No. 22-15822

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

National Center for Public Policy Research,

Plaintiff – Appellant,

v.

Shirley N. 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
No. 2:21-cv-02168
Honorable John A. Mendez, District Judge

APPELLANT'S OPENING BRIEF

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INTRODUCTION

Over thirty years ago, this Court warned that "[t]he notion that women need help in every business and profession is as pernicious and offensive as its converse, that women ought to be excluded from all enterprises because their place is in the home." *Associated Gen. Contractors of California, Inc. v. City and Cnty. of San Francisco*, 813 F.2d 922, 941 (9th Cir. 1987). Yet in 2018, California passed a "minimum gender requirement" that applies to every boardroom of every publicly held corporation, across every industry, throughout the entire state in perpetuity.

Despite the breadth and scope of this quota, the court below dismissed Appellant's facial challenge on the basis that SB 826 might be constitutionally applied to some businesses. That was error. The quota cannot be constitutionally applied under any circumstances due to its attempt to achieve balance for the sake of balance rather than remedying concrete acts of discrimination, its use of a rigid quota, its application to all publicly traded companies regardless of industry or size, its perpetual nature, and its reliance on sex stereotyping. The district court also improperly conflated the standard for a motion to dismiss with its

analysis of the likelihood that Appellant's challenge would succeed on the merits. Construing all facts in favor of NCPPR, Appellant stated a claim that SB 826, on its face, violates the Equal Protection Clause of the Fourteenth Amendment.

JURISDICTIONAL STATEMENT

This action arises under the Fourteenth Amendment to the United States Constitution pursuant to 42 U.S.C. § 1983. The district court had jurisdiction over this federal claim under 28 U.S.C. § 1331 (federal question) and 1343(a) (redress for deprivation of civil rights). Appellant's request for declaratory relief is authorized by the Declaratory Judgment Act, 28 U.S.C. § 2201. This Court has jurisdiction pursuant to 28 U.S.C. § 1291 as Appellant appeals from a final decision dismissing all of its claims which was entered on May 26, 2022. This appeal was timely filed on May 27, 2022, pursuant to FRAP 4(a)(1)(A).

STATEMENT OF THE CASE

a. Factual Background

In the last few years, California has enacted and implemented a pair of discriminatory boardroom quota laws. Under SB 826, all publicly held corporations headquartered in California are required to meet a

quota of female board members or face fines. ER 067–070, ¶¶ 1–12. Under AB 979, these companies are also required to meet an additional quota of "diverse" board members based on race and sexual orientation. ER 070–071 ¶¶ 14–17. These diversity quotas apply to all publicly held companies headquartered in California across every industry in perpetuity, regardless of whether there is any specific evidence of discrimination that would necessitate a government-mandated sex- or race-conscious remedy. ER 067 ¶ 1.

The Secretary must publish an annual report on the Office's website listing compliance with the diversity quotas. ER 071 ¶ 19. Publicly held companies that are headquartered in California must file an annual statement with the Secretary which discloses whether the company complies with the quotas. ER 071 ¶ 20. The Secretary is authorized to impose fines of up to $100,000 for a first violation and $300,000 for a second violation of each quota, with each seat improperly filled counting as a separate violation. ER 071 ¶ 22.

Appellant National Center for Public Policy Research (National Center) is a 501(c)(3) organization that supports free market solutions and opposes corporate and shareholder social activism that detracts from

the goal of maximizing shareholder returns. ER 068 ¶ 4. National Center believes that shareholders should vote for board members based on their individual talents and capacities and that quotas based on immutable characteristics are offensive and contrary to this goal, as well as to the Constitution. ER 069 ¶ 7. National Center owns shares in at least fourteen companies that are subject to California's diversity quotas. ER 068 ¶ 5. Some of the companies it invests in do not have the requisite number of diverse directors on their boards and will be subject to fines unless the shareholders vote according to the challenged quotas. ER 073 ¶ 35.

