No. 22-15149

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CREIGHTON MELAND, JR.,
Appellant,

v.

SHIRLEY N. WEBER, IN HER OFFICIAL CAPACITY AS SECRETARY OF STATE OF THE STATE OF CALIFORNIA,
Appellee.

On Appeal from the United States District Court
for the Eastern District of California
No. 19-cv-2288
Hon. John A. Mendez, Judge

ANSWERING BRIEF

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INTRODUCTION

This Court has long recognized the government's "broad power" to address entrenched barriers "exclud[ing] women from participating fully in our economic system." *Assoc. Gen. Contractors of Cal., Inc. v. City & Cnty. of San Francisco*, 813 F.2d 922, 940 (9th Cir. 1987). Generations of women have advanced in business and professional schools, excelled in management and corporate leadership, and founded millions of businesses. Yet as of 2018, boards of publicly held corporations headquartered in California remained largely closed to women. Decades of efforts by public and private entities failed to remedy this problem. In response, the State adopted Senate Bill 826 (SB 826), which requires publicly held corporations in California—a total of 625 of the more than one million companies that call the State home—to add a certain number of women to their boards, while allowing corporations to add as many seats to their boards as they wish. Since SB 826 became law, it has enabled hundreds of women to break through the "glass ceiling" that had kept them out of California's corporate boardrooms. 1-CER-22.[1]

Appellant Creighton Meland, Jr. challenges SB 826 on equal protection grounds, and argues in this appeal that the district court erred by denying a preliminary injunction prohibiting the State from enforcing the statute. But his arguments are unavailing. At the threshold, Meland has not carried his burden to

[1] CER citations refer to Meland's Corrected Excerpts of Record, Dkt 12.

establish standing at this stage of the litigation. Although this Court previously held that Meland made adequate allegations to establish standing at the pleading stage, *see Meland v. Weber (Meland I*), 2 F.4th 838, 842 (9th Cir. 2021), the case has now progressed beyond pleading. Record evidence demonstrates that Meland has not had any actual role in influencing who will be on the board of the company, so any "encourage[ment]" that he may feel to vote for female directors (*id.*) is entirely illusory.

In any event, Meland cannot demonstrate that the district court abused its discretion by denying preliminary relief. He is unlikely to prevail on the merits of his claim: the evidence demonstrates that SB 826 is substantially related to the important governmental interest of remedying past discrimination against women. This Court has previously upheld sex-conscious remedial programs designed to enable women "to assume their rightful place in business." *Assoc. Gen. Contractors*, 813 F.2d at 940.

Meland identifies no legal error: SB 826 is at least as "well-tailored" (AOB 16) as other sex-conscious remedial programs that this Court has upheld under intermediate scrutiny. Nor does Meland identify any clear error of fact: the district court's factual conclusions were supported by more than a thousand pages of statistical data, expert opinion, and witness testimony documenting discrimination in the board selection process and the need for SB 826, and Meland presented no

evidence of his own that would undercut those findings. Meland also failed to demonstrate that he would be irreparably harmed by SB 826. And the balance of the equities tip sharply against injunctive relief: as the district court concluded, it would not be in the public interest to enjoin a law that is "clearly working." 1-CER-23. While our society has made significant strides in combatting sex-discrimination in the workplace (and elsewhere), it remains the case that "women still face pervasive, although at times more subtle, discrimination," *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion), in the selection process for the boards of California's publicly held corporations.

JURISDICTIONAL STATEMENT

Appellant Creighton Meland, Jr., asserts that the district court had jurisdiction over this case under 28 U.S.C. §§ 1331 and 1343(a). As discussed below, however, *see infra* pp. 24-29, the Secretary's position is that the district court lacks Article III jurisdiction because Meland has not carried his burden to establish standing.

STATEMENT OF THE ISSUES

1. Whether Meland has carried his burden to establish standing to seek a preliminary injunction regarding SB 826's board diversity requirements.

2. Whether the district court abused its discretion in denying Meland's motion for a preliminary injunction.

STATEMENT OF THE CASE

A. Prior to SB 826, There Was a Long History of Sex-Discrimination in the Selection of Corporate Board Directors

California enacted SB 826 "to remedy a long and well-documented history of discrimination depriving women of equal opportunity (or, in many cases, any opportunity at all) to serve on corporate boards." 3-SER-641; *see* 3-SER-642; 3-SER-663-64; 3-SER-692; *see also, e.g.*, 3-SER-564 (SB 826's purpose to "break open those impenetrable walls of discrimination"). As the Legislature found, in 2017 more than "[o]ne-fourth of California's public companies in the Russell 3000 Index have NO women on their boards of directors[.]" Cal. Stat. 2018, ch. 954, § 1(e); *see also* 2-CER-369, 371 (29% of *all* California-headquartered publicly held corporations had no women directors).[2] For the 50 smallest California Russell 3000 corporations, 48%—or nearly half—did not have a single woman director. *Id.* § 1(e)(4). For the remaining companies, disparities were "vast[]" and persistent. 3-SER-641. Among the 446 California public companies in the Russell 3000 Index, women held only 15.5% of the board seats. Cal. Stat. 2018, ch. 954, § 1(e). Women held only 566 seats in total, while men held 3,089 seats. *Id.* § 1(e)(1).

[2] The Russell 3000 reflects the top 3,000 publicly traded U.S. companies, as ranked by the value of the companies' market capitalization (i.e., their outstanding shares). 2-CER-364. The State's expert who examined *all* publicly held California-headquartered corporations determined that 29% had no women directors as of June 2018, several months before SB 826's enactment. 2-CER-369, 371.

Discrimination in corporate board selection was a long-standing problem before SB 826. As early as 1993, the Legislature recognized the "glass ceiling" for women in the boards of publicly held corporations. Cal. Comm. on Ins., Claims and Corps., Bill Analysis (1993), www.leginfo.ca.gov/pub/93-94/bill/sen/sb_0501-0550/sb_545_cfa_930301_104759_sen_comm. From 2006 to 2018, the percentage of California board seats held by women increased only slightly, from 8.8% to 15.5%. *See* 2-CER-280, 2-CER-374-76. Nearly half of the 75 largest companies that went public nationwide from 2014 to 2016 did so without a single woman on their boards. Cal. Stat. 2018, ch. 954, § 1(f)(3). As the Legislature found, if then-current trends had continued, it would have taken more than 40 years for the number of women on boards nationwide to match the number of men. Cal. Stat. 2018, ch. 954, § 1(f)(1)-(2). One study foresaw virtually no improvement in women's representation on corporate boards without concerted action to remedy this exclusion. *See* Comm. for Econ. Dev., Fulfilling the Promise: How More Women on Corporate Boards Would Make America and American Companies More Competitive 12 (2012), https://www.ced.org/pdf/Fulfilling-the-Promise.pdf; *see also* 4-SER-988 (letter from SB 826's author to Governor, citing study). Others agreed that the problem would not fix itself, and that "proactive steps" were needed. *See, e.g.*, 3-SER-621 (bill analyses citing 40-year timeline and the need for

"proactive steps"); 4-SER-988 ("Companies have failed time and again to right this injustice on their own.").

The Legislature's data further showed that women were excluded from or underrepresented on the boards of California's publicly held corporations of every size, in every industry, and in every region. By industry, the percentage of companies without a single woman on their boards before SB 826 were: 59% (semiconductors); 41% (real estate); 35% (pharmaceuticals); 31% (financial services); 30% (health care); 30% (technology hardware); 29% (energy, materials & industrials); 28% (consumer goods); 22% (technology software); and 11% (utilities and communications). 2-CER-285. Women were also underrepresented in every industry—women made up no more than 15.5% of corporate directors in each industry, except the utilities and communication industry where they made up only 24.7% of directors. 2-CER-285.[3] In the semiconductors industry, for example, women made up just 6.9% of directors. 2-CER-285. Underrepresentation also extended statewide: women made up 15.2% of board directors in the Central Coast, 14.5% of directors in the Bay Area, 11.7% of directors in Southern California, and 2.6% of directors in the Central Valley. 2-CER-287.

[3] The figures from the utilities and telecommunications industry represent an outlier because they represent only nine companies. *See* 2-CER-285; 3-SER-727-28 (California Research Bureau "caution[ing] against generalizing about the industry," given limited sample).

The Legislature heard testimony, and expert evidence confirmed, that the board selection process tends to exclude women. As the State's experts explained, "[t]here is no application process for a corporate directorship, as you would see in hiring for employment opportunity. Everything is done in secret. You cannot apply to be a member of a corporate board and descriptions of skill and qualifications for corporate board membership are not posted or provided, they are generally kept confidential." 3-CER-390; *see also* 2-CER-191 (same). Instead, a company's nominating and governance committee typically identifies candidates based on whom they already know. 3-CER-389-94; 2-SER-549-51. As a board recruiter testified before the Legislature, "the big myth is that people think that search firms reach out and find candidates for boards. The company, [directors] themselves, give us that list of their friends and they say, 'Vet those candidates.'" 2-SER-550. As a result, boards normally "don't interview three or four" candidates for a vacancy. 3-SER-594. "They only interview one . . . generally a man[.]" 3-SER-594. Even though "[a]ll search firms today offer to bring forward qualified women . . . for consideration . . . such candidates are rarely, if ever, chosen." 3-CER-393-94.

Instead, male-dominated boards typically select new board members from male-dominated social networks. *See* 2-SER-547; 2-SER-549-51; *see also* 2-SER-569 ("The guys are comfortable with each other. And as a result, there is . . . discrimination . . . women haven't been able to penetrate that ceiling."). "Existing

relationships are often the most critical component" for identifying director candidates, relationships built through activities that often exclude women. 3-CER-391; *see also* 2-CER-148 ("[I]nequality was attributable to the existence of an informal 'male community' that translates to 'friends recruiting friends into the boardroom.'"). Boards often select male "university buddies or golf course buddies, or friends" already known to the corporation's leadership, failing to consider women candidates. 2-SER-550.

