

Appeal 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
THE HONORABLE JOHN A. MENDEZ, JUDGE
CASE No. 2:19-cv-02288-JAM-AC

**BRIEF OF CALIFORNIA WOMEN LAWYERS AND
12 OTHER ORGANIZATIONS AS *AMICI CURIAE*
IN SUPPORT OF APPELLEE**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), the undersigned counsel certifies that the amici curiae are not subsidiaries of any other corporation and no publicly held corporation owns 10% or more of their stock.

/s/ Johanna Schiavoni

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STATEMENT OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 29

California Women Lawyers and 12 organizations submit this brief as amici curiae supporting Appellee California Secretary of State’s opposition to Appellant Creighton Meland’s appeal from the denial of his preliminary injunction motion. Fed. R. App. 29(a)(4). Both parties consented to the filing of this amici curiae brief and this brief is timely filed. Fed. R. App. 29(a)(2), (a)(6).¹

Amici provide the following statements of interest pursuant to Federal Rule of Appellate Procedure 29(a)(4)(D):

California Women Lawyers is a nonprofit bar association chartered in 1974 and its mission is “to advance women in the profession of law; to improve the administration of justice; to better the position of women in society; to eliminate all inequities based on gender, and to provide an organization for collective action and expression germane to the aforesaid

¹ Amici certify that no party’s counsel authored the brief in whole or in part; that no party or party’s counsel contributed money that was intended to fund preparing or submitting the brief; and that no person—other than the amici, their members, and their counsel—contributed money intended to fund preparing or submitting the brief. Fed. R. App. 29(a)(4)(E).

purposes.” <https://www.cwl.org/about>. At the time of its founding, only about 3% of lawyers in the state were female.²

California Women Lawyers was established by women lawyers and judges who suffered discrimination in the profession, were in many situations excluded from or treated with hostility by traditional bar associations, and were marginalized in the practice and the courtroom.³ At its origin, some women lawyers and judges attended a 1973 State Bar convention and coalesced around the need to resist the discrimination and derision they faced in the profession (and at that very meeting). They convened in San Diego in 1974 and chartered the first provisional board of California Women Lawyers.⁴

California Women Lawyers is the only statewide bar association dedicated primarily to advancing the status of women in the law and society. Given its legacy, California Women Lawyers focuses on legal issues having a significant impact on women, and seeks to ensure removal of gender barriers to women’s full participation in professional settings and in society.

² See *Lessons from Our Mothers*, video by California Women Lawyers Foundation (2010), https://www.cwl.org/index.php?option=com_content&view=article&id=40:cwl-foundation&catid=20:site-content&Itemid=135

³ *Id.*

⁴ *Id.*

Bar Association of the Bay Area, Queen’s Bench represents more than 260 women attorneys, law students, and judges in the San Francisco Bay Area; its mission includes furthering equal opportunity for all women, and in particular women in the law, and providing an organization for collective action germane to its purposes.

California Association of Black Lawyers represents 6,000 African-American attorneys, judges, law professors, and students who advocate for race and gender equity.

The Latina Lawyers Bar Association (“LLBA”) focuses on uplifting and supporting Latinas in the legal profession. LLBA recognizes that Latinas bring tremendous talents and perspective to the practice of law, yet face unique challenges as they attempt to succeed in the legal profession. LLBA seeks to further the diversity of its membership, bringing together attorneys from all levels of seniority, backgrounds, and areas of practice, and to partner with other bar and professional associations, to provide a rich network of resources for Latinas.

Lawyers Club of San Diego is a legal association with approximately 1,000 members established in 1972 with the mission “to advance the status of women in the law and society.” In addition to presenting educational programs and engaging in advocacy, Lawyers Club participates in litigation as *amicus curiae* where the issues concern

the advancement of status of women in the law and society. Lawyers Club joins this amicus brief because eradicating sex and gender-based discrimination is imperative to ensure that women can meaningfully advance in their chosen careers and society.

Marin County Women Lawyers represents women attorneys in Marin County and its mission includes promoting gender equality and furthering equal representation both on boards and throughout society.

Mexican American Bar Association of Los Angeles represents more than 500 attorneys in Los Angeles County and its mission is to empower the Latino community and to fight for the equal rights of all people, including furthering equal representation of women.

The National Conference of Women's Bar Associations is a unique organization consisting of women's bar and legal organizations; its 60 members represent more than 35,000 attorneys across the United States and Canada; and its mission is to advocate for equality, diversity, equity, and inclusion in the legal profession and in society by mobilizing and uniting women's bar associations to effect change in gender and race-based processes and laws by providing a national forum for exchanging ideas, best practices, and information to highlight and address inequality.

