No. 20-15762

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CREIGHTON MELAND, JR.,

Plaintiff-Appellant,

v.

ALEX PADILLA,
in his 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 Creighton Meland, Jr., hereby states that he is an individual.

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**Federal Constitution**

**Federal Statutes**



**State Statute**



**Rules**



**Other Authorities**

## INTRODUCTION

Anyone required by law to make a sex-based hiring decision has standing to challenge that requirement under the Equal Protection Clause. *See RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1056 (9th Cir. 2002). The district court erred when it dismissed the present case for lack of standing.

Appellant Creighton Meland, Jr., challenges SB 826, which demands the election of a minimum number of women to the boards of publicly traded companies. Dissatisfied with the progress that women were making on their own, the California legislature passed SB 826 to increase the number of women that are elected to these boards. Based on the belief that previous non-binding resolutions were inadequate, the bill imposes a mandatory sex-based quota and heavy fines to coerce shareholders into voting for more women.

This "Woman Quota" applies to the board of each and every publicly traded company headquartered or incorporated in the state, across every industry, regardless of the company's history and irrespective of whether there's specific evidence of past discrimination against women. Its requirements increase over time and last in perpetuity. The quota's broad and perpetual reach is deeply patronizing. As this Court observed over thirty years ago, the "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).

Appellant, a shareholder of a corporation subject to SB 826, brought this civil rights lawsuit because he seeks to vote for board members free of the sex-based quota. He contends that just as the Equal Protection Clause protects persons from being subject to sex-based discrimination, it also protects individuals from being required by law to effectuate sex-based discrimination themselves. *See RK Ventures, Inc.*, 307 F.3d at 1056.

The district court erroneously dismissed for lack of standing. By focusing exclusively on the penalty that is imposed on corporations for non-compliance and the effect of that penalty on the corporation, the district court overlooked the injury to shareholders. The quota injures shareholders because it imposes a legal obligation to vote sex-consciously.

To coerce this outcome, the legislature puts shareholders in the position of voting their shares to satisfy the quota or, if they refuse, triggering the punishment of the corporation in which they hold shares. Though the penalty is not imposed on the shareholders themselves, there's no doubt that the legislature thought the penalty would twist shareholders' arms. And in fact, shareholders have largely heeded

SB 826, evidencing its coercive effect. Just as individuals are injured by laws that require them to discriminate, shareholders are injured by laws that demand that they vote based on sex. As a shareholder forced to vote sex-consciously, Meland alleged an Article III injury and has standing to challenge the quota. The decision below should be reversed.

## JURISDICTIONAL STATEMENT

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 granting Appellee's motion to dismiss the complaint for lack of standing under Fed. R. Civ. P. 12(b)(1). Appellant's Excerpts of Record (ER 004). The district court entered its judgment on April 20, 2020, (ER 003), and Appellant filed a timely Notice of Appeal on April 21, 2020. (ER 001). 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. § 1291.

## STATEMENT OF ISSUES

1. Whether shareholders have standing to bring an equal protection challenge to a law that requires them to vote for board members in a sex-discriminatory manner.

2. Whether that challenge becomes unripe or moot after one election, even though shareholders must vote again annually and the sex-based quota will increase.

## STATUTORY PROVISIONS

SB 826; Cal. Corp. Code § 301.3.

## STATEMENT OF THE CASE

### *SB 826 and its requirements*

Despite the gains that women have been making in terms of corporate representation, the legislature passed SB 826 in 2018 after determining that non-binding resolutions were ineffective at creating "parity." *See* SB 826 (ER 024-026). Accordingly, as of December 31, 2019, corporations have been required to have a minimum of one female director on their boards. *Id.* (ER 026). By December 31, 2021, that number increases depending on the board's size: a corporation with four or fewer directors must have a minimum of one female director; a corporation with five directors must have a minimum of two female directors; and a corporation with six or more directors must have a minimum of three female directors. *Id.* The Secretary of State[1] is authorized to impose fines for any violation of the Woman Quota. *Id.* A first violation results in a $100,000 fine to the corporation. *Id.* (ER 027).

[1] Secretary Padilla is sued in his official capacity pursuant to *Ex parte Young*, 209 U.S. 123 (1908).

