No. 22-15149

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CREIGHTON MELAND,

Plaintiff-Appellant,

v.

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

Defendant-Appellee.

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

APPELLANT'S REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

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

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INTRODUCTION

The Woman Quota is exactly the type of policy that the Equal Protection Clause was designed to protect against. It categorically excludes one group from eligibility for certain positions because of the immutable characteristics they were born into, and it does so by imposing a rigid, arbitrary, overbroad, and perpetual quota on private parties. The result is mandatory sex-based balancing for its own sake that cannot be described as remedial in any ordinary sense of the word. For these two unambiguous reasons—the wildly unconstitutional means (a quota) and the indisputably unconstitutional ends (sex-based balance)—SB 826, on its face, violates the Equal Protection Clause.

Perhaps because the Quota is so difficult to defend on the merits, the Secretary now argues for the fourth time that Meland lacks standing. But as this Court held in *Meland v. Weber (Meland I)*, 2 F.4th 838 (9th Cir. 2021), Meland is injured because SB 826 attempts to coerce him into making sex-based choices. Meland need not accede to that demand to suffer an Article III injury. Contrary to the government's argument, it does not matter whether he bends to the coercion by voting for an unwanted candidate or instead flouts it and withholds his vote from candidates he does not endorse. The fact that SB 826 attempts to coerce him, establishing an unequal playing field for board members in the process, is an injury that gives Meland standing to challenge the Woman Quota.

I. Meland has standing

Standing was resolved by *Meland I*, 2 F.4th 838. There, this Court affirmed that laws that "require[] or encourage[]" people to act on the basis of sex inflict an Article III injury. *Id.*; *see also Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 707 (9th Cir. 1997) (contractor had standing to challenge a law requiring bidders to engage in sex-based subcontracting); *RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1056–67 (9th Cir. 2002) (shareholders of a corporation had standing to challenge a law "aimed at forcing [them] to discriminate against members of [a] protected class"); *cf. Bras v. California Public Utilities Commission*, 59 F.3d 869, 875 (9th Cir. 1995) (plaintiff has standing to challenge a law that "authorizes or encourages" discriminatory measures). On its face, SB 826 "requires or encourages" shareholders like Meland to vote on the basis of sex and he therefore has standing to challenge it.

The Secretary argues that Meland lacks standing, however, because historically OSI elections have been uncontested.[1] Given that the corporation uses plurality voting rules, she says, Meland's vote will likely have no effect on the

[1] To be clear, OSI's Nomination and Governance Committee do not control who is nominated to the board. They control only who the *Committee* nominates, as well as who appears on the corporation's own proxy materials. 3-ER-466–69, 522. But shareholders may nominate their own candidates or may send out their own proxy materials if the Committee refuses to place an eligible candidate on its proxy card. *Id.* Moreover, while the Secretary states that nominees can vote for themselves, thus ensuring their election under plurality voting rules, there is no evidence in the record that all nominees are shareholders *prior* to being elected.

outcome of any future uncontested election and he therefore cannot claim that the law exerts any coercive pressure on him.[2] Appellee Answering Brief (Opp.) at 19, 21-22.

That argument misses the point. Meland is injured because he must vote under a law that requires him to act in a sex-conscious way. Even in uncontested elections, Meland has a choice whether to give or withhold his vote for each candidate. SB 826 "requires or encourages" him to vote according to sex. Regardless of whether the state's strongarming is effective, he is injured because the state is *attempting* to coerce him into discriminating at all, thereby creating an unequal playing field for both voters and nominees. *Cf. Monterey Mech. Co.*, 125 F.3d at 707 (a plaintiff is hurt "by a law requiring it . . . to try to discriminate"). That's exactly why the contractor in *Monterey Mechanical* had standing despite never having engaged in the encouraged discrimination, *id.* at 702, 707, or why the plaintiff in *Regents of University of California v. Bakke* had standing to challenge discriminatory

[2] While shareholders have rarely attempted to mount a contested election, it's not necessarily true that the next election will be uncontested. As the Secretary acknowledges, shareholders have twice attempted to mount contested elections, including once last year. Opp. at 20 n.8; *see also* 3-ER-469. Meland himself attempted to nominate a candidate, but his nomination was disqualified for failing to meet some of OSI's procedural rules. Opp. at 20 n.8. But it's reasonable to assume that he or others may attempt to nominate their own candidates again, either because OSI is not currently in compliance and a shareholder will seek to put forward a compliant nominee, or because a shareholder like Meland may put up an alternative candidate.

