nothing to do remedying discrimination. Instead, it's a term frequently used in the context of higher education, where racial preferences are used to achieve the "benefits that flow from a diverse student body." *Grutter*, 539 U.S. at 343. Similarly here, the Secretary's declarants contend the quota will create the "critical mass" necessary to achieve the benefits of having more women on corporate boards. *See* Konrad Decl. ¶12, 2-ER-328-29, Schipani Decl. ¶¶ 70-75, 2-ER-123-25. But whether the law will provide any benefits says nothing about whether the quota is a well-tailored remedy for discrimination.[16] Because the Secretary has not answered critical questions related to why it is an appropriate remedy, the quota is arbitrary, and the District Court's reliance on "critical mass" was misplaced.

C. The Quota is overbroad

In order to ensure a sex-based remedial measure is sufficiently tailored, courts require evidence of discrimination in the relevant field, narrowly defined. *See, e.g.*, *Coral Const. Co.*, 941 F.2d at 931 ("Some degree of discrimination must have occurred in a particular field before a gender-specific remedy may be instituted in that field."); *Miss. Univ. for Women*, 458 U.S. at 729 (striking down woman-only state-sponsored nursing school where state "made no showing that women lacked opportunities to obtain training in the field of nursing or to attain positions of

[16] Moreover, no court has ever held that achieving the benefits of gender diversity on corporate boards is a sufficiently important governmental interest to justify the use of sex quotas.

leadership in that field."); *Ensley Branch, N.A.A.C.P. v. Seibels*, 31 F.3d 1548, 1580 (11th Cir. 1994) (requiring the state to show discrimination in the relevant economic sector).Yet SB 826 applies to all corporate boards equally, differing only based on the size of the board (even though smaller boards should ostensibly be required to have higher representation). It is therefore overbroad. *Cf. J.A. Croson Co.*, 488 U.S. at 498 ("a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy").

Citing *Assoc. Gen. Contractors* and *Coral Construction*, the district court disregarded Appellant's overbreadth claims on the theory that "overbreadth alone" is insufficient to invalidate a sex-neutral law. Dist. Ct. Op. at 20, 1-ER-021. First, Appellant does not just contend that SB 826 is overbroad; he contends that the quota is overbroad, rigid, arbitrary, and perpetual. Second, SB 826 goes far beyond the remedial measures accepted in those cases, which were limited to the use of public funds in city- and county-wide public contracts. Here, SB 826 extends to all publicly held corporations, in every industry, of every size, across the entire state. It is vastly broader than even the close calls in those two cases, and was enacted nearly 35 years after the Court pronounced that women had "[o]nly recently … begun assum[ing] their rightful place in business and the professions." *Id.* at 939–40. In fact, the evidence shows women have made substantial progress since then. As this Court

warned, the state may not "ignore" that "progress," *id.* at 942, lest it create the appearance that women can only make it with government help.

D. The Quota lasts in perpetuity

Equal protection requires "at a minimum, the development of gender-neutral selection procedures," otherwise remedial gender-based laws create "a potentially indefinite cycle of discrimination." *See Ensley Branch, N.A.A.C.P.*, 31 F.3d at 1581; *F. Buddie Contracting Co.*, 773 F. Supp. at 1031; *Back*, 933 F. Supp. at 759; *Mallory*, 895 F. Supp. at 1562. Moreover, "[p]erpetual use of affirmative action may foster the misguided belief that women cannot compete on their own." *Ensley Branch, N.A.A.C.P.*, 31 F.3d at 1581–82. Yet SB 826 applies in perpetuity, meaning it will persist regardless of how attitudes, treatment, and female representation shifts in the upcoming years.[17] Indeed, it even applies in perpetuity to those companies that were already in full compliance with the Woman Quota even before it was enacted. Grounds Decl. ¶ 30, 2-ER-372 (noting that in 2018, 11% of California corporations already had 3 women or more on their board). Because it has no end date, the quota doesn't "cure [gender] imbalance," it "maintain[s] [gender] balance," and fails the

[17] A time-limited quota was entirely possible. Indeed this was the method that Italy adopted rather than employing a perpetual quota. *See* Rosenblum Decl. ¶ 54, 2-ER-163 (noting that Italy's woman quota was set to sunset after three consecutive board elections, and yet "had more compliance success" than other neighboring countries).

tailoring requirement for that reason alone. *Johnson v. Transportation Agency, Santa Clara Cty., Cal.*, 480 U.S. 616, 630 (1987).