Further, because corporate board directors and CEOs are predominantly male, they often select nominees who "share a background similar to the CEO or board directors with respect to gender." 3-CER-393; *see also* 2-CER-170 ("Men who serve on corporate boards typically choose men to succeed them . . . 'forces . . . which lead the men who manage to reproduce themselves in kind,' a form of structural discrimination"); 2-CER-327 (the number of women on corporate boards remains "static" due to men replacing men on U.S. boards); 2-CER-114 (same). This system creates a "good old boys' network" that often excludes women. 3-SER-610. A 2020 MIT study confirmed the systemic sex-discrimination: it found that 81% of U.S. boards without women failed to consider even a single woman for their most recent vacancy. 2-CER-115.

Other evidence confirmed that sex-discrimination makes it difficult for qualified women to join California's corporate boards or get into the board

promotion pipeline. *See, e.g.*, 2-CER-113-18 (explaining how board disparities are "rooted in discrimination" and "gender bias"). Numerous studies documented how double standards and sex stereotypes limit women's advancement on boards and in securing access to the pipeline to board seats. *See, e.g.*, 2-CER-170-71 (citing "[g]ender role bias, stereotypes, unconscious bias, and the strong desire to maintain sameness"); 2-CER-327-40, 2-CER-351-53 (anti-female bias in corporate pay, promotion, leadership ratings, mentorship, sex-stereotyping); *see also* 2-CER-191-93 (surveys show "a vast majority of male directors do not think that it is important to have women on their boards"); 3-SER-631 (before SB 826, women made up "only a fraction (typically 16 percent or less) of the company's board directors or executive officers"). As the State's expert Professor Alison Konrad explained, "[g]ender discrimination is the major cause of women's underrepresentation on corporate boards. Evidence links these gender biases directly to the lack of representation of women on corporate boards." 2-CER-351-53; *see also* 2-CER-114-18 (studies show gender matching bias and double standards for women); 2-CER-327 (same). For example, women faced barriers in getting into the corporate board pipeline that men did not: studies found that women who expressed anger or became parents were often penalized and passed over for promotion, while men were often rewarded for the same conduct, 2-CER-115-17. Other evidence showed that women generally received promotions less frequently than men, and that

senior women business leaders who were promoted had received higher performance ratings than men who received promotions, "indicating a double-standard whereby women are held to a higher standard of performance than men." 2-CER-333.

A woman board director—with experience interacting with senior executives from over 20 industries—confirmed the pervasiveness of this discrimination and bias, describing board dinners where male directors joked about "wh*#res," female directors who were told to be "less vocal," and a prominent male director who said that more female board members meant "more talking." 2-CER-192-93. These experts again confirmed that the insular, secretive director nomination process produces an "old boys' club" that often excludes women. 2-CER-174; *see* 2-CER-190-96 ("no application or application process", "single-sex" board networks); 3-CER-389-94 (describing "prevailing practice[s]": board openings and criteria are "not publicly available," board searches typically do not include "long lists of candidates under consideration," and these "insular selection processes" "created long-standing barriers for qualified women"); 2-CER-191, 193; 3-CER-390-91.

The Legislature was also presented with evidence demonstrating that there are a substantial number of women in California and beyond who were qualified and ready to serve on corporate boards but who were never given the opportunity.

The President of the National Association of Women Business Owners (NAWBO) testified that there were more than 1.5 million women business owners in 2018 across the State, many "who are qualified to serve on boards," but for whom "the doors are closed for even consideration[.]" 3-SER-596; *see also* 3-SER-626 (California's women business owners provide 1.9 million jobs and generate $318.2 billion in annual revenue).

Registries of board-ready women compiled by Stanford, Harvard, Northwestern, and UCLA reflected "thousands of qualified . . . executive and experienced women . . . [certified as] qualified for serving on corporate boards." 3-SER-593. Indeed, "[a] decade ago, women became a majority of workers in 'management, professional, and related occupations[.]'" 2-CER-108.[4] In 1984, the number of women in graduate school surpassed the number of men, and, as early

[4] *See also* 2-CER-188 (female board director stating that "the number of qualified women who would be excellent board members vastly exceeds the number of board seats"); 2-CER-110 (more than 4,000 board-ready women on Forté Foundation database; more than 1,000 board-experienced alumni and staff on Stanford's Women on Board database; and 15,977 women Chief Operating Officers in the United States); 3-CER-388-89 (same); 2-CER-110 (in 2019 women held on average 25% of five C-suite positions); 3-SER-624 (identifying tens of thousands of board-ready women in Equilar Diversity Network, National Association of Corporate Directors, and the National Association of Women Business Owners); 3-SER-626 (identifying board-ready women in Athena Alliance, Directors Academy, and Bay Area Women Leadership Roundtables); 4-SER-937 (almost 400 women serving in the C-suite of California's largest companies in 2016).

as 1986, women were earning at least 33% of MBAs. 2-CER-108-09; 326. By 2015, 12 elite MBA programs reported incoming classes including at least 40% women. 2-CER-327.[5] And over fifty California business leaders and associations stated that "the pipeline of qualified women candidates . . . is overflowing with experienced and capable women leaders." 4-SER-1048-1150; 3-SER-593 (describing thousands of executive, experienced women and those certified for board service by elite university programs); *see also* 4-SER-1100 (founder of 300 California CEOs organization stating that there is "an abundance of qualified women leaders" for corporate boards).

B. Previous Efforts by the Legislature and Others to Address the Exclusion of Women from California's Publicly Held Boards Were Ineffective

The Legislature enacted SB 826 only after considering decades of failed efforts by the State and others to remedy the long-standing sex-discrimination that largely excluded women from California's publicly held boards.

State and federal laws have barred sex-discrimination in private corporations and in employment since 1959, *see* Cal. Civ. Code § 51; Cal. Gov't Code § 12940(a); 42 U.S.C. § 2000e-2, but they proved ineffective in stopping discrimination in the selection of board members at publicly held corporations.

[5] *See also* 4-SER-985 (In 2016, "women earn[ed] 57 percent of bachelor's degrees, more than 62 percent of master's degrees and 53 percent of PhDs, medical degrees and law degrees.").

Responding to claims that boards lacked women because qualified women could not be found, in 1993 the Legislature created a registry to identify qualified women candidates. *See* Cal. Corp. Code, § 318; 2-SER-566; 4-SER-985 ("The assertion that there are insufficient number of women to fill these seats is simply untrue, as the existing registries . . . attest."). The Legislature also received testimony showing that privately-run registries had long been available through elite business schools such as Stanford and Harvard, but had not worked. 2-SER-566; 2-SER-585; 4-SER-985. A decade before SB 826, California's Public Employees' Retirement System (CalPERS) and California State Teachers' Retirement System (CalSTRS)—state agencies operating pension funds comprising hundreds of billions of dollars—launched another registry of qualified board candidates with diverse backgrounds. 1-SER-259-61; 2-SER-539.[6] But that, too, did not remedy the exclusion and underrepresentation of women on the boards of California's publicly held corporations. 2-SER563-64; 2-SER-566; 2-SER-539-40; *see also* 1-SER-259-61.

The State and others attempted additional measures to encourage corporations to stop excluding qualified women from their boards. In 2008, State

[6] CalPERS and CalSTRS are some of "the largest institutional investors in the world." 2-SER-548-49; *see also* CalPERS, *Investment & Pension Funding*, https://www.calpers.ca.gov/docs/forms-publications/facts-investment-pension-funding.pdf (last visited Mar. 26, 2022).

Controller John Chiang directed CalPERS and CalSTRS to prioritize corporate diversity in their investment decision. 3-SER-724. CalPERS published evidence of the benefits of gender-diverse boards; sent letters to hundreds of Russell 3000 corporations in which it invests, requesting the development and disclosure of diversity policies and the addition of qualified women on boards; and co-hosted diversity summits with CalSTRS featuring industry experts, who shared information about the benefits of gender diversity on the bottom-line. 2-CER-180-82; 2-SER-299-308.

CalSTRS led similar efforts. It contacted over 100 California corporations from 2014 to 2016, informing them of the benefits of gender diversity, urging them to adopt diversity policies or select qualified women. 4-SER-868. CalSTRS petitioned the SEC to promulgate regulations requiring proxy statements to disclose board nominees' gender. 4-SER-868. It also partnered with organizations (like the National Association of Corporate Directors) to meet the goal of having women fill 30% or more of board seats. 4-SER-867. But on the eve of SB 826's introduction, more than 26% of boards for California's publicly held corporations still had no women members. *See* Cal. Stat. 2018, ch. 954, § 1(e).

More efforts were tried and failed. Starting in 2009, the Securities Exchange Commission (SEC) required public corporations to disclose how they considered diversity in nominating new board members. 17 C.F.R. § 229.407 (2021); 2-CER-

163. In 2011, the California Department of Insurance launched an initiative to collect and publicly report gender-diversity data for corporate boards, educate insurance companies about the benefits of board diversity, and push companies to appoint diverse directors. Still, five years later, 80% of insurance company board seats nationwide were held by men, and 48% of insurance companies had *no* women on their boards. 3-SER-719; 3-SER-738-39.