admissions criteria even if applying under neutral criteria would have nevertheless been futile, 438 U.S. 265, 281 n.14 (1978), or why the plaintiff in *Bras* had standing to challenge a *non-mandatory* goal that merely "authorize[d] or encourage[d]" discriminatory action. 59 F.3d at 875. A plaintiff in an equal protection case need not suffer any harm other than being subject to a law that tilts the scales. *Northeastern Fla. Gen. Contractors v. Jacksonville*, 508 U.S. 656, 666 (1993) ("the 'injury in fact' in an equal protection case . . . is the denial of equal treatment"); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (opinion of O'Connor, J.) ("The [set aside program] denies certain citizens the *opportunity to compete* for a fixed percentage of public contracts based solely upon their race." (emphasis added)). Because Meland must vote under a law that on its face requires or encourages shareholders to vote based on sex, he has standing to challenge it.

Under the Secretary's theory, shareholders only have standing if they own enough shares such that they know their vote will have an effect on the election and therefore feel subjectively coerced. But standing is not reserved for the Elon Musks of the world (and even Musk, Twitter's biggest shareholder, for example, holds just 9.2% of its shares).[3] Standing extends to all individuals directly subject to sex-based mandates.

[3]*See* NPR, *Elon Musk and the Fear of the Activist Investor*, April 11, 2022, https://www.npr.org/transcripts/1092079315.

Consider an analogy to political elections: voters would not be deprived of standing to challenge a law requiring the election of Democrats merely because they lived in a district that was going to vote Democrat anyway. As in other equal protection contexts, the injury is not the government succeeding in its coercion (*i.e.*, forcing you to vote for someone against your will). Nor is the injury the failure to get the person of your choice elected. It's being subject to an unequal law that "requires or encourages" you to discriminate.

The right to vote freely for the board member of one's choice is not different in kind from political voting. Shareholder elections are the "ideological underpinning" of corporate legitimacy. *See MM Companies, Inc. v. Liquid Audio, Inc.*, 813 A.2d 1118, 1126 (Del. 2003). In Delaware, where OSI is incorporated, "shareholder voting rights are sacrosanct," *EMAK Worldwide, Inc. v. Kurz*, 50 A.3d 429, 433 (Del. 2012), and the ability to vote for directors is a "fundamental governance right[.]" Thus, a shareholder is free to "exercise wide liberality of judgment in the matter of voting." *Ringling Bros.-Barnum & Bailey Combined Shows v. Ringling*, 29 Del. Ch. 610, 622 (1947). Individual corporate bylaws may give shareholders more or less ability to influence corporate boards, making individual boards more or less dynamic, but it would defy the body of corporate law to say votes don't matter at all. Even in uncontested elections, votes matter. As OSI's Rule 30(b)(6) witness testified, the Board considers the number of withheld votes

and the vote tallies in uncontested elections when making future nomination decisions. 3-ER-493-95.

Because SB 826 "requires or encourages" shareholders to vote on the basis of sex, thereby tipping the election in favor of the state's desired balance, Meland has standing to challenge it.[4]

II. The Quota fails intermediate scrutiny

The Secretary characterizes the Quota as a well-tailored and flexible floor. But it is rigid, arbitrary, overbroad, and perpetual, and therefore cannot withstand the "demanding" scrutiny required for sex-based classifications. *See United States v. Virginia*, 518 U.S. 515, 555 (1996). This Court should conclude, under de novo review, that the district court erred in concluding otherwise. *See* AOB at 14 (demonstrating why the appropriate standard is de novo review, rather than abuse of discretion).

A. The Quota is rigid

SB 826 is a quota, which by itself is constitutionally troubling and likely fatal. *See W. States Paving Co. v. Wash. State Dep't of Transp.*, 407 F.3d 983, 994 (9th Cir. 2005) (quotas are the "hallmark" of an impermissible "inflexible affirmative action program"); *Coral Constr. Co. v. King Cty.*, 941 F.2d 910, 924 (9th Cir. 1991)

[4] For the same reasons, he would suffer irreparable harm at the next election absent an injunction.