The district court rejected Appellant's perpetuity arguments because the only precedent in the context of intermediate scrutiny is from out-of-circuit,[18] and it was "not persuaded" by those cases. While the court did not explain why it was unpersuaded, Appellant believes it plain on its face that without an end date, quotas transform into mandates to balance for the sake of it.

E. The Quota purports to remedy societal discrimination

If all of the above were not enough, the quota purports to remedy societal discrimination, an end that the Supreme Court has never accepted in the context of sex-based laws and has affirmatively rejected in the context of racial preferences. *Bakke*, 438 U.S. at 297; *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986); *J.A. Croson Co.,* 488 U.S. at 499. Instead, the Court has required evidence of governmental discrimination, or limited remedial measures to those where the government sought not to be a passive participant in private discrimination, as with public contracting. As the Court has noted, permitting the government to rely on such an amorphous concept as societal discrimination could justify nearly any remedial measure for any aggrieved group stretching far back into history without

[18] Though notably, this Circuit has at the very least noted that sex-based remedial measures should be "limited." *Associated General Contractors of California, Inc.*, 813 F.2d at 940.

limit. "Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications at the expense of individuals belonging to another group." *Bakke*, 438 U.S. at 297. Such a theory thus "has no logical stopping point." *J.A. Croson Co.*, 488 U.S. at 498.

The Ninth Circuit has held, despite this precedent, that "intermediate scrutiny does not require any showing of governmental involvement, active or passive, in the discrimination it seeks to remedy" *Id.* at 932. Appellant believes that's wrong, and this case shows exactly why. Relying on societal discrimination lacks any meaningful safeguards and permits the government to stray from truly remedial goals into something closer to balancing for its own sake. It would even justify imposing sex-based mandates on private parties, rather than on the government, as remedial measures have historically been used. This is a dramatic departure from the limited instances in which the Supreme Court has permitted remedial measures. As this Court has elsewhere observed, "[t]he task of remedying society-wide discrimination rests exclusively with Congress." *See Coral Const.*, 941 F.2d at 925.

F. The Quota fails to consider sex-neutral alternatives

The availability of sex-neutral alternatives signifies a law is not adequately tailored. *See, e.g., Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 151 (1980) (invalidating a sex-based law based on availability of sex-neutral alternatives); *Orr v. Orr*, 440 U.S. 268, 281 (1979) (same); *Weinberger v. Wiesenfeld*, 420 U.S. 636

653 (1975) (same). Here, there were several sex-neutral alternatives at the Secretary's disposal that would've effectuated her purposes without creating the same "stigma." *Coral Const. Co.*, 941 F.2d at 922.

For example, if the Secretary believes the selection process is non-transparent and arbitrary, she could require corporations to publicly advertise openings, make the process more transparent, or require directors to satisfy minimum standards rather than resorting to a sex-based quota. *See Craig*, 429 U.S. at 198 (the government may not use sex as a "proxy for other, more germane bases of classification"). These reforms would eliminate many issues that the Secretary's declarants identify as being barriers to the selection of female board members. Berkhemer-Credaire Decl. ¶¶ 39–40, 3-ER-396, Meline Decl. ¶ 30, 2-ECF-192. Because SB 826 neglects these alternatives, it is poorly tailored to its goal.

G. The Quota exceeds anything permitted by this Court

Even those cases most liberally allowing sex-based remedial measures weigh against SB 826. For example, in *Coral Const. Co.*, 941 F.2d at 932, a case heavily relied upon by the district court, this Court upheld a public contracting preference enacted by King County, Washington. But that preference differs from the Woman Quota in several key ways.