The Center puts forward around 25 shareholder proposals to the SEC a year which are intended to return focus to the company's bottom line rather than political pursuits. ER 068 ¶ 6. National Center intends to put forward shareholder proposals which would forbid consideration of characteristics such as race, sex, and sexual orientation in the selection of directors. *Id.* Contrary to these proposals, the diversity quotas impose a state-mandated requirement that publicly traded corporations and their shareholders consider race, sex, and sexual orientation in the selection of directors. ER 073 ¶ 34.

In order to achieve their goal, the diversity quotas must impact the behavior of shareholders like National Center, who elect the board at annual meetings. ER 072 ¶ 24. Some of the impacted companies that National Center invests in, such as Twitter, have adopted a majority voting standard for the election of directors, making them particularly responsive to shareholder votes and demands. ER 072 ¶ 27. National Center intends to vote on board members at upcoming annual meetings for the companies that it holds shares in. ER 072–073 ¶ 30. Shareholders may also submit names of candidates for election to the board of directors, ER 072 ¶ 28, and in the future, National Center plans to put forward candidates who support the Center's vision. ER 072–073 ¶ 30.

b. Procedural Background

National Center brought a challenge to SB 826 and AB 979 on November 22, 2021. ER 067. The Secretary filed a Motion to Dismiss on February 2, 2022, arguing that National Center failed to state viable facial claims and the claims were not yet ripe. ER 081. The district court ruled that Appellant's facial challenge to AB 979 was ripe and could proceed. ER 045:5–16, ER 065:5–17. However, it dismissed Appellant's facial challenge to SB 826. ER 045:2–4. The court did not issue a written

opinion. Instead, at hearing, it relied entirely on its earlier oral opinion dismissing a related challenge to the woman quota. *See* ER 045:12–16 ("for the same reasons that I granted and denied the motion to dismiss in the *Alliance for Fair Board Recruitment Case* … I am doing the same [here]").[1] That oral opinion, in turn, relied heavily on the court's decision to deny a preliminary injunction in a separate case challenging the quota, *Meland v. Weber*, No. 2:19-CV-02288-JAM-AC, 2021 WL 6118651 (E.D. Cal. Dec. 27, 2021). In the *Alliance* case, the court reasoned that the plaintiff could not state a facial claim because it had already ruled that the *Meland* plaintiff was unlikely to succeed on the merits of such a claim. *See Alliance* Hearing Tr. at 14:12–14; 15:18–16:2.

National Center then chose to voluntarily dismiss its challenge to AB 979 and brought this timely appeal to the dismissal of its claims against SB 826. On May 13, 2022, a state court ruled that SB 826 violates the state constitution, and on July 15, 2022, it entered a permanent injunction. The state's appeal, based on both jurisdictional issues and the merits, is ongoing.

[1] For this reason, Appellant's arguments are based largely on the transcript from *Alliance for Fair Board Recruitment v. Weber*, No. 2:21-cv-01951, ECF No. 73 (E.D. Ca. Jan. 11, 2022) [*Alliance* Hearing Tr.].

SUMMARY OF THE ARGUMENT

Appellant's challenge to SB 826 should not have been dismissed because the woman quota unconstitutionally discriminates based on sex and is deficient in significant respects that are apparent on its face. The law "authorizes and encourages" discrimination and does so for the impermissible purpose of achieving sex-balancing rather than remedying discrimination. Moreover, it imposes a rigid, arbitrary, and perpetual quota for every publicly held company headquartered in California regardless of industry, size, or evidence of discrimination. As a result, the quota is ill-tailored on its face. The fact that some companies currently meet the quota and therefore may not be required to discriminate does not save California's unlawful mandate, since the law still applies a coercive effect on each and every impacted company (and their shareholders) and its form is per se unconstitutional. The court below ignored these arguments, conflating Appellant's likelihood of success on the merits with the motion to dismiss standard. It also improperly converted the motion to dismiss into a ruling on the merits by considering evidence that was put forward in a different lawsuit. This Court must reverse.