(holistic requirements are "less problematic from an equal protection standpoint because they treat all candidates as individuals rather than as members of their group") (citing *J.A. Croson Co.*, 488 U.S. at 507–08); *see also Grutter v. Bollinger*, 539 U.S. 306, 334 (2003) ("[t]o be narrowly tailored, a race-conscious admissions program cannot use a quota system"). While quotas have never been held *per se* unconstitutional in the context of sex-based laws, they are inherently ill-tailored. And this quota lacks the good-faith or opt-out provisions characteristic of sex or racial preferences upheld in the past. *See, e.g.*, *Coral Constr. Co.*, 941 F.2d at 924; *Fullilove v. Klutznick*, 448 U.S. 448, 487 (1980).

The Secretary argues that the Quota is not unconstitutionally rigid because it sets a "floor" that can be exceeded and because corporations are free to add seats to their boards to meet the law's requirements. Opp. at 32. The Supreme Court rejected that argument in *Bakke* and this Court should do the same. Under *Bakke*, 438 U.S. at 319, even "floors" constitute unconstitutional quotas, since they deny some candidates "the chance to compete with applicants from the preferred groups for purposes of the [relevant] seats." The Secretary's argument also seems to undercut the law's effectiveness, since it would mean a corporation could add seats with impunity while maintaining the disparities the Secretary seeks to remedy.

The Secretary fares no better when she argues that good-faith and opt-out provisions are not constitutionally mandated. Opp. at 45 n.19. Whether required or

not, the absence of good faith or opt-out provisions is one of the several characteristics which make SB 826 woefully under-tailored to survive intermediate scrutiny.

B. The Quota is arbitrary

The Secretary never explains how the Quota's numerical requirements relate to remedying discrimination. In fact, any truly remedial program would require less of a preference as female membership increases. Moreover, its remedial design is undercut by both the Bill's text and the Secretary's evidence, which show that larger boards are less likely to be dominated by males. *See* SB 826; *see also* 2-ER-368–69, 372–75. Smaller boards, then, should have the highest quotas. Yet under SB 826, four member boards need only include one woman, while five member boards must have at least two women, and boards of six or more must have three female members. Thus, the ever-increasing quota is both non-remedial (by definition) and tailored to address the most sex-diverse companies (by design).

Rather than addressing the Quota's seemingly arbitrary requirements in terms of their remedial purpose, the Secretary instead asserts that the Quota's requirements are related to establishing a "critical mass" of women on corporate boards. Opp. at 48. The Secretary cannot have it both ways: either the Woman Quota is designed to remedy discrimination or it is designed to achieve a critical mass on corporate boards. A "critical mass"—as it is used in equal protection law—refers to the number

of minority students necessary to realize "the benefits to be derived from a diverse student body." *Grutter*, 539 U.S. at 308. But that rationale has nothing to do with remedying discrimination. Indeed, the rub of cases that permit racial preferences to achieve a "critical mass" of diverse students in higher education is that they are *not designed* to remedy past discrimination. A "critical mass" designed to remedy past discrimination is precisely what is prohibited by *J.A. Croson Co.* and *Bakke*. If SB 826 is related to remedying discrimination, its requirements must be related to remedying discrimination, *not* to achieving the number of women the California Legislature believes necessary to provide certain benefits. This fact, combined with the Secretary's continued failure to explain how the Quota's requirements relate to the relevant labor pool (or to even define that pool), is yet another reason the law fails the tailoring requirement.[5]

C. The Quota is overbroad

SB 826 applies to the board of every publicly held corporation across every industry across the entire state without any regard to local differences, industry differences, or whether there is any history of discrimination at a given corporation.

[5] The Secretary offers that there are "tens of thousands of board-ready women," Opp. at 35, that women comprise 25% of C-suite positions, and that women hold half of all graduate degrees, *id.* at 47, but that still provides no explanation of what, exactly, is the relevant labor pool for purposes of all corporate boards or how to determine whether the seemingly random quota relates to remedying discrimination.

This is plainly overbroad and exceeds even the broadest sex-based remedial plans that have been reluctantly countenanced by this Court.

The Secretary argues that the Quota is "narrow" because it "only" applies to publicly held corporations and not *all* registered corporations in the state of California. Opp. at 36. First, that argument further reveals the arbitrariness of SB 826, since the Secretary's evidence shows that non-publicly held companies actually have larger sex-disparities. 2-ER-108.