First, it was far more flexible than the rigid quota employed by California. For instance, it allowed "a reduction in the amount of set-aside levels for a given contract

if it is not feasible to meet higher levels, qualified [minority contractors] are unavailable, or [minority contractor] price quotes are not competitive." *Id.* at 914. Second, it applied only to County-wide public contracting, in contrast with SB 826's broad reach across all publicly-held (but private, non-governmental) corporations across all industries across the entire state. Third, there, the County relied on studies documenting the impact of discrimination on a variety of specific contracting fields including "construction, architecture, and engineering" as well as the "local goods and services industries." *Id.* at 915. In light of this evidence, it was understandable why the Court was willing to assume widespread discrimination. Here, the Secretary relies on evidence of disparities and broad allegations of bias against women, but that evidence also demonstrates significant progress and several sex-neutral explanations for any lasting disparities. There is no reason to presume widespread discrimination, as the Court did in *Coral*.

Associated Gen. Contractors, 813 F.2d at 941, is also distinguishable. There, this Court upheld against a facial challenge a city ordinance that gave a preference to women-owned businesses in city contracting. The Court observed that the ordinance, which applied to public contracts in the City of San Francisco, was "unusual in the breadth of the subsidy it gives women … in a large number of businesses and professions." *Id.* It further recognized that a "thin line divides governmental actions that help correct the effects of invidious discrimination from

those that reinforce the harmful notion that women need help because they can't make it on their own." *Id.* at 940. The Court nevertheless upheld the preference on the basis that women had only recently been allowed full access to the workforce and therefore it was reasonable to presume that women were disadvantaged in most fields. Still, it counseled that courts have a "responsibility to assure itself that statistics employed to justify discriminatory practices are relevant and meaningful." *Id.* at 932 n.19.

There are several major differences between the facts of *Assoc. Gen. Contractors of Cal.*, and the present case. First, that case was decided nearly 35 years ago at a time when the status of women in the workforce was far more precarious. It may have been reasonable to assume widespread discrimination and disparities 35 years ago. But it is not reasonable to make the same "troubling" assumptions more than three decades later given the weak evidence of discrimination and the substantial evidence of female gains. Second, the City of San Francisco had at the very least established the relevant labor pool: the percentage of businesses in the City that were in fact owned by women. *Id.* at 942. Here, by contrast, the Secretary never articulates the relevant labor pool except to say there is a "substantial pool of women," Schipani Decl. ¶ 16, 2-ER-106, "countless women," Berkhemer-Credaire Decl. ¶ 15, 3-ER-391, or the several other variations cited above. Third, the remedial measures in that case, while broad, applied only to public dollars going towards

public contracting in San Francisco. Here, the measures apply to all publicly held corporations (which are private, non-governmental entities) across all industries across the entire state. Fourth, the preference only would remain in effect until the City reached its goal of having 10 percent of its contracting dollars going to woman owned businesses. *Assoc. Gen. Contractors of Cal.*, 813 F.2d at 940. Here, the quota lasts in perpetuity.

Perhaps most importantly, the Court warned that while it would uphold the public contracting preference, any constitutional remedy "must not reflect or reinforce archaic stereotyped notions of the roles and abilities of women." *Id.* SB 826 is full of stereotypes. For example, the Secretary relied on declarations that women have a certain management style, Opp. at 18, 2-ER-399, Konrad Decl. ¶ 17, 2-ER-330–31, have certain views about corporate social responsibility, Konrad Decl. ¶¶ 49–50, 2-ER-347–48, are more collaborative and less "combative," Konrad Decl. ¶¶ 33–36, 2-ER-340–41, are more ethical than men, Konrad Decl. ¶¶ 42–44, 2-ER-344–45; Schipani Decl. ¶ 86, 2-ER-130, and reduce male overconfidence. Schipani Decl. ¶ 85, 2-ER-130. The bill itself said that women are more "risk-averse" and have a certain leadership style. And by setting aside a certain number of board seats for women into perpetuity, it creates the stereotype that women are quota hires.