STANDARD OF REVIEW

This Court must "review de novo a motion to dismiss for failure to state a claim under Rule 12(b)(6)." *Burgert v. Lokelani Bernice Pauahi Bishop Tr.*, 200 F.3d 661, 663 (9th Cir. 2000). In doing so, "all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party." *Id.* A district court may not dismiss "unless it appears beyond a doubt that [a] plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295 (9th Cir. 1998).

ARGUMENT

I. The District Court Erred in Ruling that SB 826 is Not Susceptible to a Facial Challenge

Appellant's challenge to SB 826 should not have been dismissed because the woman quota unconstitutionally discriminates based on sex and is deficient in significant respects that are apparent on its face. Appellant alleged that the woman quota "authorizes or encourages" each publicly traded corporation in California to select board members based on their sex rather than the merits of their qualifications. *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 711 (9th Cir. 1997); *Bras v. California Public Utilities Commission,* 59 F.3d 869 (9th Cir. 1995). It also alleged that the

law necessarily fails intermediate scrutiny because it does not further an important governmental interest and applies a rigid, arbitrary, and perpetual quota to all publicly traded corporations without consideration of industry, size, and location of the corporation. As a result of these significant deficiencies, SB 826 is inherently ill-tailored and unconstitutional in all its applications, and a facial challenge is proper whether or not each impacted company actually engages in discrimination to meet the quota.

A. Appellant Pleaded that the Woman Quota Does Not Further an Important Governmental Interest

National Center's facial challenge to SB 826 should not have been dismissed because National Center alleged that the woman quota does not further an important governmental interest. ER 074 ¶¶ 41-46. Under the Equal Protection Clause, sex-based classifications are subject to intermediate scrutiny, meaning they must be substantially related to an important state interest. *U.S. v. Virginia*, 518 U.S. 515, 555 (1996). Courts afford legislatures no deference when it comes to sex-based laws, *id.*, and the "demanding" burden of justifying them rests "entirely with the state." *Id.* at 533.

Policies that discriminate based on sex may only be justified as a means of remedying concrete discrimination. The government may neither pursue diversity nor sex-based balancing as an end in itself. *See, e.g.*, *Monterey Mech. Co.*, 125 F.3d at 714–15. The rights protected by the Fourteenth Amendment are "personal rights" that are "guaranteed to the individual," not groups. *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948); *see also Monterey Mech. Co.*, 125 F.3d at 714 (same). Thus, the "laudable desire to improve the social position of various groups perceived to be less well off" cannot be achieved "by ethnic and sex discrimination against individuals excluded by ethnicity or sex from these groups, in the absence of Constitutionally required justification." *Monterey Mech. Co.*, 125 F.3d at 714–15.

To the extent that the woman quota serves to guarantee gender parity or achieve other purported benefits of diversity rather than remedy concrete instances of discrimination or some other important objective, it is "discrimination for its own sake" and "facially invalid." *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 307 (1978). Because National Center alleged that the woman quota does not further an important interest, ER 074 ¶¶ 41-46, the burden is on the Secretary to

prove that the law was enacted to remedy past or present discrimination rather than to achieve balance for the sake of balance. Accordingly, it was improper to dismiss National Center's facial challenge at the motion to dismiss stage. This is particularly true because SB 826 itself never actually asserts it is aimed at remedying discrimination; instead, it points to disparities alone and describes a goal of increasing representation of women on corporate boards in order to achieve some sort of "critical mass" of female representation. SB 826 Prefatory Remarks (g)(1)(A). But disparities alone are not sufficient evidence of discrimination and achieving a "critical mass" has never been found to be an important governmental interest. *See Main Line Paving Co. v. Bd. of Educ.*, 725 F.Supp. 1349, 1363 (E.D. Pa. 1989) (the government must "detail the cause of th[e] disparity" or "say for certain that it was caused by gender discrimination, rather than other conditions in the general economy"); *Saunders v. White*, 191 F.Supp.2d 95, 132 (D.D.C. 2002) (the government must articulate how "raw data should be interpreted and the reasons why it supports a classification"); *Mallory v. Harkness*, 895 F.Supp. 1556 (S.D. Fla. 1995) (invalidating gender quota where the government "did not positively identify any discriminatory policy or

practices" and pointed solely to disparities). Accordingly, the burden is on the Secretary to prove the need for the woman quota on the merits and dismissal was improper.