In 2013, the Legislature approved Senate Concurrent Resolution No. 62 to "encourage equitable" gender representation on corporate boards. The Resolution cited studies demonstrating the many benefits of gender-diverse boards and urged California's publicly held corporations to have a minimum number of women directors, commensurate with board size, within three years. S. Conc. Res. No. 62, 2013–2014 Leg., Reg. Sess. (Cal. 2013). But the resolution had almost no effect: as a state legislative committee found in 2017, "despite existing law and the encouragement of SCR 62, not much has changed[.]" 3-SER-631. The percentage of women on boards increased "by one or two percent" after three years, 1-SER-559, and "[f]ewer than 20% of corporations complied with the targets encouraged by the Legislature," 2-SER-686.

C. California Adopts SB 826

In response to the pervasive and ongoing exclusion and underrepresentation of women on California's publicly held corporation boards, and the failure of other

efforts to remedy it, in 2018, California decided that "proactive steps" were needed. 2-SER-621, 655. The Legislature held nine separate hearings on SB 826, during which the relevant committees reviewed the State's prior efforts and considered evidence demonstrating that none of those efforts had been sufficient to break the "impenetrable walls of discrimination" blocking qualified women from California's publicly held corporations' boards. 1-SER-564. As SB 826's author explained, the State had "tried other methods to get to the same result," including "with the registry," a "gentle urging" in 2013, and other initiatives, but the answer that the State consistently got was to "go pound sand[.]" 2-SER-570, 563; *see also* 2-SER-623, 631, 642. The Legislature also considered other options, including adopting a policy modeled after the National Football League's "Rooney Rule," which requires teams to interview candidates of color for coaching and other senior positions. 1-SER-547, 2-SER-624, 626. But it rejected that option after considering evidence that the Rooney Rule had been largely unsuccessful. *See* 1-SER-551 (bill author: "even if we require that a woman or two women . . . be interviewed, we would never know if that person" receives genuine consideration; "they just check the box and have no chance of getting on the board over and above all the people [whom] the board already feels comfortable with.").

After those hearings, the Legislature enacted SB 826. SB 826 required publicly held corporations headquartered in California to "have a minimum of one

female director on [their] board[s]" by the end of 2019. Cal. Corp. Code § 301.3(a).[7] Beginning at the end of 2021, California's publicly held corporations with five-member boards must have at least two female directors, and those with six or more members must have at least three female directors. *Id.* § 301.3(b). Corporations "may increase the number of directors on its board" to meet requirements. *Id.* § 301.3(a). Indeed, corporations may add as many seats to their boards as they desire. *Id.* And rather than imposing these requirements on all corporations in California, the Legislature took "a more narrow" focus, targeting only California's 625 publicly held corporations, 1-SER-547, which account for 0.06% of the more than one million stock corporations registered to do business in California. 1-SER-61-62.

SB 826 also requires the Secretary to publish an annual public report documenting the number of covered corporations (1) in compliance during at least one point during the preceding year, (2) that moved out of or into California during the preceding year, and (3) that ceased to be publicly traded. Cal. Corp. Code § 301.3(d). SB 826 provides that the Secretary "may adopt regulations to

[7] Publicly held corporations are corporations with shares listed on the New York Stock Exchange (NYSE), National Association of Securities Dealers Automated Quotations (NASDAQ), or the NYSE American. *See* Cal. Corp. Code § 2115.5(b).

implement this section" and established the amount of fines the Secretary "may" impose for violations. *Id.* § 301.3(e)(1).

Since SB 826's enactment, there has been significant, measurable improvement in the number of women board directors in California's publicly held corporations. 2-CER-370-76; 2-CER-171, 173; *see also* 5-SER-1175-1176. Immediately before SB 826's enactment, 29% of California's publicly held corporations had all-male boards; by March 2021, only 1.3% had all-male boards. 2-CER-370-76. Months before the law's passage, women held 15.5% of all board seats in California's publicly held corporations; by March 2021, women held 26.5% of seats – a 66% increase. 2-CER-375; *see also* 2-CER-171, 173.

D. Procedural Background

1. Meland is an Illinois resident, who purchased his first shares of stock in OSI Systems on July 11, 2019, a few months before filing this suit. 3-CER-618; 2-SER-297. Meland owns 65 shares of the approximately 18 million outstanding shares in OSI—a 0.000363% ownership interest in the company. 2-SER-297, 415.

OSI's bylaws require annual elections for its board of directors. 2-SER-323. Its bylaws permit "the board of directors or . . . any shareholder" to nominate a candidate for election. 2-SER-333. But OSI's board controls the slate of nominees that the corporation nominates, as well as the nominees that ultimately appear on the corporation's proxy card sent to shareholders for board elections. 2-CER-229;

1-SER-152-153; 2-SER-423. In every year since OSI became a publicly held corporation in 1997, OSI has recommended the exact number of board nominees as there are board seats. *See* 1-SER-149, 153, 159-162. Because OSI directors are elected by a plurality of votes, any nominee with a single vote wins; each of OSI's directors hold shares and can vote for themselves. 1-SER-146, 2-SER-431, 491. While any shareholder may nominate additional candidates through a separate process, *see infra* p. 27-29, no shareholder has successfully done so since OSI became a public company, 1-SER-153.

From 1997 to 2019, OSI had an all-male board. 2-CER-97-98. In 2019 and 2020, years in which Meland has owned OSI stock, he voted *against* the only woman nominated and in favor of all of the male nominees. 2-CER-252-53. In both years, the female nominee prevailed—receiving over 14 million votes, more than any of the other nominees. 2-SER-408, 496.

2. Meland filed suit on November 13, 2019, 3-CER-621, and the district court granted the Secretary's motion to dismiss for lack of standing. 3-CER-636. Meland appealed, and this Court reversed and remanded. Declining to address factual objections to Meland's standing, this Court noted that it "must accept as true all material allegations of the complaint" and ruled that Meland had plausibly alleged standing, based on the pleadings "at this stage of the proceedings." *Meland I*, 2 F.4th at 846 n.2.

After remand, Meland moved for a preliminary injunction. 3-CER-636. The Secretary opposed and again challenged Meland's standing, citing evidence obtained during discovery. 1-CER-8. The Secretary also presented SB 826's legislative history, six expert declarations, and other witness testimony and research concerning sex-discrimination in the selection of corporate directors. *See* 1-CER-12-13; 5-SER-1182, 1186. On the merits, Meland presented no rebuttal witnesses or evidence of his own. 1-CER-13.

Following a hearing, the district court denied Meland's preliminary injunction motion. The district court first held that Meland had standing, citing this Court's prior ruling. 1-CER-8-9.[8] Addressing Meland's likelihood of success on the merits, the court observed that "the present record reflects an abundance of evidence supporting the legislature's determination that discrimination exists[.]" 1-CER-12-13. It further held that "SB 826 is substantially related to its remedial goal" in remedying sex-discrimination on the boards of California's publicly held corporations. 1-CER-22. The court also noted that a preliminary injunction would not serve the public interest. Although Meland claimed a constitutional injury, the

[8] At the same time as he filed his reply brief in support of his motion for a preliminary injunction, Meland attempted to introduce a supplemental declaration indicating that he tried and failed to nominate himself for OSI's board during its most recent election. *See* 1-SER-34-39. The district court ruled that declaration inadmissible. 1-CER-7; 1-SER-42.

court observed that Meland had not established that SB 826 is clearly unconstitutional. 1-CER-22. The court determined that "enjoining this [remedial] law at this early stage may deny highly qualified women who are eager and seeking to join corporate boards the opportunities provided by SB 826," and would "shut[] out thousands of qualified women." 1-CER-21-22.

SUMMARY OF THE ARGUMENT

I. At the threshold, Meland has not met his burden of showing that he has Article III standing to challenge SB 826 at this stage of the litigation. This Court previously held that Meland had sufficiently established standing at the pleading stage because he "plausibly alleged that SB 826 requires or encourages him to discriminate based on sex." *Meland I*, 2 F.4th at 849. But the Court also acknowledged that Meland's theory of standing required him to prove certain facts at later stages in the litigation. *See id.* at 846 n.2. Discovery has since revealed that Meland's votes for the board of directors of OSI Systems have no actual effect on the outcome of the election. The board itself nominates candidates for board seats in the first instance, and it has always nominated the same number of candidates as there were seats available. Shareholders can only vote "yes" or "no" for a candidate recommended by the board. Because any nominee who receives a plurality of votes wins a seat, and all of OSI's nominees are shareholders, all nominees are awarded a seat on the board so long as they vote for themselves. In

every election since OSI became a public company, every one of the nominees recommended by the board has been approved through this plurality-vote process. Moreover, while it is theoretically possible that a shareholder—including Meland—could nominate an additional nominee, no shareholder in OSI's history has successfully done so. And even if Meland had introduced admissible evidence that he intends to try and create a contested election in the future, that would not change the outcome: he owns just 65 shares, fewer than every member of OSI's board and its largest institutional investors. Because the evidence in the record establishes that Meland's votes have not and could not effect the outcome of the election, SB 826 does not "require" or "encourage" him to vote for female candidates. *Meland I*, 2 F.4th at 849.

II. If this Court reaches the merits, it should affirm. This Court reviews denials of preliminary injunctions for abuse of discretion, deferring to the district court unless the court erred on law or committed clear factual error. The district court did neither. It correctly observed that the Legislature enacted SB 826 to remedy the long-standing sex-discrimination that has denied women the full and equal opportunity to serve on the boards of California's publicly held corporations. The unrebutted record reveals that anti-female bias, sex-stereotypes, double standards, and the insular, secretive board-selection process that relies on male-dominated networks to fill seats all continue to impede women's ability to join

corporate boards and secure access to the board-promotion pipeline. It also shows that there is a substantial pool of qualified women ready to serve.