Second, the Secretary uses the wrong denominator. Any law could be considered narrow if you define the relevant sector broadly enough. SB 826 may be narrow compared to a quota on every single business in the state. The Quota is overbroad, however, because it applies equally to *all* publicly held corporations, which consist of vastly different businesses of different sizes in different industries, all of which have varying degrees of representation and different histories with regards to women in the workplace. For example, among the 50 publicly held corporations with the lowest revenue, women held 8.4% of director seats; among the 50 companies with the highest revenue, women held 23.5% of director seats; and all 50 had at least one woman on their board. *See* 2-ER-368–69, 372–75 (noting important distinctions "based on the size of company" and stating that "smaller companies generally, and microcap companies specifically," had fewer women than

larger companies); *see also* 2-ER-107 (twice as many small California corporations had no women on their boards as large companies).

Female board representation also differs significantly by region of the state, with as much as a 9% difference in female representation between Los Angeles and San Francisco. *Id.* There are also differences between industries. The percentage of female directors differs widely, from 13% in healthcare to 28% in utilities. *See* 2-ER-93. In 2018, women secured 38% of seats on consumer boards, 37% of seats in the industrial sector, and 48% of seats in financial services.[6] Yet SB 826 applies to all corporate boards equally, differing only based on the size of the board (in fact, irrationally increasing with the board's size). Without taking these differences into account, the Quota will necessarily grant preferential treatment to women even where there is no history of sex-based discrimination.

The Secretary dismisses these arguments by saying whatever the differences among corporations, she believes that representation among all corporations is low.[7]

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[6] *See* Heidrick & Struggles, *Board Monitor U.S. 2019*, at 13, *available at* https://www.heidrick.com/-/media/heidrickcom/publications-and-reports/board_monitor_us_2019.pdf.

[7] She also claims that the supposed existence of widespread discrimination defeats a facial claim. Opp. at 51. But SB 826 is facially unconstitutional not only because the Secretary lacks the requisite evidence of discrimination, but also because it uses a rigid and perpetual quota that is inherently ill-tailored to any legitimate remedial purpose. For this reason, it cannot be constitutionally applied to any industry or corporation, even if for a legitimate remedial end, and is facially unconstitutional.

That misses the point. Representation differs widely among the covered companies. Because the Quota applies equally to all of them, it is overbroad.

D. The Quota is perpetual

If remedial measures outlive their purpose, they transform into a permanent mandate to engage in sex-based balancing. Some courts have therefore held that equal protection requires "the development of gender-neutral selection procedures" to prevent "a potentially indefinite cycle of discrimination." *Mallory v. Harkness*, 895 F. Supp. 1556, 1581 (S.D. Fla. 1995); *see also F. Buddie Contracting Co. v. City of Elyria, Ohio*, 773 F. Supp. 1018, 1031 (N.D. Ohio 1991); *Back v. Carter*, 933 F. Supp. 738, 759 (N.D. Ind. 1996). SB 826 is not properly tailored because it lacks any end date.

The Secretary argues, paradoxically, that no end date is required because SB 826 has been "effective." Opp. at 52. That's exactly the point. If SB 826 is effective at remedying discrimination, it must have an end date so that it does not continue to offer one sex opportunities at the expense of another beyond its purported remedial goal.

She also argues that this Circuit and the Supreme Court have never *required* remedial measures to include an end date[8] and she finds the out-of-circuit precedent

[8] Notably, in *Assoc. Gen Contractors of Cal.*, 813 F.2d at 942, this Court did warn that the government may not "ignore the substantial progress women have made and

"unpersuasive." Opp. at 51. But as a matter of common sense, quotas must contain an end date to ensure that "members of the gender benefited by the classification actually suffer a disadvantage related to the classification." *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 728 (1982). Tailoring is constitutionally required, and SB 826's lack of an end date demonstrates a poor means-ends fit. The Secretary's repeated attempt to dismiss each critique as "not constitutionally required" ignores that each critique shows a profound lack of tailoring and is therefore another of the many reasons the law fails intermediate scrutiny.

E. The Quota impermissibly purports to remedy societal discrimination

The Supreme Court has warned that remedying societal discrimination (rather than intentional government discrimination) could justify remedial measures for any aggrieved group stretching far back into history without limit. *Bakke*, 438 U.S. at 297; *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986). A "generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy," let alone a generalized assertion of discrimination across society. *J.A. Croson Co.*, 488 U.S. at 498; *Coral Constr. Co.*, 941 F.2d at 917 (using "data of 'societal discrimination'" for the "factual basis for an MBE program" is

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continue to make in business and the professions," thereby implying that remedial goals cannot outlast their purpose.