B. Appellant Pleaded that the Woman Quota is Inadequately Tailored

The facial challenge to SB 826 should also not have been dismissed because the woman quota unconstitutionally discriminates based on sex and is deficient in significant respects that are apparent on its face. ER 074 ¶¶ 41-49. Sex-based remedial measures must be flexible, narrow, and time-limited. *See, e.g.*, *Mallory v. Harkness*, 895 F.Supp. 1556, 1562 (S.D. Fla. 1995); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 729 (1982); *Ensley Branch, N.A.A.C.P. v. Seibels*, 31 F.3d 1548, 1581 (11th Cir. 1994); *Back v. Carter*, 933 F.Supp. 738, 759 (N.D. Ind. 1996). SB 826 is none of those things. ER 074 ¶¶ 41-49. It is rigid, broad, and lasts in perpetuity, thereby creating a permanent interest in outright sex-based balancing. *Id.* Because SB 826 lacks any of these key characteristics, it is defective on its face and the district court erred in dismissing Appellant's challenge.

SB 826 also improperly incorporates stereotypes about female behavior (i.e., women have a distinctive leadership style, are risk-averse,

law-abiding, and have certain views about corporate responsibility), impermissibly relying on "overbroad generalizations about the different talents, capacities, or preferences of males and females." *U.S. v. Virginia*, 518 U.S. at 516.

1. SB 826 imposes a rigid quota, which is *per se* unlawful

SB 826 is a rigid quota that takes a number of seats off the table and reserves them for one sex without exception, barring evaluation of a candidate on a case-by-case basis and lacking opt-out, waiver, or good faith provisions. ER 074 ¶ 47; *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 508 (1989) (discussing these vital safeguards for ensuring that those benefitted have actually "suffered from the effects of past discrimination" and that innocent parties are not "unnecessarily burdened"); *Coral Const. Co. v. King Cnty.*, 941 F.2d 910, 924 (1991) (same).

Quotas are the "hallmark" of an impermissible "inflexible affirmative action program." *See W. States Paving Co. v. Wash. State Dep't of Transp.*, 407 F.3d 983, 994 (9th Cir. 2005). Quotas are also a "divider of society" and a "creator of caste." *J.A. Croson Co.*, 488 U.S. at 527 (Scalia, J., concurring) (citation omitted). Under Supreme Court

precedent the use of quotas is a per se illegitimate means of achieving any end. *See, e.g., Bakke*, 438 U.S. 265; *Gratz v. Bollinger*, 539 U.S. 244, 293 (2003); *Grutter v. Bollinger*, 539 U.S. 306, 309 (2003; *J.A. Croson Co.,* 488 U.S. at 499; *see also Coral Const. Co.*, 941 F.2d at 924 (upholding the challenged program because it was "simply not a quota").

SB 826 is impermissibly rigid in two ways. First, it makes sex determinative. It does not offer merely a preference, and it forbids consideration of board candidates on a "case-by-case basis." These are vital safeguards for ensuring that those benefitted have actually "suffered from the effects of past discrimination" and that innocent parties are not unnecessarily burdened. *J.A. Croson Co.*, 488 U.S. at 508; *Coral Const. Co.*, 941 F.2d at 924. Under SB 826, a candidate's background, perspective, experience, or skill set, are irrelevant unless the candidate is a woman. Such a regime cannot be squared with equal protection, which demands the government treat people as individuals—not as fungible members of a group. *See Coral Const. Co.*, 941 F.2d at 924 (holistic requirements are "less problematic from an equal protection standpoint because they treat all candidates as individuals rather than as members of their group") (citing *Croson*, 488 U.S. at 507–08).

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

Because SB 826 employs such a rigid quota, it is unlawful regardless of rationale behind it or the quantum of evidence the state might offer to support it. And even if that wasn't the case, the nature of the quota is one of many factors pointing to the law's lack of tailoring, and it was therefore inappropriate to dismiss this challenge at the motion to dismiss stage.