Any subsequent offense is a $300,000 fine. *Id.* Each seat that is required to be filled by a woman but is given to a man constitutes a separate violation. *Id*.

To aid the Secretary in enforcing the quota, SB 826 requires corporations to file an annual statement with the Secretary which discloses whether the board complies with the quota. *Id.* (ER 026). A corporation's failure to report or to timely report whether it complies with the quota will result in a $100,000 fine. *Id.* (ER 027). The Secretary is required to publish reports on his 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 Analyses.[2]

[2]https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB826#. Courts may take judicial notice of publicly available information found on a government website. *Gerritsen v. Warner Bros. Entm't Inc.*, 112 F. Supp. 3d 1011, 1033 (C.D. Cal. 2015); Fed. R. Evid. 201. Appellant requests that this Court do so for this document and all other public documents from government websites cited herein.

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 traded corporations with a California address to 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 traded corporations incorporated 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, the Secretary published an updated report.[6]

The Woman Quota has already started to have its intended effect of coercing the outcome of annual shareholder elections. Estimates show that before the quota,

[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.

between a quarter and a third of companies lacked a female member.[7] Some reports show that only 4% now lack a female director.[8]

***Appellant and his claims***

Appellant Creighton Meland, Jr., is a shareholder of OSI Systems, Inc. (OSI), a publicly traded company that is incorporated in Delaware and headquartered in Hawthorne, California, and subject to the quota. Complaint ¶¶ 4, 17 (ER 018, 020). The shareholders of OSI, including Meland, select who sits on the corporation's board of directors. *Id.* ¶ 23 (ER 021). SB 826 itself recognizes that shareholders are the parties responsible for electing board members, *see* SB 826 (ER 23) ("each director is elected by shareholder vote"), and Delaware law considers shareholders'

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[7] SB 826, Section 1(e)(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."); Alisha Haridasani Gupta, *California Companies Are Rushing to Find Female Board Members*, New York Times (Dec. 17, 2019), https://www.nytimes.com/2019/12/17/us/california-boardroom-gender-quota.html; Editorial: *California Woman Quota Law Forcing Companies to Put Women on Corporate Boards is Coercion: But it's Working*, Los Angeles Times (Jan. 6, 2020), https://www.latimes.com/opinion/story/2020-01-06/woman-quota-law-scares-companies-into-doing-the-right-thing.

[8] Courtenay Brown, *California's 'Woman Quota' Law Seems to be Working*, Axios (Feb. 21, 2020), https://www.axios.com/californias-woman-quota-law-seems-to-be-working-f18e9450-40de-483d-99f6-d8b850439824.html (estimating that only 4% of companies are out of compliance); KPMG, The Women Changing California's Boardrooms, https://boardleadership.kpmg.us/content/dam/boardleadership/en/pdf/2020/the-women-changing-california-boardrooms.pdf.

right to vote for board members the "ideological underpinning" of corporate legitimacy. *MM Companies, Inc. v. Liquid Audio, Inc.*, 813 A.2d 1118, 1126 (Del. 2003); *Blasius Industries, Inc. v. Atlas Corp.*, 564 A.2d 651, 659 (Del. Ch. 1988) (the shareholder's ability to vote for board members "is critical to the theory that legitimates the exercise of power by some (directors and officers) over vast aggregations of property that they do not own"). Under OSI's bylaws, a person is elected to the board if a plurality of shareholders vote in favor at the annual shareholder meeting. Complaint ¶ 25 (ER 021).

Prior to December 2019, OSI had a seven-member, all-male board. *Id.* ¶ 21 (ER 020). On December 12, 2019, at its Annual Meeting of Stockholders, the shareholders of OSI voted to place a woman on the Board to fill a spot vacated by another board member. Dist. Ct. Op. at 10 (ER 013). Because of its size, the shareholders will be required to vote annually to retain her or another woman indefinitely, and to add two more female board members by the end of 2021. Complaint ¶ 21 (ER 20). Meland intends to vote annually at shareholder elections. *Id.* ¶ 27 (ER 021).