Further, SB 826 substantially relates to its goal of remedying discrimination: it provides a flexible floor that applies narrowly to California's publicly held corporations—less than one-tenth of one percent of the more than one million total stock corporations registered in the state. By requiring covered corporations to add women to their boards, SB 826 addresses discrimination within the board selection process—which, generally has no advertised openings, no application process, and no open competition. SB 826 also conforms to the research indicating that a critical mass of women (approximately three) is needed to reduce stereotyping, tokenism, and exclusion in the boardroom. Cal. Stat. 2018, ch. 954, § 1(g)(1).

In addition, Meland cannot establish irreparable harm for the same reasons he cannot establish standing: SB 826 does not require or encourage him to discriminate on the basis of sex because he has no actual role in influencing OSI's board membership. And the district court correctly concluded that the balance of the equities and the public interest weigh against enjoining SB 826. The court properly balanced Meland's unsupported assertions of harm against the fact that enjoining this law at this early stage would deny thousands of highly qualified women the full and equal opportunity to lead on the boards of California's publicly held corporations.

STANDARD OF REVIEW

This Court reviews a denial of a preliminary injunction for abuse of discretion. *Env't. Prot. Info. Ctr. v. Carlson*, 968 F.3d 985, 989 (9th Cir. 2020). Legal issues underlying the order are reviewed de novo. *Id.* "[A]s long as the district court got the law right, it will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case." *Id.* at 989–90 (citation omitted).

ARGUMENT

I. MELAND FAILED TO PRESENT EVIDENCE OF TRACEABLE INJURY NECESSARY TO ESTABLISH STANDING

At the threshold, Meland has not carried his burden to prove standing at this new stage in the case. Courts vigilantly guard Article III's limitations at every stage to protect their proper role in a "limited and separated government" and refrain from acting as "a roving commission [that] publicly opine[s] on every legal question." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) (citation omitted). As this Court explained in *Meland I*, the party invoking federal jurisdiction bears the burden of establishing the elements of standing—and "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the *successive stages of the litigation*." *Meland I*, 2 F.4th at 843 (citation omitted) (emphasis added). Pleadings that plausibly allege standing and

survive a motion to dismiss "may not suffice at later stages of the proceedings when the facts are tested." *Syed v. M-I, LLC*, 853 F.3d 492, 499 n.4 (9th Cir. 2017). At the preliminary injunction stage, the plaintiff has the burden to make a "clear showing" that he (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. *Yazzie v. Hobbs*, 977 F.3d 964, 966 (9th Cir. 2020).

Meland has failed to make that clear showing of traceable injury. He alleges that SB 826 "injures [his] right to vote for the candidate of his choice, free from the threat that the corporation will be fined if he votes without regard to sex." 3-CER-625. In *Meland I*, this Court held that a "person required or encouraged" by a statute to "discriminate on the basis of a protected class" has standing to challenge the statute. 2 F.4th at 844. Turning to this case, the Court reasoned SB 826 "required or encouraged" Meland to vote for female nominees because he was a shareholder in OSI, and "[a]s a general rule, shareholders are responsible for electing directors." *Id.* at 845-46; *see also id.* (for SB 826 to "have any effect at all," it must "compel shareholders to act"). But the Court also recognized that evidence obtained during discovery might reveal that OSI's board—and not Meland—is in fact responsible for ensuring that OSI's board complies with SB 826. *See id.* at 846 n.2 (declining to "consider" this argument because it was "unsupported by the pleadings").

Discovery has since revealed that, as a factual matter, Meland's actions have no influence on the composition of OSI's board. OSI's board of directors has sole authority to decide the number of seats on the board. 1-SER-151-152; 2-CER-229 (Corporate Governance Guidelines No. 1); 2-SER-335 (Bylaws, Art. III, Sec. 2), 2-SER-319-320 (Certificate of Incorporation, V., VIII.). The board is also solely responsible for nominating the corporation's slate of candidates each year to fill those board seats. 2-CER-229. If the board nominates the same number of candidates as board positions available—which OSI has done in every election in the quarter century since OSI became a public company, 1-SER-149-150, 153—the election is uncontested.[9] *See* 1-SER-153. Because OSI directors are elected by a plurality of votes, when there are the same number of nominees as there are seats available, any nominee who receives a single "yes" vote will be elected. 1-SER-146. Consequently, in uncontested elections, all of the corporations' nominees are elected to the board so long as they vote for themselves (or receive a single vote from any other shareholder). 1-SER-146-150.

These facts disprove Meland's allegation that SB 826 "requires or encourages" him to consider sex when voting for board members. *Meland I*,

[9] The only exception is where a shareholder has satisfied the several hurdles to nominate a candidate and place them for proxy vote, which has never happened in OSI's history. *See* 1-SER-153; *infra* pp. 27-28.

2 F.4th at 846. During the two board elections in which Meland voted, the board recommended the same number of nominees as there were available board seats. 1-SER-162. No matter which way Meland voted, the outcome would have been the same, because each nominee owned OSI shares and was able to vote for him or herself. 2-SER-431. Indeed, in both elections in which Meland was eligible to vote he voted against the woman nominee. 2-CER-263-271. Any "worry that [Meland] might subject OSI to fines unless he consider[ed] sex when selecting a board member," *Meland I*, 2 F.4th at 847, was entirely subjective and without any factual basis: regardless of how Meland voted during those elections, the result would have been, and were, the same. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 418 (2013) ("[A]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm[.]"); *cf. California v. Texas*, 141 S. Ct. 2104, 2114-15 (2021) (plaintiffs did not have standing to challenge a provision of federal law that could not be enforced against them, even though they changed their conduct to conform to what they believed that provision required them to do).

To be sure, OSI's bylaws authorize "any shareholder" to nominate a candidate for the board. *See* 2-SER-333 (Art. II, Sec. 14(a)-(b)). To do so, a shareholder must provide advanced notice to the corporation of the intent to nominate a candidate, and provide certain information, including information about

the nominee that must be "disclosed in a proxy statement or other filing . . . for elections of directors in a contested election." *See* 2-SER-333 (Art. II, § 14(b)-(c)). Then, to obtain votes for that nominee, the shareholder must persuade OSI to include the nominee on its proxy card, mount an independent proxy campaign (soliciting proxy votes directly from OSI shareholders), or attend the meeting in person and vote his or her own shares. *See* 17 C.F.R. § 240.14a-19 (2021); *Roosevelt v. E.I. Du Pont de Nemours & Co*., 958 F.2d 416, 422 (D.C. Cir. 1992) (recognizing that the proxy solicitation process rather than shareholder meetings is the primary forum for shareholder voting).

No OSI shareholder has successfully nominated a candidate through this process in the quarter century since OSI became a public company. 1-SER-153. And while Meland attached a supplemental declaration to his reply brief in support of his motion for preliminary injunction indicating that he tried *and failed* to nominate himself as a director during OSI's most recent shareholder meeting, *see* 1-SER-36, the district court struck that evidence because it relied on a theory of injury not pleaded in the operative complaint and prejudiced the Secretary due to its untimely submission. 1-CER-7, 31-32, 3-CER-638; 1-SER-34-35.[10]

[10] Meland did not appeal that order, and makes no mention of it in his opening brief.

Even had Meland introduced admissible evidence that he intends to create a contested election in the future, he has not—and cannot—show that a "reasonable shareholder" in his position would fear that "a failure to vote for a female [director] would contribute to the risk of putting the corporation in violation of state law." *Meland I*, 2 F.4th at 846. Meland owns just 65 of the nearly 18 million OSI shares, 2-SER-297, 415, and *every* OSI director has more shares (and therefore more votes) to cast in favor of themselves, 2-CER-431. Moreover, OSI's largest institutional shareholders have expressed strong support for gender diversity on boards independent of SB 826, including one shareholder that, as of 2020, owned over 3 million shares, *see* 1-SER-147-148; 2-SER-459. In any event, "'some day' intentions" are insufficient to "support a finding of the 'actual or imminent' injury" required to establish Article III standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 (1992).

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY DENYING A PRELIMINARY INJUNCTION

A preliminary injunction is an "extraordinary" remedy, "never awarded as of right." *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008) (citations omitted). To secure a preliminary injunction, a plaintiff is required to show that he is (1) likely to succeed on the merits, (2) likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of the equities tips in his favor, and (4) that an injunction is in the public interest. *Garcia v. Google, Inc.*, 786 F.3d 733, 740

(9th Cir. 2015) (en banc) (citing *Winter v. NRDC*, 555 U.S. 7, 20 (2008)). Here, because Meland brought a facial challenge, to succeed on the merits he must carry the "heavy burden" of demonstrating that "no set of circumstances exists under which the Act would be valid." *United States v. Peeples*, 630 F.3d 1136, 1138 (9th Cir. 2010).

Here, the district court did not abuse its discretion by denying Meland's preliminary injunction motion. Meland is unlikely to succeed on the merits of his claim. SB 826 satisfies intermediate scrutiny because it is substantially related to the state's important interest in remedying the sex-discrimination that has denied women the full and equal opportunity to lead on California's publicly held corporations' boards. *See United States v. Virginia*, 518 U.S. 515, 533 (1996). Further, Meland has not proven that he would be irreparably harmed absent a preliminary injunction; SB 826 has not impaired Meland's ability to vote against women candidates. The district court also properly held that the equities and public interest weigh heavily against enjoining SB 826: Meland's unsupported assertions of harm are far outweighed by the fact that an injunction would shut out thousands of highly qualified individuals from California's publicly held boards, causing harms to those individuals and the State.

A. Meland is Unlikely to Succeed on the Merits of His Claim that SB 826 Is Unconstitutional

1. SB 826 is substantially related to the important State interest of remedying sex-discrimination in California's publicly held boards.