The Secretary has argued that SB 826 is not a quota. But SB 826 takes a number of seats off the table and reserves them for one sex

without exception. That's a quota. *Bakke*, 438 U.S. at 289, one of the several cases rejecting quotas, involved a minimum seat set aside like SB 826. When the school argued the policy was not a quota because its policy merely set a floor and did not establish fixed percentages by race, Justice Powell ruled that such a "semantic distinction" was "beside the point." *Id.* The relevant consideration was that the policy disqualified individuals with certain traits from competition for a certain number of seats. It told applicants that "[n]o matter how strong their qualifications . . . including their own potential for contribution to . . . diversity, they are never afforded the chance to compete with applicants from the preferred groups" for purposes of certain spots. *Id.* at 319. It's of no importance that a corporation can increase the size of its board, or can exceed the minimum. SB 826 establishes a quota. *See also F. Buddie Contracting Co. v. City of Elyria, Ohio*, 773 F.Supp. 1018, 1032 (N.D. Ohio 1991) ("[c]alling a quota a goal will not convert a quota into a goal. A quota is a quota no matter what it is called"). The Secretary can attempt to call a duck a chicken, but "[i]f it looks like a duck and quacks like a duck, it's a duck." Hearing Tr., ER 58:19–22.

2. Appellant alleged SB 826 is overbroad

Appellant also stated a facial claim because it alleged that SB 826 applies to all corporate boards throughout the state regardless of industry, size, and location of the corporation, making it fatally overbroad. In order for a sex-based remedial measure to survive scrutiny, courts require evidence of discrimination in the relevant field, narrowly defined. *See, e.g.*, *Coral Const. Co.*, 941 F.2d at 931 ("Some degree of discrimination must have occurred in a particular field before a gender-specific remedy may be instituted in that field."); *Hogan*, 458 U.S. at 729 (striking down woman-only state-sponsored nursing school where state "made no showing that women lacked opportunities to obtain training in the field of nursing or to attain positions of leadership in that field."); *Ensley Branch, N.A.A.C.P. v. Seibels*, 31 F.3d 1548, 1580 (11th Cir. 1994) (requiring the state to show discrimination in the relevant economic sector). Yet SB 826 applies to all corporate boards equally, differing only based on the size of the board. This is the case even though the law's prefatory remarks note that "[s]maller companies are much more likely to lack female directors," SB 826 Prefatory Remarks (e)(4), and there is good reason to anticipate significant differences between industries and

geographic areas. Without taking these differences into account, the quota will necessarily impermissibly grant preferential treatment to women even where there is no history of sex-based discrimination. Appellant pleaded SB 826 is overbroad and the Secretary lacks compelling evidence that such an expansive and one-size-fits-all quota was truly necessary.

3. Appellant alleged SB 826 lasts in perpetuity

Appellant also stated a facial claim because it alleged that SB 826 imposes a quota in perpetuity, regardless of how attitudes, treatment, and female representation shifts in future years. If remedial measures outlive their purpose, they transform into a permanent mandate to engage in sex-based balancing. Equal protection requires "at a minimum, the development of gender-neutral selection procedures," to prevent "a potentially indefinite cycle of discrimination." *See Ensley Branch, N.A.A.C.P.*, 31 F.3d at 1581; *F. Buddie Contracting Co.*, 773 F.Supp. at 1031; *Back*, 933 F.Supp. at 759; *Mallory*, 895 F.Supp. at 1562. Moreover, "[p]erpetual use of affirmative action may foster the misguided belief that women cannot compete on their own." *Ensley Branch, N.A.A.C.P.*, 31 F.3d at 1581–82. Yet SB 826 applies in perpetuity even to those companies

that were already in full compliance with the woman quota before it was enacted. Because it has no end date, the quota doesn't "cure [gender] imbalance," it "maintain[s] [gender] balance," and is defective on its face for that reason alone. *Johnson v. Transportation Agency, Santa Clara Cnty., Cal.*, 480 U.S. 616, 630 (1987).