"impermissible"). Yet here, the Secretary relies not on any identifiable discriminatory actions, but instead on broad allegations of societal bias against women. *See, e.g.*, 2-ER-114–118, 170–71. As explained in the opening brief, this justification goes far beyond anything previously recognized by the Supreme Court.

The Secretary counters that SB 826 is not intended to remedy societal discrimination writ large, but societal discrimination on corporate boards. Opp. at 53. Even if that wordplay had purchase, the Secretary lacks the evidence to prove it. The Secretary may *intend* to remedy societal discrimination in one sector, but her evidence of discrimination consists entirely of allegations of societal bias *generally*, or at best, societal bias against women in the workplace. Freewheeling allegations of societal bias, whether confined to bias in the workplace or not, leave courts with little guidance as to how to judge the scope of discrimination being remedied, to determine whether the remedial measures are adequately tailored, or to ascertain when the remedial measures are no longer needed. They also treat women as interchangeable members of a group, requiring measures favoring some women to correct discrimination against others. And that's exactly why the Supreme Court has rejected them as a legitimate basis for remedial measures in the context of race. *Bakke*, 438 U.S. at 297; *Wygant*, 476 U.S. at 276; *J.A. Croson Co.*, 488 U.S. at 499.

The Secretary cites three cases from the 1970s—before *Hogan* or *United States v. Virginia* were decided— *Schlesinger v. Ballard*, 419 U.S. 498 (1975), *Kahn*

v. Shevin, 416 U.S. 351 (1974), and *Califano v. Webster*, 430 U.S. 313 (1977), for the proposition that the government enjoys "broad" power to remedy discrimination—including societal discrimination. But not one of them actually makes her point.

In *Schlesinger*, 419 U.S. 498, the Court upheld a more lenient standard for military discharges for women than for men. Under the policy, women were given more time of commissioned service before mandatory discharge for want of promotion. *Id.* Given the "demonstrable fact" that the Navy had previously imposed combat and sea duty restrictions on women, which put women at a disadvantage in competing for promotions, the Navy could offer women more time for promotion before discharge. *Id.* at 508. To underscore the point, the Court noted that the Navy gave no such leniency in corps where male and female lieutenants were similarly situated. *Id.* at 509. Rather than supporting the Secretary, *Schlesinger* illustrates exactly when remedial measures are appropriate: when there has been identifiable government discrimination and the remedial measures are tailored specifically to benefit those previously discriminated against.

Kahn, 416 U.S. 351, concerns tax exemptions, and the Court afforded the government broad discretion to craft its policies. The Court upheld a statute that gave widows, but not widowers, a $500 exemption from property taxation. *Id.* Subjecting the case to what was essentially rational basis review, the Court held that a state tax

law is "not arbitrary although it 'discriminate(s) in favor of a certain class . . . if the discrimination is founded upon a reasonable distinction, or a difference in state policy,' not in conflict with the Federal Constitution." *Id.* at 355 (citation omitted). Because it was a case involving tax preferences and evaluated under rational basis scrutiny, it provides little guidance for this case.

In *Califano*, 430 U.S. 313, the Court upheld a provision that allowed women to exclude three more years of their 'lower earning years' than men for purposes of calculating old-age insurance benefits. *Id.* at 315. Recognizing the pervasive discrimination of the time, the Court held that the distinction was a permissible governmental remedial measure. *Id.* at 317. This limited measure, which had actually been repealed by the time the case reached the Supreme Court, *id.* at 320, and which related to the calculation of government benefits, is a far cry from a permanent employment quota imposed on private parties. First, it was a remedial measure imposed on the government itself, not on private parties, and it had already concluded by the time the case reached the Court. Second, the context is directly relevant. This was a time when Congress had lowered the retirement age for women to 62, while men's retirement age was 65, given the serious historical lack of opportunity for women. Such a thing nowadays would be unthinkable, not only because the status of women in the workplace has drastically improved since the 1960s, but because such a measure would be seen as deeply patronizing.

In sum, SB 826's broad reliance on societal discrimination exceeds any remedial measure countenanced by the Supreme Court.