***Procedural history***

The district court dismissed for lack of standing on the theory that shareholders are not injured by the quota. The court ruled that the corporation suffers the penalty for non-compliance and shareholders are free to disregard the law and

vote for whomever they want. *See* Dist. Ct. Op. at 9 (ER 012). It further held that the case was unripe because OSI shareholders had previously elected a woman to the board and so there was no immediate threat of enforcement for non-compliance. *Id.* at 10 (ER 013). This timely appeal followed.

## STANDARD OF REVIEW

The existence of subject matter jurisdiction is a question of law and is reviewed de novo. *United States v. Peninsula Communications, Inc.*, 287 F.3d 832, 836 (9th Cir. 2002). Where subject matter jurisdiction is attacked on its face, the court must accept the plaintiff's allegations in the complaint as true. *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994). But where subject matter jurisdiction is questioned in fact, the Court may consider matters outside of the complaint for the purpose of establishing jurisdiction. *See Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). Courts must "accord [plaintiffs] the benefit of all reasonable inferences," and "[a]bsent evidentiary offering[s]" that controvert specific jurisdictional allegations, they must delay "weighing the plausibility" of a plaintiff's allegations until "a later stage of the proceedings." *Feldman v. FDIC*, 879 F.3d 347, 351 (D.C. Cir. 2018).

## SUMMARY OF THE ARGUMENT

The Equal Protection Clause of the Fourteenth Amendment not only protects people from "the burden of invidiously discriminatory disqualifications," *Ne. Fla.*

*Chap. of Assoc. Gen. Contractors of Am. v. City of Jacksonville*, *Fla.*, 508 U.S. 656, 666 (1993), it also ensures that individuals will not be forced to effectuate discrimination themselves. *See RK Ventures*, *Inc. v. City of Seattle*, 307 F.3d at 1056. Because SB 826's quota for corporate boards requires shareholders to vote based on sex when they elect the board of directors, it violates this constitutional promise and confers standing on shareholders to bring suit.

Appellant Creighton Meland, Jr., a shareholder of OSI Systems, brought this lawsuit because he seeks to vote at annual shareholder meetings free of the government's sex-based mandate. The district court dismissed for lack of standing. Based on its conclusion that the quota and the penalty are "place[d] . . . on publicly held corporations" rather than their shareholders, the court reasoned that shareholders are free to "vote in shareholder elections as [they] please[]." Dist. Ct. Op. at 9 (ER 012). Moreover, the court concluded that because OSI shareholders elected a woman at the last shareholder meeting, there was no imminent threat of enforcement for non-compliance and the case was therefore unripe. *Id.* at 11 (ER 014).

That decision should be reversed. First, the quota regulates the behavior of shareholders because they are the parties responsible for voting for board members in accordance with SB 826. Contrary to the district court's conclusion that the quota "places a requirement . . . on publicly held corporations," the law operates directly

on shareholders because shareholders, and not corporations, elect board members at annual meetings. The quota therefore causes shareholders to suffer an Article III injury separate and apart from any injury to the corporation. Delaware law supports the conclusion that injuries to shareholder voting rights, like the right to select board members, are properly brought by the shareholders themselves. *See Tooley v. Donaldson, Lufkin, & Jenrette, Inc.*, 845 A.2d 1031, 1036 (Del. 2004).

Second, it's irrelevant that the penalty for non-compliance is imposed on corporations, rather than shareholders. Meland is still required to vote sex-consciously by law, and his decision not to do so would result in an unwanted legal consequence. That consequence was intended to coerce shareholders into complying, and it's no coincidence that they largely have complied. They understand they are under a legal obligation to vote a certain way and seek to avoid the consequence of flouting that mandate. Because shareholders are legally required to vote sex-consciously, and because SB 826 imposes consequences for failure to do so, they are injured and have Article III standing. *See Steffel v. Thompson*, 415 U.S. 452, 462 (1974) (where plaintiffs are put between the "Scylla of intentionally flouting state law and the Charybdis of forgoing what [they] believe[] to be constitutionally protected activity," they have standing to seek prospective relief).