4. SB 826 impermissibly relies on stereotyping

Finally, Appellant's facial claim should not have been dismissed because SB 826 explicitly incorporates stereotypes about female behavior (i.e., women have a distinctive leadership style, are risk-averse, law-abiding, and have certain views about corporate responsibility), and therefore impermissibly relies on "overbroad generalizations about the different talents, capacities, or preferences of males and females." *U.S. v. Virginia*, 518 U.S. at 516. As this Court warned, gender preferences "must not reflect or reinforce archaic stereotyped notions of the roles and abilities of women." *Assoc. Gen. Contractors of Cal.*, 813 F.2d at 940.

SB 826 is built on the foundation of "stereotyped notions of the roles and abilities of women." According to SB 826, women are risk-averse, law-abiding, and have a particular leadership style. SB 826 Prefatory Remarks (c)5(C). And by ignoring the very real progress women have

made in recent years, the quota creates a new stereotype in the process: the idea that women can't make it without government help. Perhaps in the future, this "gallantry" will reveal itself as it really is—"Victorian condescension." *See* Amicus Br. of the ACLU, 1976 WL 181333 at *18, *Craig v. Boren*, 429 U.S. 190 (1976) (No. 75-628) (authored by future-Justice Ruth Bader Ginsburg) (citation omitted).

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

based essentialism, even if intended as a compliment. *Associated Gen. Contractors*, 813 F.2d at 941. By relying on sex-based essentialism, SB 826 is defective to its. Granting the Secretary's motion to dismiss was improper.

C. The Possibility that Some Companies May Not Need to Discriminate Does Not Salvage the Woman Quota

The Secretary argued below that the woman quota is not susceptible to a facial challenge because some companies may not need to engage in discrimination to meet it.[2] For instance, the Secretary argued that some companies may not need to discriminate because their existing board composition satisfies the quota, or that some companies may be prompted to adopt sex-neutral policies that just so happen to

[2] It isn't entirely clear whether the district court embraced this argument. But in *Alliance*, the court did rely on the case of *United States v. Salerno*, 481 U.S. 739 (1987) and emphasized that "a plaintiff can only succeed in a facial challenge by establishing that no set of circumstances exists under which the Act would be valid, *i.e.*, that the law is unconstitutional in all of its applications." *Alliance* Hearing Tr. at 13:25–14:19. Reliance on *Salerno* was not well-founded. That case involved a due process challenge to the highly fact specific Bail Reform Act, and so rejecting a facial claim made sense in light of the "extensive safeguards" put in place to guarantee due process. *Salerno*, 481 U.S. at 752. By contrast, SB 826 applies a rigid, arbitrary, and perpetual quota to all publicly traded corporations without any "extensive safeguards" or fact specific analysis.

result in compliance with the quota. But this possibility cannot salvage the woman quota since the quota applies to all publicly traded corporations throughout the state and "requires or encourages" all of them to discriminate based on sex. *Meland v. Weber*, 2 F.4th 838, 846 (9th Cir. 2021) ("SB 826 necessarily requires or encourages individual shareholders to vote for female board members."). This discriminatory law is a "'palpable violation of the Fourteenth Amendment,' regardless of whether the persons required to discriminate would have acted the same way regardless of the law." *Monterey Mech. Co.*, 125 F.3d at 707 (quoting *Peterson v. City of Greenville*, 373 U.S. 244, 248 (1963)).