Such an argument is reminiscent of historical attempts to justify sex-based classifications, as when Colorado argued women should have a lower drinking age because they are better behaved than men, *Craig*, 429 U.S. 190, or when Mississippi argued that women need single sex education because women don't feel comfortable being smart in front of men, *Hogan*, 458 U.S. at 738 (Powell, J., dissenting), or when Virginia argued it should be able to have male-only military schools because "[m]ales tend to need an atmosphere of adversativeness," while "[f]emales tend to thrive in a cooperative atmosphere," *U.S. v. Virginia*, 518 U.S. at 541, or when Oregon argued women need maximum hours laws because women aren't physically cut out for manual labor. *See* Brief for Petitioner, *Muller v. Oregon*, 208 U.S. 412 (1908) (No. 107), 1908 WL 27605. The lesson from those cases is that this Court should reject such sex-based essentialism, even if intended as a compliment. SB 826 is therefore a far cry from the limited remedial measures approved of in *Assoc. Gen. Contractors*, and commits the very error this Court warned of.

Neither case can sustain the Woman Quota. Neither case involved a fixed, rigid quota imposed on private parties. Neither case involved a statewide mandate. Neither case required a quota into perpetuity. Neither case explicitly relied on stereotypes about female behavior. And both cases are decades old, such that their permissive attitude should no longer apply in light progress women have made. *Id.*

at 942,[19] SB 826 exceeds anything previously condoned by this Court and is likely unconstitutional.

II. Appellant satisfies the other preliminary injunction factors

The other preliminary injunction factors also weigh in favor of granting a preliminary injunction. Appellant is at risk of suffering deprivation of his constitutional right to be free of a quota during the next shareholder nomination and election process. Deprivation of constitutional rights "unquestionably constitutes irreparable injury," *Hernandez v. Sessions*, 872 F.3d 976, 994 (9th Cir. 2017), including the deprivation of equal protection. *Monterey Mech. Co. v. Wilson,* 125 F.3d 702, 715 (1997); *see also Hecox v. Little*, 479 F. Supp. 3d 930, 987 (D. Idaho 2020).

The irreparable harm to Appellant outweighs any harm that a preliminary injunction would cause the Secretary because the government "cannot suffer harm from an injunction that merely ends an unlawful practice." *Rodriguez v. Robbins*,

[19] This case is much less like *Assoc. Gen. Contractors* or *Coral Construction* and much more like the law struck down in *Croson*. In fact, SB 826 suffers all of the flaws identified in that case. There, the Supreme Court struck down a law based on the fact that it was a rigid quota, lacked any explanation of the relevant labor pool, relied on a "generalized assertion" of past discrimination in the entire construction industry, failed to use race-neutral alternatives, and articulated several race-neutral explanations for the disparities. Although that case was evaluated under strict scrutiny, the fact that the Woman Quota suffers from *all* of the deficiencies cited in *Croson* is telling.

715 F.3d 1127, 1145 (9th Cir. 2013); *see also Zepeda v. I.N.S.*, 753 F.2d 719, 727 (9th Cir. 1983). It is always in the public interest to prevent the violation of a person's constitutional rights. *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). Enjoining the Woman Quota would not harm the government and would instead set shareholders and corporate actors free to nominate and elect directors—including even female directors—outside of a mandatory quota.

Because the court below erroneously held that Meland was not likely to prevail on the merits of his claim, it also erroneously concluded that the balance of the equities was not in Appellant's favor. But the district court's error is more fundamental than that. In concluding that it should not enjoin "a law that the evidence shows is clearly working" and that would "effectuate much needed and long overdue cultural change," 1-ER-023, the court revealed exactly the problem with SB 826.

Women were making substantial gains in corporate boardrooms long before SB 826. Between 2006 and 2018, representation grew by 176%. As of 2018, women were securing 40% of Fortune 500 board seats. To the extent disparities remained, they were being remedied by the institutional investors and other parties who were electing women to boards in parity to men. Nzima Decl. ¶¶ 6–7, 2-ER-182–83. But the district court's conclusion that women need the mandate to succeed is why remedial measures are dangerous. They create the "pernicious and offensive" notion

that women cannot succeed without government help. *Assoc. Gen. Contractors of Cal.*, at 941. Not to mention, unconstitutional laws should always be enjoined, regardless of the "cultural change" they foster.

CONCLUSION

Appellant respectfully requests this Court reverse the district court's denial of preliminary injunction.