As the Supreme Court has recognized, "[s]ex classifications may be used" to "compensate women for particular economic disabilities they have suffered," to "promot[e] equal employment opportunity," and "to advance full development of the talent and capacities of our Nation's people." *Virginia*, 518 U.S. at 533 (citations omitted). And as this Court has explained, the "[g]overnment has broad power" to assure that women are "not . . . exclude[d] . . . from participating fully in our economic system." *Assoc. Gen. Contractors*, 813 F.2d at 940; *see also Coral Constr. Co. v. King Cnty.*, 941 F.2d 910, 932 (9th Cir. 1991) (similar).

Gender-based classifications are constitutional so long as they "serve an important governmental objective" and there is a "direct, substantial relationship between the objective and the means chosen to accomplish the objective." *Coral Constr. Co.*, 941 F.2d at 931. To enact a remedial program, the State only needs to show that "[s]ome degree of discrimination . . . occurred in a particular field before a gender-specific remedy may be instituted in that field." *Id.* at 932. So long as the record shows that the "the gender benefited actually suffer[ed] a disadvantage related to the classification," the statute must be upheld. *Assoc. Gen. Contractors*, 813 F.2d at 942 (citation omitted). The constitutionality of the program "should be

evaluated based upon all evidence presented to the district court, whether such evidence was adduced before or after enactment[.]" *Coral Constr. Co.*, 941 F.2d at 920; *see also Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 316-17, 317 n.51 (1978) (considering evidence from amici). Here, the district court correctly concluded that SB 826 likely satisfies both prongs of the intermediate scrutiny test.

a. SB 826 was adopted to remedy "a long and well-documented history of discrimination depriving women of equal opportunity (or, in many cases, any opportunity at all) to serve on corporate boards." 3-SER-641; *see also* 2-SER-568; *Assoc. Gen. Contractors*, 813 F.2d at 940 ("[H]elping women overcome the adverse effects of discrimination" is an "important objective" for purposes of intermediate scrutiny). As the district court concluded, there is an "abundance of evidence supporting the legislature's determination that [sex] discrimination exist[ed]" in the selection of boards of directors. 1-CER-12. Before SB 826's passage, 26% of California's publicly held corporations in the Russell 3000 Index and 29% of *all* such California corporations had *no* women on their boards of directors. Cal. Stat. 2018, ch. 954, § 1(e). For the remaining corporations, women held only 15.5% of the total board seats. *Id.*; *see also id.* §1(e)(1) (among the 446 California-headquartered Russell 3000 index corporations, women held only 566 of more than 3,500 board seats as of June 2017). The disparities were particularly

acute for smaller California corporations in the Russell 3000 Index, almost half of which did not have a single woman director. *Id.* § 1(e)(4).

Evidence in front of the Legislature and introduced in the court below also demonstrates that this pattern of discrimination was long-standing and widespread and that California lagged behind the nation. *See supra* pp. 5-6; 3-SER-639. In 1993, the Legislature recognized the "glass ceiling" barring women from boards of publicly held corporations. *See supra* pp. 5, 13. Nearly half of the 75 largest companies that went public nationwide from 2014 to 2016 did so without a single woman on their boards. Cal. Stat. 2018, ch. 954, § 1(f)(3). And before SB 826's enactment, women were entirely excluded from or vastly underrepresented on the boards of California's publicly held corporations in every industry and every region. Up to 59% of companies in some industries had *no* women on their boards; and women made up no more than 15.5% of all board directors in every industry except utilities and communications (where women still made up just 24.7% of total directors). 2-CER-285; *see supra* p. 5. Underrepresentation also extended in every region statewide, ranging from only 2.6% of directors in the Central Valley to 15.2% of directors in the Central Coast. 2-CER-287; *see supra* pp. 5-6.

The record further explains why women were largely excluded from board selection. As several experts explained, women faced "gender discrimination" and "gender biases." 2-CER-351-53; *see also* 2-CER-113-18; 2-CER-171. For

example, corporate leaders promoted women less often than men because they viewed women as having "more work-family conflict" and required women to be more accomplished than men to receive a promotion to senior leadership positions that can lead to board selection. 2-CER-115-17; 333. *See also supra* pp. 7-8, 10 (reviewing additional studies documenting the ways in which board gender disparities are rooted in discrimination and gender bias).[11] Such stereotypes and bias amount to discrimination in the corporate board selection process and pipeline. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-52 (1989) (plurality opinion) (holding that sex stereotyping in promotion decisionmaking is evidence of discrimination); *Assoc. Gen. Contractors*, 813 F.2d at 939–40 (same); *cf. United States v. Paradise*, 480 U.S. 149, 168–69 (1987) (plurality opinion) ("Discrimination at the entry level necessarily precluded blacks from competing for promotions[.]").

Discrimination also persisted because of the secretive and insular process typically used to select board members, *supra* p. 7: as the record below shows, male-dominated boards persistently made selections biased toward men, 2-CER-114; 2-CER-170; 2-SER-547; 2-SER-549-51; 2-SER-569; recruited candidates

[11] Meland argues that this evidence "is not specific to corporate boards and is not evidence of discrimination in hiring," AOB 6-7, but that is incorrect. *See, e.g.*, 2-CER-335 (documenting discriminatory processes in corporate board selection and in the pipeline); 2-CER-327 (similar); 2-CER-330 (similar).

based on relationships formed through male-dominated networks and activities that often excluded women, 2-SER-550; and declined to consider qualified women, even when recruiters brought them to their attention. 3-CER-393-94; 2-CER-174 (board selection process reflects an "old boys club" culture) *see also supra* pp. 7-8, 10 (reviewing additional evidence regarding old boys' network).[12] A MIT study confirmed the systemic sex-discrimination: 81% of U.S. boards without women did not consider a single woman for their most recent vacancy. 2-CER-114-15; *see also* 2-CER-336 ("[S]ubstantial amount of evidence shows that . . . in the absence of female leaders, male decision-makers are relatively unlikely to appoint women to the board."). The record also refutes any suggestion that the lack of women on boards could have been the result of a lack of qualified candidates: tens of thousands of board-ready women are included on national registries, found and run highly profitable businesses, and serve in the C-suite. 2-CER-110, 2-CER-370; 3-

[12] This unrebutted evidence negates Meland's suggestion that women were excluded from or underrepresented in the corporate boardroom because the board recruitment process is "opaque, insular, and sometimes arbitrary." AOB 6. *See W. States Paving Co. v. Washington State Dep't of Transp.*, 407 F.3d 983, 992 (9th Cir. 2005) (accepting evidence of "institutional wall[s] and old-boy network" as discrimination justifying race-conscious and sex-conscious remedial program); *cf. Assoc. Gen. Contractors of Am., San Diego Chapter, Inc. v. Cal. Dep't of Transp.*, 713 F.3d 1187, 1197–98 (9th Cir. 2013) (recognizing "difficulties . . . breaking into the 'good ole boy' network" as discrimination).

SER-624; 3-SER-626; 4-SER-937; *see also supra* pp. 10-12 & n.4 (reviewing additional evidence).[13]

b. SB 826 is also "substantially related" to addressing the effects of gender discrimination. *Coral Constr. Co.*, 941 F.2d at 932. The law addresses a discrete problem: discrimination against women in the corporate board-selection process and pipeline. Cal. Corp. Code § 301.3(b). It applies only to the boards of California's publicly held corporations, *id.*, a total of 625 companies, less than one tenth of one percent of the more than one million private stock corporations registered in California, 1-SER-61-62. It employs a flexible floor that allows corporations to add as many seats to their boards as they want—and thus add as many men to their boards as they want—so long as a certain number of seats are filled by women. *See* Cal. Corp. Code § 301.3(b).

Further, SB 826 targets the specific practices that keep women out of the boardrooms of California's publicly held corporations. By requiring those boards to add qualified women, SB 826 enables them to counteract sex-stereotypes and bias that had previously kept them out without excluding any qualified men. *See* 2-ER-115 ("[L]eadership roles are still widely perceived as not suitable for

[13] The C-suite refers to a corporation's most senior executives, including its Chief Executive Officer, Chief Operating Officer, Chief Financial Officer, and Chief Information Officer. *See* 2-CER-378.

women[.]"). And it allows those women to draw on a gender-diverse range of talent for new positions. 2-ER-376, 378; *see also* 111-12; *compare* 2-CER-115 (81% of boards without women failed to consider a single women candidate) *with* 2-CER-114 (56% of boards with women directors considered at least one woman candidate).

Moreover, California adopted SB 826 only after decades of other efforts to remedy sex-discrimination in board selection proved ineffective. As detailed above, *see supra* pp. 12-16, those efforts date back to at least 1959, when the State first barred sex-discrimination in private corporations and employment. *See* Cal. Civ. Code § 51; Cal. Gov't Code § 12940(a). By 1993, public and private entities alike had created and maintained registries identifying qualified women candidates. *See supra* p. 13. In 2008, the State Controller directed CalPERS and CalSTRS—two of the largest institutional investors in the world—to prioritize corporate diversity when they invest. 3-SER-724. Over the next several years, CalPERS and CalSTRS undertook additional efforts to promote gender diversity, including publishing evidence about the benefits of gender diversity on corporate boards and petitioning the SEC to promulgate regulations requiring proxy statements to disclose board nominees' gender. *Supra* p. 14. In 2011, the California Department of Insurance undertook similar efforts to educate corporations about the benefits of board diversity. In 2013, the Legislature adopted Concurrent

Resolution No. 62, in which it urged corporations to have a minimum number of women directors on their board within three years. S. Conc. Res. No. 62, 2013–2014 Leg., Reg. Sess. (Cal. 2013).