Last, Meland's injury is not made unripe or moot by the fact that OSI shareholders elected a woman at the last election. Absent declaratory or injunctive

relief, Meland will continue to be injured because he must vote again annually to keep the company in compliance and because OSI shareholders will be required to add more women to the board in future elections to satisfy the *increasing* quota.[9] Appellant respectfully requests that this Court reverse the decision below.

## ARGUMENT

### I. Meland Is Injured

Anyone who is "required by the government to discriminate by ethnicity or sex" is injured and "has standing to challenge the validity of the requirement." *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 707 (9th Cir. 1997); *RK Ventures*, *Inc.*, 307 F.3d at 1055-56 (same); *accord Columbia Basin Apartment Ass'n v. City of Pasco*, 268 F.3d 791, 798 (9th Cir. 2001); *see also Peterson v. City of Greenville*, 373 U.S. 244, 248 (1963) (A "law compelling persons to discriminate against other persons because of race" is a "palpable violation of the Fourteenth Amendment."); *cf. Scott v. Greenville Cty.*, 716 F.2d 1409, 1415-16 (4th Cir. 1983). Meland suffered an injury at OSI's 2019 shareholder election, when shareholders voted in

[9] In fact, that only makes his injury more concrete because it suggests that shareholders feel bound by the quota.

anticipation of the impending quota,[10] and he will be injured at future elections when he will once again be subject to SB 826's increasing sex-based quota.[11]

The district court ruled that SB 826 injures corporations, not shareholders, because the quota and the penalty are "place[d] . . . on publicly held corporations" and shareholders may "vote in shareholder elections as [they] please[]."[12] Dist. Ct. Op. at 9 (ER 012). But that's simply not true. SB 826 imposes a quota that *only* shareholders can ultimately decide whether to follow. It makes no difference that the penalty for non-compliance is imposed on the corporation. SB 826 creates a consequence for flouting the quota that the legislature expected shareholders would want to avoid. At each election, shareholders are forced to choose between violating

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[10] Shareholders are also injured because they must take the quota into account if they seek to nominate a board member for election, and must make sex-conscious voting decisions when deciding whether to appoint, retain, or remove a board member.

[11] Meland need not actually violate the law to have standing. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 163 (2014) ("[n]othing in this Court's decisions requires a plaintiff who wishes to challenge the constitutionality of a law to confess that he *will* in fact violate that law"). The fact that he is subject to the law now makes his injury ripe. Moreover, Meland need not allege that a candidate that he preferred would have won absent the quota. The injury in an equal protection challenge is not the denial of a benefit or a specific outcome, but rather the simple fact of being subject to a sex-based classification. *See, e.g.*, *Ne. Florida Chap. of Assoc. Gen. Contractors of America*, 508 U.S. at 666.

[12] In order to establish Article III standing, a plaintiff must demonstrate an injury in fact, fairly traceable to the defendant's conduct, which is likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The district court ruled that Meland failed to satisfy the injury in fact prong. ER 013-014.

state law and refraining from constitutionally protected activity, and they therefore have standing to sue for prospective relief. *See Steffel v. Thompson*, 415 U.S. at 462.

### A. The Quota Operates on Shareholders

In order to "proactively increase the number of women serving on corporate boards," SB 826 imposes a legal obligation to abide by a quota. *See* SB 826 (ER 024) (imposing quota and noting that "each director is elected by shareholder vote"). Whether the Court considers the quota as being "imposed on corporations" or "imposed on shareholders," the law injures shareholders because it regulates their behavior. *See Stilwell v. Office of Thrift Supervision*, 569 F.3d 514, 517 (D.C. Cir. 2009) (investor had standing to challenge law that "directly regulated" corporations because it was aimed at curbing shareholders' ability to invest in those corporations); *Chamber of Commerce of U.S. v. Securities and Exchange Comm'n*, 412 F.3d 133, 138 (D.C. Cir. 2005) (investor was injured by a law that governed composition of board members because it denied investor the opportunity to invest in non-compliant businesses); *cf. Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 204 (1995) (subcontractor was injured by requirement imposed on contractors).

The district court held that the "requirement that corporations . . . have at least one woman on their board of directors is not imposed on [Meland]" and instead is imposed on the corporation itself. But that reasoning ignores how the law operates.