The National Women’s Law Center is a nonprofit legal advocacy organization and fights for gender justice—in the courts, in public policy, and in our society—and for the rights of all people to be free from sex discrimination, especially women of color, LGBTQ people, and low-income women.

Orange County Women’s Lawyers Association represents more than 300 attorneys in Orange County and its mission includes furthering equal representation or fighting gender discrimination or eliminating discrimination both on boards and throughout society.

Women’s Bar Association of the State of New York is the largest state women’s bar association in the country, with 20 regional Chapters across New York and more than 3,500 attorney members practicing in every area of the law; its mission is to advocate for the advancement of the status of women; to promote diversity, equity and inclusion in the legal profession and society; to ensure the fair and equal administration of justice; and to act as a unified voice for its members on issues of statewide, national, and international significance.

Santa Barbara Women Lawyers, founded in 1988, represents more than fifty lawyers and law students in the Santa Barbara legal community and its mission is to promote gender equality and the diverse interests of women lawyers.

Women Lawyers Association of Los Angeles has as its mission to promote the full participation in the legal profession of women lawyers and judges from diverse perspectives and racial and ethnic backgrounds, maintain the integrity of our legal system by advocating principles of fairness and equality, and improve the status of women by supporting their exercise of equal rights, equal representation, and reproductive choice.

While this brief focuses on supporting the efforts to ensure the inclusion of women, amici recognize the compounded effects of racial and other forms of discrimination, exclusion, and structural barriers to the participation on corporate boards faced by women of color, those from the LGBTQIA+ community, and women from other underrepresented communities, and the crucial need to also create solutions to address and remedy these additional barriers.

The brief sets out an independent perspective on the questions presented and provides additional context relevant to those questions, which will benefit the Court in its consideration of this case.

INTRODUCTION

The first two female corporate directors in the United States were Clara Abbott in 1900 and Lettie Pate Whitehead in 1934, both of whom had husbands who were their corporations' founders.⁵ Despite these early appointments, during the next 84 years public corporate boards remained bastions of men. By 2018 when SB 826 was enacted only a small percentage of California's public company board seats were held by women and 29% of California companies had *no* women on their boards of directors.⁶

In enacting SB 826, the Legislature found the gross underrepresentation of women on California public company boards results from discrimination based on pernicious stereotypes and "impenetrable walls of discrimination" inherent in the secretive and closed-network board appointment process. SER 564. The Legislature

⁵ Nicolena Farias-Eisner, *Gender Diversity in Corporate Boardrooms: Do Equal Seats Mean Equal Voices?*, 13 J. Bus. Entrepreneurship & L. 1, 1-2 (2019), <https://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1203&context=jbel>.

⁶ ER 374, ¶35. SB 826 provides that by the end of 2019, any covered corporations must have "a minimum of one female director on its board." Cal. Corp. Code § 301.3(a). By the end of 2021, covered corporations with four or fewer directors must have at least one female director, covered corporations with five directors must have at least two female directors, and covered corporations with six or more directors must have at least three female directors. *Id.* § 301.3(b)(1)-(3).

also found these barriers are self-perpetuating and will not be disrupted without governmental action. As the district court put it: “The Legislature determined that the law was necessary because the glass ceiling had been bolted shut with metal, shutting out thousands of qualified women.” ER 22. In response to these and other findings, the Legislature adopted SB 826 as a necessary step to remove the obstacles to women’s full participation in the boardroom and the global economy.

Meland challenged the law and sought a preliminary injunction. The district court concluded he did not meet his burden to show grounds for preliminary relief, finding the Secretary submitted strong, credible evidence of past discrimination warranting the need for remedial action and that SB 826 is substantially related to remedying this past discrimination. The district court further found the record established the law is “working” and “necessary” to prevent the ongoing, discriminatory barriers that exclude qualified women from seats on corporate boards. ER 22-23, 10-12.

California Women Lawyers and its other amici submit this brief to provide context on the discriminatory structural barriers leading corporations to exclude women from their boardrooms, to explain the need for governmental action to remedy past discrimination and halt ongoing discrimination against women at the highest levels of business

leadership, and to highlight the many experienced and well-qualified women who are willing and able to serve on public company boards.

ARGUMENT

The district court found the Secretary established that SB 826 was justified by an important and exceedingly persuasive justification: remedying extensive discrimination against women preventing them from being placed on public corporate boards. ER 10-11. The district court further found SB 826 was substantially related to remedying this discrimination. ER 15-22. The district court based these findings on “legislative history materials, statistical analyses, expert studies, anecdotal evidence, and expert declarations.” ER 12-13.

To better understand the broad scope of the historical discrimination and the reason the law is needed to remedy this discrimination, amici describe the embedded nature of the structural barriers, the numerous highly qualified women available to serve if those barriers are removed, the fact that without SB 826, discrimination in public board member selection would continue unabated, and the undisputed evidence showing SB 826 is already working to dismantle the structural barriers.