But sex-discrimination in board selection persisted. As a California Senate Committee found in 2017, "despite existing law and the encouragement of [Concurrent Resolution] 62, not much ha[d] changed[.]" 3-SER-631, 649. From 2006 to 2018, the percentage of California board seats held by women crawled from 8.8% to 15.5%.[14] *See* 2-CER-280, 2-CER-374-76. At that rate, it would have taken more than 40 years for the number of women on boards nationwide to match the number of men without concerted action. Cal. Stat. 2018, ch. 954, § 1(f)(1)-(2). Until 2018, the "impenetrable walls of discrimination" blocking qualified women from California's publicly held boards remained. 1-SER-564; *see, e.g.*, 2-SER-570 (bill author: "[W]e've tried other methods to get to the same result. . . . And the answer has been, go pound sand.").

[14] Meland emphasizes the growth *rate* in women on corporate boards between 2006 and 2018, a twelve-year period, (AOB 7), but the fact remains that immediately before SB 826 women were excluded from 29% of California's publicly held corporate boards and vastly underrepresented on the remaining ones. 2-CER-369, 371; *see also infra* pp. 11-12 & n. 4(in 2016, women occupied 25% of C-suite positions in companies nationwide and held more than half of all graduate degrees as early as 1984).

And unlike every prior effort, SB 826 is working. Before SB 826 was adopted, 29% of California's publicly held corporations had all-male boards; by March 2021, only 1.3% had all-male boards. 2-CER-370-76. And while women held 15.5% of board seats in California's publicly held corporations in June 2018, by March 2021, women held 26.5% of seats – an increase of 66%. 2-CER-375; *see also* 2-CER-171, 173; 5-SER-1175-1176.

c. Precedent from the Supreme Court and this Court confirms that SB 826 is constitutional. In *Califano v. Webster*, for example, the Supreme Court upheld a provision of the Social Security Act that allowed women to exclude more of their "lower earning years" for purposes of calculating old-age insurance benefits than similarly-situated men, which in turn resulted in a higher monthly benefit payment for women. 430 U.S. 313, 314-15, 317 (1977) (per curiam). This differential treatment did not violate the Equal Protection Clause because it was "not a result of 'archaic and overbroad generalizations' about women," or the "'role-typing society has long imposed' upon women, such as casual assumptions that women are 'the weaker sex' or more likely to be child-rearers or dependents." *Id.* at 317 (citations omitted). Instead, the statute operated "directly to compensate women for past economic discrimination": women had been "unfairly hindered from earning as much as men," and eliminating additional low-earning years from their benefits calculation "work[ed] directly to remedy some part of the effect of past

discrimination." *Id.* at 318; *see also Kahn v. Shevin*, 416 U.S. 351, 353-55 (1974) (upholding a law that granted a $500 exemption from property taxes to widows but not widowers to account for the challenges women face in earning equal pay); *Schlesinger v. Ballard*, 419 U.S. 498, 505-10 (1975) (upholding a policy that afforded women in the military more time than men to achieve a certain rank because women could not be assigned to combat missions or duty on most Navy vessels and thus did not have the same opportunity to compile a record).

This Court has similarly upheld programs designed to address prior economic discrimination against women. In *Associated General Contractors*, the Court rejected a facial challenge to a city ordinance that gave women-owned businesses preferences in securing municipal contracts. *See* 813 F.2d at 924, 939-42.[15] The ordinance sought to compensate women "for the disparate treatment they have suffered in the business community" and the "bureaucratic inertia in the city's contracting procedures that ha[d] perpetuated the disadvantages flowing from that treatment." *Id.* at 940-41. Although the ordinance gave women an "advantage in a large number of businesses and professions," this Court concluded that it "hew[ed] closely enough to the city's goal" to survive a facial challenge. *Id.* at 941. Even

[15] The Court also upheld a preference for local-owned businesses, but struck down a preference for minority-owned businesses under strict scrutiny. *See Associated General Contractors*, 813 F.2d at 944; *see also Coral Constr. Co.*, 941 F.2d at 926 (holding similar minority preference unconstitutional "at least in part").

though the city's program "extend[ed] preferences to some fields where women are not disadvantaged," experience had shown that these were the "exceptions," and that women still faced discrimination in "most fields." *Id.* at 942; *see also Coral Constr. Co.*, 941 F.2d at 931-33 (upholding a similar contracting preference for contracts issued by a county government).[16]

These precedents control the outcome in this case. SB 826 was adopted to help women overcome the "firmly entrenched practices" that kept them from competing on a level playing field. *Kahn*, 416 U.S. at 353; *see also Webster*, 430 U.S. at 317 (reducing the disparity in economic conditions between men and women "caused by the long history of discrimination against women" is an important government interest). It addresses that problem through a carefully-designed program that seeks to remedy a specific problem—the exclusion of women from corporate boards—and in a manner that does not require corporations to exclude any man from their boards. Because the "members of the gender benefited by" SB 826 "actually suffer[ed] a disadvantage related to the classification," the law is constitutional. *Assoc. Gen. Contractors*, 813 F.2d at 940.

[16] *Associated General Contractors* suggested that it may have reached a different conclusion if there were a challenge to the preference for women-owned businesses "as applied to an industry where women are not disadvantaged," but left that question for "another day." 813 F.2d at 942. And *Coral Construction Co.* rejected an as-applied to challenge with respect to the preferences for women-owned businesses in the construction industry. 941 F.2d at 932-33.

Meland's opening brief does not even mention of *Webster*, *Kahn*, or *Schlesinger*. And his attempts to distinguish *Associated General Contractors* and *Coral Construction Co.* are unpersuasive. While those cases were "decided nearly 35 years ago," AOB 31, they remain binding precedent. And that precedent requires consideration of the considerable evidence assembled and reviewed by the Legislature, which demonstrates that corporate boards remain one of the "last bastions" excluding women. 3-SER-591 (bill author, Jun. 26, 2018 hearing) *see also supra* pp. 12-16 (reciting previous efforts).

Meland also attempts to distinguish *Associated General Contractors* and *Coral Construction* by asserting that the evidence of discrimination in those cases was stronger and the remedies narrower. He is incorrect on both counts. In *Coral Construction*, the Court upheld gender-conscious programs after observing the absence of statistical data, but citing a single affidavit to uphold a gender-conscious remedy. *See* 941 F.2d at 918, 933.[17] Here, the State introduced an "abundance of evidence" that sex-discrimination in the corporate boardroom existed, including "legislative history materials, statistical analyses, expert studies, anecdotal evidence, and expert declarations." 1-CER-12-13. Moreover, the

[17] In *Coral Construction*, the Court declined to consider two post-enactment studies because they had not been presented to the district court. *Coral Constr. Co.*, 941 F.2d at 919-22. Thus, the record in *Coral Construction* contained a total of three documents discussing sex-discrimination. *Id.* at 918 & n.7.

program in *Associated General Contractors* was broader than SB 826's program: in that case, the county set aside a fixed and finite resource—public funds and contracts—exclusively for women. *Assoc. Gen. Contractors*, 813 F.2d at 924 (reserving two percent of each city department's purchasing power for women-owned businesses).

2. Meland's contrary arguments lack merit.

Meland does not dispute that redressing past discrimination against women is an important government interest, and indeed conceded this point in the district court. *See* 1-CER-10. And his arguments that SB 826 is not substantially related to that interest rely primarily on precedents involving race-conscious programs—even though this Court has repeatedly held that the standards applied in that context do not govern the type of question presented here. *See Assoc. Gen. Contractors*, 813 at 940-42; *Coral Constr. Co*, 941 F.2d at 930-33.[18]

a. Meland first argues that SB 826 is unconstitutional because it imposes a "rigid quota." AOB 19. But SB 826 sets no limit on the number of "opportunities" or "available seats," *Grutter v. Bollinger*, 539 U.S. 306, 335 (2003), available to men; it simply requires a certain number of women to be on corporate boards, *see* Cal. Corp. Code § 301.3(a)-(b). In this respect, SB 826 is fundamentally different

[18] For ease of reference, the Secretary responds to each of Meland's arguments in turn and uses a letter ("a" "b" "c" and so on) that correspond to the subheadings in the Argument section of his brief. *See generally* AOB 18-29.

from the cases Meland cites, each of which involved a strict mandate that allocated a fixed resource among a defined pool of applicants, such as construction firms bidding for a contract or students applying for limited seats in an incoming class. *See Bakke*, 438 U.S. at 265 (admissions for 100 seats in a medical school class); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 481 (1989) (plurality opinion) (fixed percentage of city subcontract funds); *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 704 (9th Cir. 1997) (fixed percentage of state subcontract funds); *cf. Higgins v. City of Vallejo*, 823 F.2d 351, 360 (9th Cir. 1987) (upholding minority promotion program, in part, because program did not deny a livelihood to a non-minority person).

And even if SB 826 could be fairly characterized as a "quota," that "is not the dispositive issue." 1-CER-20. As the district court explained, no case "supports a per se rule that *gender* quotas are unconstitutional." 1-CER-20. Indeed, each of the cases Meland invokes involved classifications on the basis of race. *See* AOB 18-20 (citing *Fullilove v. Klutznick*, 448 U.S. 448, 454 (1980) (plurality opinion); *Bakke*, 438 U.S. at 265; *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003); *Grutter*, 539 U.S. at 309; and *Croson*, 488 U.S. at 508). Moreover, while racial classifications must be "'narrowly' tailored to the government's objective, there is no requirement that gender-based statutes be 'drawn as precisely as they might have been.'" *Assoc. Gen. Contractors*, 813 F.2d at 942 (citations omitted). Here, SB 826 "hew[s]

closely enough to the [State's] goal of compensating women for disadvantages they have suffered[.]" *Id.* at 941.[19]

Additionally, the board selection process is different from other application processes because it is not an open competition. In the public contracting and school admissions cases Meland cites, race-conscious requirements proved problematic because they denied applicants "individualized consideration" that they would receive in open "competition." *Grutter*, 539 U.S. at 334. By contrast, the typical board-selection process includes no position description, no application process, and no defined candidate pool, 2-CER-190-96; 3-CER-390-94, and board candidates are not evaluated or measured against one another. *Id.*; 2-SER-551 ("[I]t's not like a regular job search, where there are people compared against one another."). Thus, rather than interfering with corporations' ability to consider candidates on an individualized basis, SB 826 merely prompts corporations to expand their selection process to women who were "never afforded the chance to compete with applicants" in the first place. *Bakke*, 438 U.S. at 319; *see* 2-CER-115

[19] Meland's assertion that that SB 826 must contain an "opt-out, waiver, or good faith provision[]," AOB 19, fails for the same reason: this Court has never required those kind of provisos when evaluating gender-based (as opposed to race-based) classifications. The authorities he cites both involve *race-based* programs. *See Coral Const. Co.*, 941 F.2d at 924 (addressing the contractor preference for minority-owned businesses); *Fullilove*, 448 U.S. at 454.