Board members are elected by the shareholders, who vote at annual meetings. *See* SB 826 (ER 024) ("each director is elected by shareholder vote"); Complaint ¶ 25 (ER 021) (alleging that shareholders are elected by plurality vote at annual shareholder meetings); *Pell v. Kill*, 135 A.3d 764, 786 (Del. Ch. 2016) ("The stockholders' power is the right to vote on specific matters, in particular, in an election of directors."). In fact, the right to vote for board members is the most important right a shareholder has. *EMAK Worldwide*, *Inc. v. Kurz*, 50 A.3d 429, 433 (Del. 2012) (shareholder voting rights are "sacrosanct"). As a practical matter, the quota *must* be a legal obligation that is imposed on shareholders for it to have any effect, because shareholders elect the board.

While the law does not use the phrasing, "shareholders must vote for a minimum number of women," standing is not a semantic game; it's based on whose rights are affected by the challenged law. *See Colum. Broad. Sys. v. United States*, 316 U.S. 407, 422 (1942) (standing is unaffected by the fact that a law is not explicitly directed at the injured party where it sets standards that affect a party's rights). For example, the Supreme Court has held that an organization could challenge the standards by which the FCC issues licenses to broadcasting stations because those standards affected the organization's contractual relations with the regulated stations. *Id.* Similarly, SB 826 may set standards for corporations, but ultimately it affects shareholder voting rights because shareholders elect board

members. *See, e.g.*, *Contender Farms, L.L.P. v. U.S. Dep't of Agriculture*, 779 F.3d 258, 265 (5th Cir. 2015) (private participants in horse industry had standing to challenge a regulation requiring organizations to enforce industry standards); *Duarte ex rel. Duarte v. City of Lewisville, Tex.*, 759 F.3d 514 (5th Cir. 2014) (family members had standing to challenge ordinance regulating where immediate relative could live).

"Whether someone is in fact an object of regulation is a flexible inquiry rooted in common sense." *See Texas v. EEOC*, 933 F.3d 433, 446 (5th Cir. 2019). Common sense tells us that the quota must operate on shareholders, as they vote at annual elections on the board of directors. Just as contractors have standing to challenge laws that require them to subcontract based on race or sex, *see Monterey Mechanical Co.*, 125 F.3d at 707, Meland has standing to challenge the requirement that he vote according to SB 826's quota.

### B. Shareholders Are Not Free To Vote How They Want

Where the plaintiff is the object of regulation, "there is ordinarily little question" that he has standing. *Lujan*, 504 U.S. at 561-62. The district court ruled, however, that because the penalty for failing to comply with the quota is imposed on corporations, shareholders like Meland "can vote in shareholder elections as [they] please[]." Dist. Ct. Op. at 9 (ER 012). This reasoning ignores the fact that even if the

penalty is not imposed directly on shareholders, it was intended to, and in fact does, have a coercive effect on them.

Meland is not free to ignore the law and vote for whomever he wants. Should he flout the quota, he will subject the corporation to fines and public shaming—penalties that were designed to coerce shareholders into complying. While the penalties are not imposed on shareholders, they are akin to the state saying to shareholders "vote how I want or I'll punish your friend." Complaint ¶ 30 (ER 021). They were intended to attain compliance. Whether the legislature achieves its coercive effect by penalizing shareholders directly or by fining corporations, the effect is the same; Meland is the object of that coercion and suffers an injury.

That shareholders have largely complied with the quota demonstrates that the penalty is very effective at coercing compliance. *See supra* n.8. The Secretary's own reports indicate that shareholders believe that the quota requires them to vote in a certain way and do not feel free to ignore it. *Id.*; *supra* n.6.

SB 826 simply must be mandatory; its stated purpose is "to proactively increase the number of women serving on corporate boards." And the bill alludes to the fact that previous *non*-mandatory resolutions had been ineffective, necessitating a mandatory law. If the legislature believed that shareholders would *not* feel coerced into voting to fill the quota, it would have enacted a law that contradicts its very purpose. *See also Owner-Operator Indep. Drivers Ass'n v. Fed. Motor Carrier*

*Safety Admin.*, 656 F.3d 580, 586 (7th Cir. 2011) (finding it "odd that the Agency is arguing that it must have a strict rule *now* to get [its objects] to be more compliant with [the agency's] rules, but at the same time it is asserting that these rules are not meant to change anyone's immediate behavior enough to confer standing to challenge that regulation").