DATED: February 23, 2022.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Plaintiff-Appellant is aware of no related cases within the meaning of Circuit Rule 28-2.6.

CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number(s): 22-15149

I am the attorney or self-represented party.

This brief contains 8,440 **words,** excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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DATED: February 23, 2022.

s/ Anastasia P. Boden
ANASTASIA P. BODEN

CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system

s/ Anastasia P. Boden
ANASTASIA P. BODEN

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9th Circuit Case Number: 22-15149

I, Anastasia P. Boden, certify that this brief is identical to the version submitted electronically on February 23, 2023.

DATED: February 23, 2022.

s/ Anastasia P. Boden
ANASTASIA P. BODEN

No. 22-15149

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CREIGHTON MELAND,

Plaintiff-Appellant,

v.

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

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of California, Sacramento
Honorable John A. Mendez, District Judge

APPELLANT'S ADDENDUM

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Index of Addendum

DATED: February 23, 2022.

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United States Code Annotated
Constitution of the United States
Annotated
Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

U.S.C.A. Const. Amend. XIV

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Currentness

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

<Section 1 of this amendment is further displayed in separate documents according to subject matter,>

<see USCA Const Amend. XIV, § 1-Citizens>

<see USCA Const Amend. XIV, § 1-Privileges>

<see USCA Const Amend. XIV, § 1-Due Proc>

<see USCA Const Amend. XIV, § 1-Equal Protect>

<sections 2 to 5 of this amendment are displayed as separate documents,>

<see USCA Const Amend. XIV, § 2,>

<see USCA Const Amend. XIV, § 3,>

<see USCA Const Amend. XIV, § 4,>

<see USCA Const Amend. XIV, § 5,>

U.S.C.A. Const. Amend. XIV, USCA CONST Amend. XIV
Current through P.L. 117-80. Some statute sections may be more current, see credits for details.

Senate Bill No. 826

CHAPTER 954

An act to add Sections 301.3 and 2115.5 to the Corporations Code, relating to corporations.

[Approved by Governor September 30, 2018. Filed with Secretary of State September 30, 2018.]

LEGISLATIVE COUNSEL'S DIGEST

SB 826, Jackson. Corporations: boards of directors.

The General Corporation Law provides for the formation of domestic general corporations by the execution and filing of articles of incorporation with the Secretary of State. Under that law, the business and affairs of these corporations are generally managed by, and all corporate powers exercised by or under, the direction of their boards of directors, and each director is elected by shareholder vote, with certain exceptions, as specified. That law also allows foreign corporations to transact intrastate business by obtaining certificates of qualification from the Secretary of State and requires foreign corporations that meet certain criteria to comply with specified provisions applicable to domestic general corporations to the exclusion of the law of the jurisdiction in which the foreign corporation is incorporated.

This bill, no later than the close of the 2019 calendar year, would require a domestic general corporation or foreign corporation that is a publicly held corporation, as defined, whose principal executive offices, according to the corporation's SEC 10-K form, are located in California to have a minimum of one female, as defined, on its board of directors, as specified. No later than the close of the 2021 calendar year, the bill would increase that required minimum number to 2 female directors if the corporation has 5 directors or to 3 female directors if the corporation has 6 or more directors. The bill would require, on or before specified dates, the Secretary of State to publish various reports on its Internet Web site documenting, among other things, the number of corporations in compliance with these provisions. The bill would also authorize the Secretary of State to impose fines for violations of the bill, as specified, and would provide that moneys from these fines are to be available, upon appropriation, to offset the cost of administering the bill.

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares as follows:

(a) More women directors serving on boards of directors of publicly held corporations will boost the California economy, improve opportunities for

women in the workplace, and protect California taxpayers, shareholders, and retirees, including retired California state employees and teachers whose pensions are managed by CalPERS and CalSTRS. Yet studies predict that it will take 40 or 50 years to achieve gender parity, if something is not done proactively.

(b) In September 2013, Senate Concurrent Resolution 62 urged that by December 31, 2016, all public companies in California increase the number of women on their boards of directors ranging from one to three, depending upon the size of their boards. California was the first state in the United States to adopt such a resolution, followed by five other states that passed similar resolutions urging more women directors on corporate boards in their states.