The court below recognized this with regard to National Center's challenge to California's race and sexual orientation quota, finding that the fact that some corporations may not need to make changes to comply with this quota or could comply with it without engaging in discrimination was irrelevant because the law "authorizes or encourages" each impacted corporations to use race in selecting board members. *Alliance* Hearing Tr. at 26:5–7; ER 058:16–059:10. The woman quota "authorizes or encourages" discrimination on the basis of sex in precisely the same way that AB 979's race quota encourages or requires

discrimination on the basis of race. The two quotas also suffer from all of the same facial deficiencies, such as applying to all industries throughout the state and lasting in perpetuity. There was therefore no basis for the court below to rule that the facial challenge to AB 979 could proceed while the facial challenge to SB 826 could not. Indeed, one of this Court's decisions that the district court relied on in allowing the facial challenge to AB 979 to proceed, *Bras*, 59 F.3d at 874, involved *both* discrimination on the basis of race *and* discrimination on the basis of sex. *Alliance* Hearing Tr. at 26:5–11, 29:7–11; *see also Monterey Mech.*, 125 F.3d at 704. Because the woman quota "authorizes or encourages" discrimination at each publicly traded corporation in California and does so in an ill-tailored and unlawful fashion, it is susceptible to a facial challenge.

II. The Trial Court Improperly Conflated the Likelihood of Success on the Merits with the Motion to Dismiss Standard

The district court committed clear legal error in this case by conflating the threshold question of whether National Center could bring a facial challenge with the party's likelihood of success on the merits. *See Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997) ("In reviewing the sufficiency of a complaint, the issue is not whether a

plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." (internal citation and quotation marks omitted)).

Rather than focusing on the pleadings and asking whether Appellant stated a claim for relief, the court below improperly focused on whether Appellant was likely to succeed on the merits. The court conflated the motion to dismiss and preliminary injunction standards, relying heavily on its earlier denial of a preliminary injunction in the *Meland* case. It reasoned that "for [the plaintiff's] complaint to go forward . . . you've got to allege that in all its applications SB 826 is unconstitutional. And I've already found that . . . the likelihood of success is that it's not unconstitutional." *See, e.g.*, *Alliance* Hearing Tr. at 9:6–12, 11:22–12:10, 14:12–14, 15:18-25. Whether SB 826 is likely to survive constitutional scrutiny is a question related to the merits, not to a motion to dismiss, where all of Appellant's allegations must be taken as true, including the allegations that "[t]he diversity quotas serve no important nor compelling government interest," ER 74 ¶ 41, that "Defendant does not have specific evidence of discrimination against racial minorities, women, or sexual minorities, sufficient to justify the diversity quotas,"

Id. ¶ 42, and that the law is not adequately tailored because it is a rigid, arbitrary, overbroad, and perpetual quota. *Id.* ¶¶ 47–49.

This error was compounded further because in *Meland*, the court reviewed "thousands of pages of 'extracurricular' documents" including expert declarations, deposition transcripts, and dozens of competing studies and concluded that SB 826 was likely to survive intermediate scrutiny because it "is substantially related to its remedial goal and likely to survive a facial challenge." *Meland v. Weber*, No. 2:19-CV-02288-JAM-AC, 2021 WL 6118651, at *2, *8 (E.D. Cal. Dec. 27, 2021). But those thousands of pages of documents were not before the court in this case, nor could the court properly consider this extensive record at the motion to dismiss stage. *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999 (9th Cir. 2018) (explaining that "a court cannot take judicial notice of disputed facts" at the motion to dismiss stage). Because the district court improperly converted the Secretary's motion to dismiss into a decision on the merits, its decision must be reversed.

CONCLUSION

This Court should reverse the decision granting the Secretary's motion to dismiss.

DATED: September 6, 2022.

Respectfully submitted,

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[ ] a party or parties are filing a single brief in response to multiple briefs; or

[ ] a party or parties are filing a single brief in response to a longer joint brief.

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[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/ *Anastasia P. Boden* **Date** September 6, 2022
ANASTASIA P. BODEN

CERTIFICATE OF SERVICE

I hereby certify that on September 6, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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The following transaction was entered on 09/06/2022 at 2:06:15 PM Pacific Daylight Time and filed on 09/06/2022

Case Name: National Center for Public Policy Research v. Shirley Weber
Case Number: 22-15822
Document(s): Document(s)

Docket Text:
Submitted (ECF) Opening Brief for review. Submitted by Appellant National Center for Public Policy Research and Appellee Shirley Weber. Date of service: 09/06/2022. [12534100] [22-15822] (Boden, Anastasia)

Notice will be electronically mailed to:

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