Courts have been skeptical where the government has argued that a plaintiff does not have standing when the challenged law regulates the plaintiff's conduct. *See, e.g.*, *Texas v. EEOC*, 933 F.3d at 448; *Owner-Operator Indep. Drivers Ass'n*, 656 F.3d at 586; *Stilwell*, 569 F.3d at 518 (finding that "it is more than a little ironic that [the government] would suggest [the plaintiff] lack[s] standing and then, later in the same brief, label [the plaintiff] as a prime example [of] . . . the very problem the Rule was intended to address"). Similarly, it would be odd for the government to argue that a mandatory quota was necessary to "proactive[ly]" speed up the election of women to corporate boards and then to also claim that shareholders are perfectly free to vote for whomever they please.

Significantly, courts have held that plaintiffs have standing to challenge legal obligations even when there's *zero* penalty for failing to comply where the plaintiffs allege they feel obliged to follow the law. The Fifth Circuit, for example, recently ruled that plaintiffs had standing to challenge the requirement that individuals obtain health insurance (the "individual mandate") even though Congress had reduced the

penalty for failure to comply to $0. *See Texas v. United States*, 945 F.3d 355, 380 (5th Cir. 2019). The court ruled that it was reasonable to expect that some people will choose to obey the law simply because *it's the law*. Thus, even where there is *no* threat of *any* penalty to *anyone* in the event of non-compliance, plaintiffs have been found to have standing to challenge government-imposed mandates where they plausibly allege that they feel obligated to follow the law and suffer an injury because of it. *Id.*

Meland made such an allegation of concrete harm here: he alleged that he is injured because he is forced, *by law*, to vote sex-consciously. That is a textbook Article III injury. He further alleged that the penalties for non-compliance, including posting the corporation's non-compliance on a government website, public stigmatization of the corporation, and potential six-figure fines, have a coercive effect that deprives shareholders of their liberty to vote as they'd like.

### C. Delaware Law Confirms That Limits on Shareholder Voting Rights Injure the Shareholder, Not the Corporation

In addition to satisfying Article III's standing requirements, shareholders must satisfy prudential considerations.[13] *See Franchise Tax Bd. of California v. Alcan*

[13] In some of its most recent standing decisions, the Supreme Court has drawn into question whether prudential standing limitations can be enforced in light of the "virtually unflagging" obligation federal courts have to hear and decide cases within their jurisdiction. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014) (citing *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77

*Aluminium Ltd.*, 493 U.S. 331, 336 (1990). Under the prudential shareholder standing doctrine, a shareholder generally "cannot rest his claim to relief on the legal rights or interests" of a corporation and must assert "a direct, personal interest in a cause of action" that is non-derivative of the corporation's injury. *Id.* Whether a shareholder has suffered a direct or derivative injury is determined by the law of the state of incorporation, which is Delaware in this case. *See Lapidus v. Hecht*, 232 F.3d 679, 682 (9th Cir. 2000); *In re Sunrise Sec. Litig.*, 916 F.2d 874, 879 (3d Cir. 1990). The district court ruled that Meland failed to satisfy prudential standing requirements for the same reason that he failed to satisfy Article III. But Delaware case law supports the theory that Meland is harmed in a concrete way that satisfies both prudential and Article III concerns.

Delaware courts have repeatedly held that measures that reduce the ability of shareholders to freely add or remove board members cause a *direct* injury to shareholders and confer standing to sue. *See Tooley*, 845 A.2d at 1036 (lawsuits involving "injuries affecting [a person's] legal rights as a stockholder" are suffered directly by shareholders rather than being derivative of the corporation's injuries). Delaware case law is particularly protective of shareholder voting rights. It

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(2013)). In *Lexmark Int'l*, the Court emphasized that prudential standing was "not derived from Article III" and suggested that in a future case the Court would need to reevaluate and clarify the third-party prudential standing doctrine's "proper place in the standing firmament." *Lexmark Int'l*, 572 U.S. at 126, 127 n.3.