I. SB 826 Is an Appropriate Remedial Measure Because Discriminatory Barriers Preclude Women from Obtaining Corporate Board Seats

Unlike the many gains in other contexts, women’s progress in obtaining fair representation on corporate boards has long been “stalled,” “static,” and “clogged,” and efforts at achieving such representation by voluntary means were ineffectual. See Debbie Thomas, *Bias in the Boardroom: Implicit Bias in the Selection and Treatment of Women Directors*, 102 Marq. L. Rev. 539, 540-541 (2018); Barbara Black, *Stalled: Gender Diversity on Corporate Boards*, 37 U. Dayton L. Rev. 7 (2011); Lisa Fairfax, *Clogs in the Pipeline: The Mixed Data on Women Directors and Continued Barriers to Their Advancement*, 65 Md. L. Rev. 579, 586 (2006) (“data undermines the notion that women’s board representation will improve with the passing of time”).

To understand why this is so—and why the district court properly found that SB 826’s remedial requirement setting the floor for gender diversity on boards is necessary and a proper Legislative goal—it is essential to understand the recruitment and appointment process for public company board seats. ER 12-13. These entrenched board selection practices erected discriminatory structural barriers excluding women from board positions. ER 131-37 ¶¶91-98, 103, 111.

A. The Barriers Are Structural: The Board Recruitment Process Is Secretive, and the Criteria Are Unstated or Highly Subjective

The corporate board recruitment and appointment process is private and secretive. ER 390-91 ¶¶18-26. “[C]orporate board searches are held very confidentially and behind closed doors.” SER 603; *accord* SER 596. Meland acknowledges these facts, admitting the board member selection process is “opaque” and “insular.” AOB 6.

Board member recruitment is unlike a job search for an executive position, “where there are people compared against one another.” SER 551; *see* SER 549-50. There is no opportunity to apply, or for a candidate to know whether she was considered, or to know the basis for the decision. ER 390-91 ¶¶18, 21, 26; ER 191 ¶30.

A corporate board appointment is by invitation only. *See* ER 390-92 ¶¶18-29. There is no public notice or open application process. ER 389-91 ¶¶17-18, 21, 26. Even if open board positions are made public, there often are no stated criteria for the position and the vetting is conducted in secret. ER 389-91 ¶¶17-18, 21, 26, 30.

“[C]orporate directors are most often chosen based on subjective qualities including interpersonal and communication skills, leadership skills, culture fit, and passion.” Jacqueline Concilla, *A Glimmer of Hope for California’s Well-Intentioned Attempt to Put More Women in the*

Boardroom, 93 So. Cal. L. Rev. 603, 626 (2020). The more subjective the desired qualifications, the easier it is to perpetuate stereotypes and hide biases. See Thomas, *Bias in the Boardroom*, 102 Marq. L. Rev. at 549, 552, 559; Deborah L. Rhode & Manda K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make?*, 39 Del. J. Corp. L. 377, 406-07 (2014). And, even when a Board sets out a matrix or position description for its board candidate search, “[t]here is no requirement that a director position be filled by an individual who is qualified according to [the] criteria identified” ER 392 ¶32.

B. Board Recruitment Is Sourced from a Closed Network of Predominantly Male Insiders

When a board position opens, board members rely on their existing networks and friends to fill the position. SER 550; see California Partners Project, *Claim Your Seat: Women of Color on California’s Public Company Boards* 21 (2021) (hereafter, “*Claim Your Seat Report 2021*”);⁷ Cydney Posner, *Tackling the Underrepresentation of Women of Color on Boards*, Cooley PubCo at 3 (May 10, 2021);⁸ Coco Brown, *Why Men Still Dominate Corporate Boardrooms*, Fortune Magazine (June 7, 2017);⁹ see

⁷ <https://www.calpartnersproject.org/wocclaimyourseat>

⁸ <https://cooleypubco.com/2021/05/10/underrepresentation-women-of-color-boards>

⁹ <https://fortune.com/2017/06/07/most-powerful-women-career-advice-corporate-boardroom-diversity-workplace-inequality-favoritism>

also Thomas, *Bias in the Boardroom*, 102 Marq. L. Rev. at 549, 552, 559 (“when . . . selecting board nominees, nominations tend to come from a small pool of individuals from personal networks”).

And these networks and friends are overwhelmingly comprised only of other men. ER 391-94 ¶¶24-25, 30-31, 35-36, 39; ER 190-97 ¶¶27-30, 37-38, 43-44; ER 195-96 ¶43 (“The common way of sourcing directors from the personal networks of the CEO, the lead director or other board chair are limited by the single-sex nature of board leadership and their networks.”); see Matt Huffman & Lisa Torres, *It’s Not Only ‘Who you Know’ That Matters: Gender, Personal Contacts, and Job Lead Quality*, 16 Gender & Soc’y 793, 796 (2002). When asked why there are no female directors on their boards, executives frequently say “they do not know any qualified women.” ER 191 ¶29; see ER 191 ¶31, ER 196 ¶43.