("81% of boards without women failed to consider a single woman candidate for their most recent board vacancy.").

b. Meland next argues that SB 826 is "arbitrary" because, in choosing the number of seats that must be filled by women on corporate boards, the State has not defined the "relevant labor pool or the level of representation" it believes would be present absent discrimination. AOB 21. Once again, he relies on a case (*Croson*) that involved race-based classifications. *See* AOB 21-23. The standards imposed by that case have never been imposed to justify laws that draw lines on the basis of gender. *See Coral Constr. Co.*, 941 F.2d at 930-33 (rejecting application of *Croson* to gender-based preferences and applying intermediate review instead). Rather, "the degree of specificity required" for evidence of discrimination may "vary." *Assoc. Gen. Contractors of Am., San Diego Chapter, Inc. v. Cal. Dep't of Transp.*, 713 F. 3d 1187, 1195-97 (9th Cir. 2013) (merging review of race and gender-conscious measures under strict scrutiny standard and upholding the entirety of program). The evidence presented here far exceeds anything required under this Court's intermediate scrutiny cases. *Compare Coral Constr. Co.*, 941 F.2d at 933 (citing one declaration by a woman business owner as adequate evidence of discrimination).

In any event, in the process of enacting SB 826, the State *did* consider the "relevant statistical pool"—*i.e.*, the number of women "qualified to undertake the

particular task," *Croson*, 488 U.S. at 501-02—in deciding how many seats should be allocated to women. The Legislature considered evidence showing the substantial number of qualified women whom boards have excluded, no matter how you define the relevant "pool" from which those women are drawn: across the country, 25% of C-suite positions are occupied by women; and women make up 50% of the professional and management workforce and hold half of all graduate degrees. *See* 2-CER-108-12, 2-CER-326-27, 2-CER-388-89. As of June 2018, however, 29% of all corporate boards in California had *no* women, and women made up only 15.5% of board directors in the State's publicly held corporations. 2-CER-370.[20] The Legislature also considered evidence of the tens of thousands of qualified women on national board registries and in CEO and other C-Suite positions. *Supra* at pp. 10-11. But as of June 2018, women accounted for only 566 of the more than 3,500 total corporate board seats on publicly held corporations in California. Cal. Stat. 2018, ch. 954, § 1(e)(3).

[20] Meland attempts to minimize these disparities by focusing only on the number of women in C-suite positions and the number of women who have earned MBAs at "12 top tier business schools in 2015." AOB 22. But he ignores the fact that women also face discrimination in entering C-suite positions, *see* 2-CER-337, fails to acknowledge that many men on California boards have no prior C-Suite experience, 4-ser-1001, and does not explain why the percentage of women who received MBAs from a small slice of business schools during one year is the key point of comparison. Moreover, the percentage of women in C-suite positions nationwide (25%) and the percentage of women in the entering classes of those 12 schools (40%) was far higher than the percentage of women on the boards of California's publicly held corporations in 2018 (15.5%).

Meland also challenges SB 826's numeric requirements, claiming that the Secretary has not explained why they are an "appropriate remedy." AOB 22. That ignores the Legislature's findings, which tie SB 826's numeric requirements to research indicating that a critical mass of women is needed to reduce stereotyping, tokenism, and exclusion in the boardroom. *See* Cal. Stat. 2018, ch. 954, § 1(g)(1) (citing studies explaining that a critical mass of women on boards "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"); *see, e.g.*, *Virginia*, 518 U.S. at 523 ("'[C]ritical mass' . . . provide[s] the female cadets with a positive . . . experience" in institution that historically excluded them). The district court similarly concluded that the Secretary "provided persuasive evidence that the numbers chosen are roughly in line with empirical research supporting the idea that a critical mass of women is required and that any number below risks creating a token factor." 1-CER-19. For example, one study of women on Fortune 1000 boards found that "solo women on corporate boards in particular are frequently ignored, interrupted, and contradicted to the point where one . . . [board member] told us, 'She had to break down brick walls to be heard.'" 2-CER-330. As the study's author explained, absent a critical mass, women risk "being devalued and ignored"—a result of gender bias. 2-CER-337-38.

c. Next, Meland argues that SB 826 is overbroad because it does not target specific industries, geographic regions, or company sizes. AOB 24-25. As the district court recognized, however, this Court has already "rejected precisely the same argument." 1-CER-21 (citing *Assoc. Gen. Contractors*, 813 F.2d at 941-42; *Coral Constr. Co.*, 941 F.2d at 932). And here, the Legislature declined to restrict SB 826 to certain industries, regions, or company sizes in light of the evidence showing that women are excluded and vastly underrepresented on corporate boards in every industry, across every part of the State, and in companies big and small. *See supra* p. 6; *cf. also Cal. Dep't of Transp.*, 713 F.3d at 1199 (upholding race-conscious remedial program that did not "distinguish[] between construction and engineering contracts," as there are "sound policy reasons to not require such parsing, including the fact that there is substantial overlap").

Meland responds to the evidence demonstrating discrimination in corporate-board selection across company size, region, and industry by pointing out that there are differences in the number of women on boards across each dimension. *See* AOB 7-8, 24-25. But these variations demonstrate only that women are significantly underrepresented even in the best case scenarios. *See*, *e.g.*, AOB 24 (acknowledging female directors make up at most 24.7% of directors in the utilities industry); *see also supra* p. 6 & n.3 (explaining that the utilities industry is an outlier because it only includes nine companies).

And much of the data Meland relies on fails to account for critical developments and nuances. For example, Meland cites a study concluding that women secured up to 48% of corporate board seats in financial services companies in 2018. AOB 25. But he fails to acknowledge that these figures document the percentage of *new* seats filled by women that year, rather than overall board composition; and partially reflect post-SB 826 enactment data and companies nationwide, not just those in California. *See* Heidrick & Struggles, Board Monitor U.S. 2019 at 13. As the Legislature found, however, in 2018 it remained the case that women held just 15.5% of *all* board seats in California's publicly held corporations, Cal. Stat. 2018, ch. 954, §1(e), and the State lagged behind the nation in addressing gender discrimination on its boards, *see* 3-SER-639, 657, 672, 4-SER-1058. Elsewhere, Meland relies on studies that reflect data regarding women who secured their directorships in 2019, after SB 826 was adopted. *See* AOB 8 & n. 9. As the district court recognized, those studies are of "limited value." 1-CER-12. Indeed, one authority Meland cites in his opening brief, *see* AOB 8 n. 9, published an earlier report that included data from July to September 2018—the three months "immediately prior to SB 826's enactment"—demonstrating that there was "only a [0].3 percent increase in the percentage of women on Russell 300 Boards." 1-CER-12.

In any event, even if Meland could establish that women were not disadvantaged in securing corporate board seats in some sectors, that would not support his request for facial relief in this case. *See* 1-CER-627 (Meland's complaint, asking for a declaration that SB 826 violates the Equal Protection Clause "on its face"). As this Court explained in *Associated General Contractors*, a gender-classification like SB 826 will survive a facial attack so long as women are disadvantaged in "most fields." 813 F.2d at 942. That is clearly the case when it comes to corporate board selections. *See supra* pp. 6-12.

d. Meland also briefly asserts that SB 826 is unconstitutional because it does not contain a sunset provision. AOB 26-27. Even for race-based programs, however, "[a]n explicit or immediately foreseeable end date has never been required for an affirmative action plan to be valid." *Doe v. Kamehameha Schools* 470 F.3d 827, 846 (9th Cir. 2006) (en banc); *see also Grutter*, 539 U.S. at 316 (upholding school affirmative action policy without a sunset); *Coral Constr. Co.*, 941 F.2d at 914 (upholding county's sex-conscious affirmative action policy without a sunset). And the out-of-circuit cases Meland cites (AOB 26) are unpersuasive. For example, in *Ensley Branch, N.A.A.C.P. v. Seibels*, the Eleventh Circuit held that the district court abused its discretion by failing to modify consent decrees governing the hiring of women in public employment entered 13 years earlier, in light of evidence that the decrees had "done little or nothing to promote

the development of selection procedures that are fair to women." 31 F.3d 1548, 1581 (11th Cir. 1994). Here, by contrast, SB 826 has already been effective. *See supra* p. 18.