(c) Numerous independent studies have concluded that publicly held companies perform better when women serve on their boards of directors, including:

(1) A 2017 study by MSCI found that United States' companies that began the five-year period from 2011 to 2016 with three or more female directors reported earnings per share that were 45 percent higher than those companies with no female directors at the beginning of the period.

(2) In 2014, Credit Suisse found that companies with at least one woman on the board had an average return on equity (ROE) of 12.2 percent, compared to 10.1 percent for companies with no female directors. Additionally, the price-to-book value of these firms was greater for those with women on their boards: 2.4 times the value in comparison to 1.8 times the value for zero-women boards.

(3) A 2012 University of California, Berkeley study called "Women Create a Sustainable Future" found that companies with more women on their boards are more likely to "create a sustainable future" by, among other things, instituting strong governance structures with a high level of transparency.

(4) Credit Suisse conducted a six-year global research study from 2006 to 2012, with more than 2,000 companies worldwide, showing that women on boards improve business performance for key metrics, including stock performance. For companies with a market capitalization of more than $10 billion, those with women directors on boards outperformed shares of comparable businesses with all-male boards by 26 percent.

(5) The Credit Suisse report included the following findings:

(A) There has been a greater correlation between stock performance and the presence of women on a board since the financial crisis in 2008.

(B) Companies with women on their boards of directors significantly outperformed others when the recession occurred.

(C) Companies with women on their boards tend to be somewhat risk averse and carry less debt, on average.

(D) Net income growth for companies with women on their boards averaged 14 percent over a six-year period, compared with 10 percent for companies with no women directors.

(d) Other countries have addressed the lack of gender diversity on corporate boards by instituting quotas mandating 30 to 40 percent of seats to be held by women directors. Germany is the largest economy to mandate a quota requiring that 30 percent of public company board seats be held by women; in 2003, Norway was the first country to legislate a mandatory 40 percent quota for female representation on corporate boards. Since then, other European nations that have legislated similar quotas include France, Spain, Iceland, and the Netherlands.

(e) One-fourth of California's public companies in the Russell 3000 index have NO women on their boards of directors; and for the rest of the companies, women hold only 15.5 percent of the board seats. A 2017 report being prepared by Board Governance Research LLC, conducted by University of San Diego professor Annalisa Barrett, found the following:

(1) As of June 2017, among the 446 publicly traded companies included in the Russell 3000 index and headquartered in California, representing nearly $5 trillion in market capitalization, women directors held 566 seats, or 15.5 percent of seats, while men held 3,089 seats, or 84.5 percent of seats.

(2) More than one-quarter, numbering 117, or 26 percent, of the Russell 3000 companies based in California have NO women directors serving on their boards.

(3) Only 54, or 12 percent, of these companies have three or more female directors on their boards.

(4) Smaller companies are much more likely to lack female directors. Among the 50 California-based companies with the lowest revenues, with an average of $13 million in 2015 revenues, only 8.4 percent of the director seats are held by women, and nearly half, or 48 percent, of these companies have NO women directors. Among the 50 largest California companies, with an average of nearly $30 billion in 2015 revenues, 23.5 percent of the director seats are held by women. All of the 50 have at least one woman director.

(f) If measures are not taken to proactively increase the numbers of women serving on corporate boards, studies have shown that it will take decades, as many as 40 or 50 years, to achieve gender parity among directors, including:

(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.

(2) The 2017 Equilar Gender Diversity Index (GDI) revealed that it will take nearly 40 years for the Russell 3000 companies nationwide to reach gender parity — the year 2055.

(3) Nearly one-half of the 75 largest IPOs from 2014 to 2016 went public with NO women on their boards. Many technology companies in California have gone public with no women on their boards, according to a 2017 national study by 2020 Women on Boards.

(g) Further, several studies have concluded that having three women on the board, rather than just one or none, increases the effectiveness of boards, including:

(1) (A) According to the study entitled "Women Directors on Corporate Boards From Tokenism to Critical Mass," by M. Torchia, A. Calabrò, and M. Huse, published in the Journal of Business Ethics in 2011, and a report entitled "Critical Mass on Corporate Boards: Why Three or More Women Enhance Governance," attaining critical mass, going from one or two women directors to at least three women directors, creates an environment where women are no longer seen as outsiders and are able to influence the content and process of board discussions more substantially.