emphasizes that "shareholder voting rights are sacrosanct," and the "ability to vote for the directors the shareholder wants to oversee the firm" is a "fundamental governance right" of a shareholder. *See, e.g.*, *EMAK Worldwide*, *Inc. v. Kurz*, 50 A.3d 429, 433 (Del. 2012); *MM Companies*, *Inc. v. Liquid Audio*, *Inc.*, 813 A.2d 1118, 1126 (Del. 2003) (A shareholder's "right to vote on specific matters, in particular, in an election of directors" is the "ideological underpinning" of corporate legitimacy.). An act impairs those rights even when it merely limits when and how shareholders can elect directors—for example, only at certain meetings and with a certain vote percentage. *In re Gaylord Container Corp. Shareholders Litig.*, 747 A.2d 71, 83 (Del. Ch. 1999); *see also In re Tri-Star Pictures*, *Inc.*, *Litig.*, 634 A.2d 319, 331 (Del. 1993), *as corrected* (Dec. 8, 1993) (allegation that a merger reduced the shareholders' voting power pleaded direct injury); *Pell*, 135 A.3d at 794 (an injury to "the right of shareholders to a meaningful exercise of their voting franchise" is a direct injury); *Carmody v. Toll Bros.*, 723 A.2d 1180, 1189 (Del. Ch. 1998) (plaintiff's allegation that action "directly impair[ed] shareholders' voting rights" pleaded direct injury); *accord Lapidus*, 232 F.3d at 683 (finding shareholder standing under Massachusetts law where a corporation prevented shareholders from voting on issues guaranteed to them in the corporation's registration statement).

These cases confirm that SB 826 injures Meland because it affects his ability to vote for the board member of his choice free of a sex-based mandate. Before SB

826, the law was silent as to how shareholders must allocate males and females on corporate boards, consistent with their right to "exercise wide liberality of judgment in the matter of voting," and to follow their own motives, whether they be "for personal profit, or determined by whims or caprice." *See Ringling Bros.-Barnum & Bailey Combined Shows v. Ringling*, 29 Del. Ch. 610, 622 (1947). Because of SB 826, the world of candidates is necessarily smaller and shareholders are constrained by a sex-based quota. "For good or ill, the Company's stockholders . . . have the right to elect the individuals" who "direct and oversee the business and affairs of the corporation." *Pell*, 135 A.3d at 795. Because SB 826 limits this right, Meland satisfies prudential standing concerns in addition to Article III.[14]

## II. Meland's Injury Is Ripe

It's difficult to argue that this case is not ripe when shareholders have already voted in anticipation of the quota going into effect and, by all accounts, they've overwhelmingly changed their behavior to comply. The ripeness requirement exists to prevent courts "from entangling themselves in abstract disagreements" and to

[14] Delaware courts "have been more prepared to permit the plaintiff to characterize the action as direct when the plaintiff is seeking only injunctive or prospective relief." *Grimes v. Donald*, 673 A.2d 1207, 1213 (Del. 1996) (citing American Law Institute, *Principles of Corporate Governance: Analysis and Recommendations Section* § 7.01 (1992)), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000); *see also Grayson v. Imagination Station, Inc.*, No. 5051-CC, 2010 WL 3221951, at *6 (Del. Ch. Aug. 16, 2010) ("The remedy sought . . . supports a finding that [a complaint] states a direct claim.").

ensure that a policy's "effects [have been] felt in a concrete way." *Municipality of Anchorage v. United States*, 980 F.2d 1320, 1325 (9th Cir. 1992). SB 826's effects have already been felt, and they will continue to be felt every year as shareholders are once again faced with the decision of how to vote.[15]

The bill's very text indicates that the legislature intended for its effects to be immediately felt. It states, for instance, that non-binding resolutions had been ineffective at achieving the State's desired balance of directors such that a quota was necessary to increase the rate at which women are elected. *See* SB 826. In committee, the Bill Analysis estimated that the Secretary would spend about $500,000-$600,000 a year to enforce it.[16] And the Secretary *is*, at present, enforcing the statute by collecting compliance data and publishing it.