In addition, SB 826 requires the Secretary to collect and publish data annually, which allows the Legislature, Secretary, and the public to review regularly the need for and application of SB 826. Cal. Corp. Code § 301.3(d). The Legislature's decision to adopt annual reviews accounts for the long-standing nature of sex-discrimination on California's publicly held boards and the State's duty to remedy discrimination both now and in the future. *Cf. Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) ("Where racial discrimination is concerned, 'the (district) court has not merely the power but the duty to render a decree which will . . . eliminate the discriminatory effects of the past as well as bar like discrimination in the future.'"); *Clemens v. Centurylink Inc.*, 874 F.3d 1113, 1116 (9th Cir. 2017) (same).

e. Meland further argues that this Court should enjoin SB 826 because it remedies "societal discrimination," not "government discrimination." AOB 27-28. But he recognizes that circuit precedent forecloses this argument. *See* AOB 28 (citing *Coral Constr. Co.*, 941 F.2d at 932); *see also Coral Constr. Co.*, 941 F.2d at 932 ("[I]ntermediate scrutiny does not require any showing of governmental

involvement, active or passive, in the discrimination it seeks to remedy.").[21] In any event, SB 826 does not address societal discrimination writ large. *Cf. Bakke*, 438 U.S. at 307 (societal discrimination is an "amorphous concept of injury that may be ageless in its reach into the past"). Rather, SB 826 targets the "identified discrimination," *id.*, that denied women seats on California's publicly held boards. *Id.*; *see supra*, pp. 6-12.

f. Meland next asserts that SB 826 is unconstitutional because the Legislature failed to consider alternatives. AOB 28-29. Once again, that argument misunderstands both what the law requires and what actually happened here. California was not required to exhaust all conceivable alternatives before enacting a remedial program, even under strict scrutiny. *See Grutter*, 539 U.S. at 339.[22] Even if it were, the Legislature enacted SB 826 after decades of public and private efforts to remedy sex-discrimination in board selection proved unsuccessful. *See*

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[21] In his opening brief (AOB 28), Meland quotes another part of *Coral Construction Co.*, but that quotation comes from the Court's consideration of a race-based program. *See* 941 F.2d at 925.

[22] *Orr v. Orr*, 440 U.S. 268 (1979), *Weinberger v. Wisenfeld*, 420 U.S. 636 (1975), and *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142 (1980) are inapposite. AOB 28. The statutes in those cases were unconstitutional because they withheld state benefits based on sex and were based on sex-based generalizations regarding the likelihood of dependency, rather than evidence that there was sex-discrimination that the statute was intended to remedy. *See Orr*, 440 U.S. at 279-83; *Weinberg*, 420 U.S. at 644-45 (1975); *Wengler*, 446 U.S. at 150-52. Unlike SB 826, those statutes were not intended to remedy well-documented discrimination against women in a specific area.

supra pp. 12-14. The Legislature also considered a policy modeled after the NFL's "Rooney Rule"—which requires teams to interview candidates of color—but rejected that approach because it has proven ineffective. *See supra* pp. 16-17.

g. Meland also repeatedly argues that SB 826 relies on and reinforces "archaic stereotyped notions of the roles and abilities of women." *E.g.*, AOB 32; *see also* AOB 10, 16, 17, 18, 33-34. That is simply incorrect. He claims that the Legislature's findings include generalizations about women; in fact, the findings describe studies indicating that *corporations* that have gender diverse boards are (for example) "more likely to 'create a sustainable future.'" *e.g.*, Cal. Stat. 2018, ch. 954 § 1(c)(4). These findings are consistent with the testimony of the State's experts, who observed that gender diverse companies perform better because diverse boards incorporate a greater variety of perspectives. *See, e.g.*, 2-CER-156; 2-CER-120-29; 2-CER-195 ("Firms with a mix of women and men on their boards had fewer . . . incidence of fraud [.]").[23] Similarly, the State's expert did not make generalizations about women's "leadership styles." *E.g.*, AOB 10 n.11, 18. Instead,

[23] Meland's claims that SB 826 relies on stereotypes about men being (for example) "less ethical," AOB 10 n.11, 32, fail for the same reason. The studies he identifies found that boards *with a mix of women and men* have fewer incidents of accounting errors or fraud. *See, e.g.*, 2-CER-195. And the State's declarants did not "rely on *stereotypes*" that men "tell bawdy jokes at board meetings or dinners" or "choose board members among their golf buddies," AOB 10 n.11 (emphasis added), but instead relayed the declarants' and other women's *experiences*, *see* 2-CER 192-193.

that expert reviewed employee surveys that rated corporate women leaders more highly than men to rule out the possibility that performance was "a plausible explanation for women's poorer outcomes in terms of salaries, promotions, and board appointments[.]" 2-ER-330–31. These findings and evidence demonstrate why SB 826 was necessary: qualified women were being kept off corporate boards even though there was a strong business case for including them. And the State may adopt sex-conscious remedial programs to ensure that actual differences between the professional experiences of men and women do not impede the ability of women to "fair[ly] and equitabl[y]" advance their careers. *Schlesinger*, 419 U.S. at 508.

Finally, Meland's assertion that SB 826 "foster[s] the misguided belief that women cannot compete on their own," AOB 26, is not supported by the record. On the contrary, the evidence demonstrates that there were tens of thousands of women who were eminently qualified to serve on California's boards before 2018, but were unable to do so because of a gender-biased selection process that prevented them from competing at all. While our society has made great strides with respect to women in the workplace in the last 50 years, when it comes to boardrooms in the State's publicly held corporations, it remained the case before the passage of SB 826 that the "job market [was] inhospitable," as result of "overt discrimination" and the "male-dominated culture." *Kahn*, 416 U.S. at 353.

B. Meland Will Not Suffer Irreparable Harm Absent a Preliminary Injunction

Meland also cannot make a clear showing of irreparable harm. *See Garcia*, 786 F.3d at 740.[24] To secure a preliminary injunction, a plaintiff "must do more than merely allege imminent harm sufficient to establish standing; a plaintiff must *demonstrate* immediate threatened injury[.]" *Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1022 (9th Cir. 2016) (citation omitted). "The smaller the probability of a plaintiff's success, the greater must be the showing of irreparable harm." *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005).

As explained above, Meland cannot claim irreparable injury from the specter of penalties that cannot possibly be triggered by his conduct. The board is the entity responsible for nominating candidates to serve on the board; and because it has consistently nominated the same number of candidates as there are board seats, and because every nominee is also a shareholder, the board itself effectively controls who will be on the board. *See supra* pp. 26-28. While Meland might theoretically add additional candidates that he or other shareholders could vote on, Meland has not introduced admissible evidence indicating that he has done so or plans to do so in the future; and even if he could, his small number of votes would not be enough to change the outcome of the election. *See supra* pp. 28-29; *see also*

[24] The district court did not address irreparable harm, finding that Meland was not likely to succeed on the merits. 1-CER-22.

Herb Reed Enterprises, LLC v. Fla. Ent. Mgmt., Inc., 736 F.3d 1239, 1250 (9th Cir. 2013) (rejecting claims of irreparable harm when not "grounded in any evidence or showing"). To the extent that Meland claims an unfounded, subjective fear of penalty, any injury he suffers is self-inflicted. "[S]elf-inflicted wounds are not irreparable injury." *Al Otro Lado v. Wolf*, 952 F.3d 999, 1008 (9th Cir. 2020) (citation omitted).[25]

C. The Balance of the Equities and the Public Interest Weigh Heavily Against Granting a Preliminary Injunction

The district court did not abuse its discretion in finding that the balance of the equities did not favor granting a preliminary injunction, and that a preliminary injunction would not serve the public's interest. "An injunction is a matter of equitable discretion." *Winter*, 555 U.S. at 32. At this early stage in the litigation, "[t]he assignment of weight to particular harms is a matter for district courts to decide." *Earth Island Inst. v. Carlton*, 626 F.3d 462, 475 (9th Cir. 2010). In *Earth Island Institute*, this Court affirmed a district court's finding that the public interest

[25] Should the Court enjoin SB 826's diversity requirements, it should allow its reporting provisions to remain. By including separate provisions to address diversity reporting and board diversity, *compare* Cal. Corp. Code § 301.3(a)-(b) *with id.* § 301.3(c)-(d), the Legislature intended these provisions to operate independently, and the potential invalidity of one provision should not affect the others. Meland does not challenge the reporting provisions of SB 826, *see generally* 3-CER-621-27, and he bears the burden to justify the scope of any equitable relief he seeks. *Winter*, 555 U.S. at 20.

did not support a preliminary injunction because "the district court balanced all of the competing interests at stake." *Id.*

The same result is appropriate here. As the district court concluded, the only argument that Meland made with respect to the equities is that SB 826 is unconstitutional; but as the district court concluded, SB 826 "is not clearly unconstitutional." 1-CER-22. Indeed, Meland's claims on the equities were especially weak: his only claim of harm was that SB 826 "'requires or encourages' him," *Meland*, 2 F.4th at 845, to vote for female directors of a company in which he owns less than a 0.001 percent share—purchased just months before filing this lawsuit. *Supra* pp. 18-19.

"On the other side of the ledger," enjoining SB 826 at this early stage would "deny highlight qualified women who are eager and seeking to join corporate boards the opportunities provided by SB 826," a result that would be especially inequitable in light of the evidence that the law "is clearly working." 1-CER-22-23. Enjoining SB 826 would also deprive the State of the many benefits that board diversity brings to California residents, retirees, and the State overall. *See* Cal. Stat. 2018, ch. 954 § (1)(a) (more women on boards will "boost the California economy" and protect "California taxpayers, shareholders, and retirees"); *see also, e.g.*, 2-CER-118-30. As the district court explained, the public interest would be disserved by enjoining enforcement of a law that was designed to help—and *has*

helped—qualified women break through "the glass ceiling [that] had been bolted shut with metal." 1-CER-22.

CONCLUSION

This Court should remand the case with instructions to dismiss Meland's suit for lack of Article III jurisdiction. If this Court reaches the merits, it should affirm the district court's order denying Meland's motion for a preliminary injunction.

Dated: March 28, 2022

Respectfully submitted,

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STATEMENT OF RELATED CASES

The Secretary is not aware of any related cases, as defined by Ninth Circuit Rule 28-2., that are currently pending in this Court and are not already consolidated here.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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