(B) Boards of directors need to have at least three women to enable them to interact and exercise an influence on the working style, processes, and tasks of the board, in turn positively affecting the level of organizational innovation within the firm they govern.

(2) (A) A 2016 McKinsey and Company study entitled "Women Matter" showed nationwide that companies where women are most strongly represented at board or top-management levels are also the companies that perform the best in profitability, productivity, and workforce engagement.

(B) Companies with three or more women in senior management functions score even more highly, on average, on the organizational performance profile, than companies with no women on boards or in the executive ranks. When there are at least three women on corporate boards with an average membership of 10 directors, performance increases significantly.

SEC. 2. Section 301.3 is added to the Corporations Code, to read:

301.3. (a) No later than the close of the 2019 calendar year, a publicly held domestic or foreign corporation whose principal executive offices, according to the corporation's SEC 10-K form, are located in California shall have a minimum of one female director on its board. A corporation may increase the number of directors on its board to comply with this section.

(b) No later than the close of the 2021 calendar year, a publicly held domestic or foreign corporation whose principal executive offices, according to the corporation's SEC 10-K form, are located in California shall comply with the following:

(1) If its number of directors is six or more, the corporation shall have a minimum of three female directors.

(2) If its number of directors is five, the corporation shall have a minimum of two female directors.

(3) If its number of directors is four or fewer, the corporation shall have a minimum of one female director.

(c) No later than July 1, 2019, the Secretary of State shall publish a report on its Internet Web site documenting the number of domestic and foreign corporations whose principal executive offices, according to the corporation's SEC 10-K form, are located in California and who have at least one female director.

(d) No later than March 1, 2020, and annually thereafter, the Secretary of State shall publish a report on its Internet Web site regarding, at a minimum, all of the following:

(1) The number of corporations subject to this section that were in compliance with the requirements of this section during at least one point during the preceding calendar year.

(2) The number of publicly held corporations that moved their United States headquarters to California from another state or out of California into another state during the preceding calendar year.

(3) The number of publicly held corporations that were subject to this section during the preceding year, but are no longer publicly traded.

(e) (1) The Secretary of State may adopt regulations to implement this section. The Secretary of State may impose fines for violations of this section as follows:

(A) For failure to timely file board member information with the Secretary of State pursuant to a regulation adopted pursuant to this paragraph, the amount of one hundred thousand dollars ($100,000).

(B) For a first violation, the amount of one hundred thousand dollars ($100,000).

(C) For a second or subsequent violation, the amount of three hundred thousand dollars ($300,000).

(2) For the purposes of this subdivision, each director seat required by this section to be held by a female, which is not held by a female during at least a portion of a calendar year, shall count as a violation.

(3) For purposes of this subdivision, a female director having held a seat for at least a portion of the year shall not be a violation.

(4) Fines collected pursuant to this section shall be available, upon appropriation by the Legislature, for use by the Secretary of State to offset the cost of administering this section.

(f) For purposes of this section, the following definitions apply:

(1) “Female” means an individual who self-identifies her gender as a woman, without regard to the individual’s designated sex at birth.

(2) “Publicly held corporation” means a corporation with outstanding shares listed on a major United States stock exchange.

SEC. 3. Section 2115.5 is added to the Corporations Code, to read:

2115.5. (a) Section 301.3 shall apply to a foreign corporation that is a publicly held corporation to the exclusion of the law of the jurisdiction in which the foreign corporation is incorporated.

(b) For purposes of this section, a “publicly held corporation” means a foreign corporation with outstanding shares listed on a major United States stock exchange.

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CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system

s/ Anastasia P. Boden
ANASTASIA P. BODEN

CERTIFICATE FOR BRIEF IN PAPER FORMAT

9th Circuit Case Number: 22-15149

I, Anastasia P. Boden, certify that this brief is identical to the version submitted electronically on February 23, 2023.

DATED: February 23, 2022.

s/ Anastasia P. Boden
ANASTASIA P. BODEN