F. Availability of sex-neutral alternatives

Given that the Secretary's evidence of discrimination repeatedly contends that board disparities result from the opaque and insular board member nomination process, 3-ER-391–94, the Legislature should have implemented measures that make the process more transparent before resorting to a mandatory and sex-based perpetual quota. The Secretary is correct that the government need not try *every* neutral alternative before resorting to sex-based measures. Opp. at 53. But her failure to consider the most obvious and relevant alternative is yet another a reason the law fails the tailoring requirement.

G. The Quota relies on and creates stereotypes

SB 826 and the declarations the Secretary submitted in support of it overwhelmingly rely on "overbroad generalizations about the different talents, capacities, or preferences of males and female." *United States v. Virginia*, 518 U.S. at 517. For example, the bill argues that more female representation is needed because women are more risk-averse and have certain ideas about "corporate sustainability," which supposedly benefits corporations. *See* SB 826.

The Secretary argues that these statements do not rely on stereotypes about *women*, and instead rely on stereotypes about *boards* that have more women on

them. Opp. at 54. That's a fun semantic game. It's like a Giants fan claiming that saying "stadiums with Dodgers fans are more annoying" is a statement about the stadium and not about the Dodgers fans. In any event, the Secretary's argument is contradicted by the declarations she submitted, which state that women (not women-led boards) have a transformational leadership style, 2-ER-329–30, that women are more rule-following than men, 2-ER-196, and that men only hire other men with whom they attend sports games (which, one declarant notes, is a "gendered" activity). 3-ER-391. The Secretary's stereotyping of women far exceeds any evidence she has of corporate boards doing the same.

The entire lesson of the Supreme Court's equal protection jurisprudence is that states must treat women as individuals, not as members of a homogeneous group. *See, e.g.*, *United States v. Virginia*, 518 U.S. at 517 (military style single-sex education could not be justified based on the generalization that it suited one sex better); *Craig v. Boren*, 429 U.S. 190, 204 (1976) (attempting to prove sex differences through statistics "is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause"); *Hogan*, 458 U.S. at 729 (sex-based set asides at a nursing school invalidated in part because it would "tend[] to perpetuate the stereotyped view of nursing as an exclusively woman's job"). That's not to say that men and women are not at all

different; it's to say that not all women (and not all men) are the same. Therefore, the state may not rely on generalizations to exclude one sex from opportunities.

In addition to relying on stereotypes, the Quota runs the risk of creating the stereotype that women are "quota hires." "A thin line divides governmental actions that help correct the effects of invidious discrimination from those that reinforce the harmful notion that women need help because they can't make it on their own." *Associated Gen. Contractors of California, Inc. v. City & Cty. of San Francisco*, 813 F.2d 922, 940 (9th Cir. 1987). The Secretary, however, states that there is nothing in the record proving SB 826 is having this effect. Opp. at 54. The Secretary need only look in the mirror. She credits the whole of women's recent achievements to SB 826, rather than the individual merit of those women. The Secretary does so even though the uncontroverted evidence shows that women were already securing nearly half of open board seats before the law went into effect.[9] SB 826 is "working," she says. Opp. at 58. The question is what is it working to do? Because of its poor tailoring, it's not working to remedy discrimination in any meaningful sense. Instead it's

[9] *See, e.g.*, *U.S. Board Diversity Trends in 2019*, Harvard Law School Forum on Corporate Governance, https://corpgov.law.harvard.edu/2019/06/18/u-s-board-diversity-trends-in-2019. Another study shows women secured 29.4% of seats in 2017, and 35.6% of seats in 2018. *See Equilar Q3 2018 Gender Diversity Index*, https://www.equilar.com/reports/61-equilar-q3-2018-gender-diversity-index.html. Yet another shows that in 2018, women secured 38% of seats on consumer boards, 37% of seats in the industrial sector, and 48% of seats in financial services. *See* Heidrick & Struggles, n.5, *supra*.

working to create the state's desired balance. And in the meanwhile, it's suggesting that women need help in every boardroom and are only successful because of that help. This is yet another reason the Quota violates the Constitution's guarantee of equal protection of the laws. *Assoc. Gen. Contractors of Cal.*, 813 F.2d at 940.

III. The Quota exceeds anything previously allowed by this Court

The Woman Quota exceeds anything previously allowed by this Court. The County-wide public contracting preference upheld in *Coral Constr. Co.*, 941 F.2d at 932, for example, was far narrower and more flexible than SB 826. It allowed public entities to reduce the amount of the required set-aside depending on feasibility and it applied only to County-wide public contracting. SB 826, by contrast, allows no flexibility and applies to all publicly held corporations in all industries across the entire state.