Importantly, shareholders were forced to comply at the last election because election results stand for a year and the Secretary may choose to impose penalties at any time between elections. *See Texas v. United States*, 945 F.3d at 378 (noting

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[15] Moreover, "[p]ure legal questions" that require little factual development are "more likely to be ripe." *San Diego County Gun Rights Committee v. Reno*, 98 F.3d 1121, 1132 (9th Cir. 1996). Whether the quota is constitutional requires no factual development; either it was constitutional when the legislature passed it or it was not.

[16] *See* SB 826 Bill Analysis, https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB826#. *See also Mobil Oil Corp. v. Attorney Gen. of Commonwealth of Va.*, 940 F.2d 73, 76 (4th Cir. 1991) ("We see no reason to assume that the . . . legislature enacted this statute without intending it to be enforced.").

plaintiffs are injured when they must take steps now to ensure compliance later). Shareholders could reasonably believe that in addition to collecting and publishing compliance data, the Secretary intends to act on that data and to impose penalties. He never disclaimed any intention of enforcing the law.[17] *See Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302 (1979) (finding case ripe where the government "has not disavowed any intention" of enforcing the law). The fact that shareholders are largely complying and women are being elected to corporate boards at a higher rate demonstrates that SB 826's effects are being felt by Meland and others.[18] The case is therefore ripe.

### A. Meland's Injury Is Not Unripe Merely Because One Election Has Passed

Every year, Meland will be required to vote for the board of directors according to the increasing quota established by SB 826. That injury is a continuous

[17] Even if the Secretary were to say now that he did not intend to enforce the Woman Quota, the case would not be moot. Absent "the repeal, amendment, or expiration of challenged legislation," the voluntary cessation of enforcement does not moot a case because "the defendant would be free to resume the conduct." *Bd. of Trustees of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195, 1198 (9th Cir. 2019).

[18] To the extent relevant, prudential considerations like "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration" weigh in favor of ripeness. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). This lawsuit asks only a legal question: is the statute substantially related to an important state interest. Until that question is resolved, Meland and other shareholders will be required to vote sex-consciously.

one because elections happen annually. Appellant therefore sought relief not just from the 2019 election, but prospective relief to shield him from having to vote according to the quota at future elections.

The district court ruled that because one election has passed and SB 826 successfully coerced OSI shareholders into voting in accordance with the quota, there is no immediate threat of penalty and the case is not ripe. Dist. Ct. Op. at 11 (ER 013). But Meland's injury—the legal requirement that he vote sex-consciously—will recur every year regardless of who wins the election. That injury is ripe now because he seeks a court decision to protect him from upcoming elections—especially given that the quota is set to increase.[19]

Under the district court's understanding, any challenger to the Woman Quota would feel like Sisyphus hopelessly rolling his rock uphill. The lawsuit is ripe in the

[19] Nor is the case made moot by the election of a woman to OSI's board. A case is moot only when "it [is] absolutely clear that the litigant no longer ha[s] any need of the judicial protection that it sought." *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000); *see also Smith v. Univ. of Wash., Law Sch.*, 233 F.3d 1188, 1194 (9th Cir. 2000) (a case is moot only where "events have completely and irrevocably eradicated the effects of the alleged violation"). Here, the elections will recur again. And even if there were any colorable argument that the case was made unripe or moot by the past election, those doctrines would be inappropriate under the capable of repetition yet evading review doctrine. Under that doctrine, the case is live where, 1) the challenged action is in its duration too short to be fully litigated prior to expiration, and 2) there is a reasonable expectation the same complaining party would be subject to the same action again. *Wolfson v. Brammer*, 616 F.3d 1045, 1054 (9th Cir. 2010). Both factors apply here.

weeks before the election, but is then mooted after the vote, only to become ripe again in eleven months. Meland need not wait until just before the election, or until the company falls out of compliance, to bring suit. *Babbitt*, 442 U.S. at 298 ("[o]ne does not have to await the consummation of threatened injury to obtain preventive relief"). The fact that his injury "is certainly impending" is enough to bring suit now. *Id.*

## CONCLUSION

Appellant respectfully requests that this Court reverse the district court's opinion dismissing the case for lack of subject matter jurisdiction.

DATED: July 22, 2020.

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

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