Associated Gen. Contractors of Cal., 813 F.2d at 941, is also more narrow. While broad, the remedial measures in that case applied only to public dollars going towards public contracting in the city of San Francisco and they sunset after the city reached its goal. *Id.* at 924. And while the Court upheld the challenged law, it emphasized that women had only recently been allowed full access to the workforce and therefore it was reasonable to defer to the government's assertion that women were disadvantaged in most fields. *Id.* at 939–40. Still, this Court instructed the city

not to "ignore the substantial progress women have made and continue to make in business and the professions." *Id.* at 942. That was 35 years ago.

The Secretary responds, without elaboration, that Meland's arguments are "unpersuasive." Opp. at 42. She also argues that SB 826's perpetual statewide quota is somehow *narrower* than the flexible public contracting programs upheld 35 years ago under vastly different circumstances. That defies reality. Upholding SB 826 would require extending *Assoc. Gen. Contractors* and *Coral Construction* to authorize the government to impose perpetual hiring quotas on private actors across every industry across the entire state. Indeed, upholding SB 826 would likely justify a quota any time there is a disparity accompanied by allegations of societal bias. For intermediate scrutiny to remain meaningful, this Court should decline to allow such a broad and ill-tailored law to stand.

IV. The Secretary obscures the figures regarding female representation

The Woman Quota violates the Equal Protection Clause based on tailoring alone. But just a word about the Secretary's figures:

The Secretary's portrait of disparities are only half of the story. For example, rather than focusing on *current* hiring patterns, which demonstrate that women were at near parity in hiring before the Quota was enacted, *see* n.4, *supra*, the Secretary focuses on disparities in gross representation. Rather than noting that among the 50 California companies with the highest revenue, all 50 had at least one woman on

their board (and in fact, 11% of all California companies had 3 or more women on their boards), 2-ER-368–69, 371–74, she notes that 48% of small corporations lacked a single woman director.

She also seeks to ignore non-discriminatory reasons for lasting disparities, including lower MBA program graduation rates for women (33% in 1986 and 40% in recent years), 2-ER-108–09, 326–7, or lack of representation at the C-suite level (25% of positions held by women, with most of that coming from the Chief Marketing Officer position).[10] 2-ER-108–12. She claims that from 2006–2018, the percentage of seats held by women increased "only slightly," Opp. at 5, though it increased nearly 100% (from 8.8% to 15.5% of seats). And she dismisses Meland's more optimistic figures by characterizing them as "partially post-enactment data," *id.* at 50, even though the only post-enactment studies he cites are a summary of board representation in 2018, and a Harvard & Equilar study through mid-2019. *See* Opp. at 8 nn.8 & 9. (For reference, SB 826 was passed on the last day of September in 2018 and didn't go into effect until the *end* of 2019.). The Secretary seeks to distract from her own lack of evidence by accusing Meland of presenting no evidence of his own at the preliminary injunction stage, even though it is the Secretary, and not Meland, who carries the burden of justifying the Quota. *United*

[10]If the Secretary seeks to address discrimination at the C-suite level, she should address that at the C-suite level.

States v. Virginia, 518 U.S. at 533 ("The burden of justification is demanding and it rests entirely on the State.").

But ultimately, SB 826 fails because its *means* fail. Even assuming the factual predicate of past intentional discrimination exists, a quota is a drastic and divisive remedy that denies people opportunity solely on the basis of the characteristics they were born with. It's a remedy that is the very opposite of equal protection before the law. And it is a remedy that necessarily devolves into sex-balancing for its own sake. The District Court erred when it disagreed. [11]

CONCLUSION

Appellant respectfully requests this Court reverse the denial of preliminary injunction.

DATED: April 13, 2022.

Respectfully submitted,

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[11]For reasons discussed in the opening brief, Meland also satisfies the other preliminary injunction factors. The Secretary's irreparable harm arguments overlap with her erroneous standing arguments. And the balance of the equities favors enjoining an unconstitutional law, despite whatever benefits the Secretary thinks the mere fact of adding more women (who were already at parity in hiring) provides to corporate boards.

FORM 8. CERTIFICATE OF COMPLIANCE FOR BRIEFS
9th Cir. Case Number 22-15149

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