Quantitative studies analyzing archival data have confirmed that male networks “are very influential in board selection and . . . represent a huge barrier for women,” resulting in “and reinforcing inequalities in the careers of men and women.” Isabelle Allerman et al., *Role of Old Boys’ Network and Regulatory Approaches in Selection Processes for Female Directors* at 39, 40 (Jan. 15, 2021);¹⁰ see also Thomas, *Bias in the Boardroom*, 102 Marq. L. Rev. at 559, n.125 (“in a Harvard Business

¹⁰ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3768833

Review study of the experiences of female directors, even 33% of male directors interviewed believed that women face limited access to boards because of weaker networks and the ‘old boys’ club’ ”); Boris Groysbert & Deborah Bell, *Dysfunction in the Boardroom*, Harv. Bus. Rev. 88, 95 (June 2013).¹¹ When “those who sit on boards – mostly white men – . . . comb their networks for people they can put forward (*which is how 87% of board seats are filled*), they find few women executives in their own circles.” Brown, *Why Men Still Dominate Corporate Boardrooms* (emphasis added); accord ER 190-91 ¶¶27-29, 34; ER 391-93 ¶¶25, 30, 35, 36; *Claim Your Seat Report 2021* at 21 (board “[s]earch committees are most comfortable with candidates who are ‘known and vouched for,’ leading boards to recruit new directors from their existing networks”).

Even when a corporate board uses a recruiter, the Board’s nominating committee typically gives the recruiter a list of men they already know, and then asks the recruiter to vet only the individuals on that list. SER 549-50. The list includes primarily other men “whom they feel comfortable with . . . [who have] been university buddies or golf course buddies, or friends they know through business.” SER 550. “When the search firms vet the candidates, [the recruiting firm] come[s] back with a report to the corporate client that says, ‘This person has

¹¹ <https://hbr.org/2013/06/dysfunction-in-the-boardroom>

served on X amount of boards and never had a major problem, or actually did.’ And then the nominating committee chooses their favorite” SER 551. The selected candidate (or slate of candidates) is then presented to the shareholders (or voting intermediaries) in an election that is almost always uncontested; the shareholders *vote only on the board’s chosen candidate*. SER 152 ¶41; *see also* SER 143-51 ¶¶14, 25-27, 36.

That boards rely on internal networking to select new members results, in part, from a phenomenon known as “in-group” bias, which influences perceptions of competence and results in board members choosing someone who looks and acts like them. *See* Thomas, *Bias in the Boardroom*, 102 Marq. L. Rev. at 549, 552, 559; Brown, *Why Men Still Dominate Corporate Boardrooms* (“[T]hose who already have a seat at the table are far more likely to invite favorite members of their own networks to fill any spaces that open up beside them. And these networks are often comprised exclusively of people like them.”); Rhode & Packel, *Diversity on Corporate Boards*, 39 Del. J. Corp. L. at 404-05; *see also* Carolyn Janiak, *The “Links” Among Golf, Networking and Women’s Professional Advancement*, 8 Stan. J.L. Bus & Fin. 317, 325 (2003). Studies show this occurs because it is assumed that similar people will “fit in better” or that is who makes up the “talent pool.” Erica Hersh, *Why Diversity Matters:*

Women on Boards of Directors, Harvard T.H. Chan School of Public Health (July 21, 2016).¹²

As to the former, board members have an incentive and self-interest to preserve “ ‘social comfort levels and board cohesion.’ ” Farias-Eisner, *Gender Diversity in Corporate Boardrooms*, 13 J. Bus. Entrepreneurship & L. at 9. A survey of more than 500 hiring managers found 74 percent reported their most recent hire had a personality similar to their own. Hersh, *Why Diversity Matters*. In one Harvard Business School study, business school students were given two case studies, identical, except that the name of the CEO differed (“John” or “Jane”). Students consistently rated “Jane” more negatively. Rhode & Packel, *Diversity on Corporate Boards*, 39 Del. J. Corp. L. at 407.

Women face “stereotypes and bias” based on “perceptions that they lack the qualities of effective [business] leaders.” Thomas, *Bias in the Boardroom*, 102 Marq. L. Rev. at 549; accord ER 139 ¶¶2-3, ER 171 ¶73; ER 115 ¶51 (“[L]eadership roles are still widely perceived as not suitable for women, despite what their qualifications actually are, resulting in women leaders being evaluated more negatively compared to otherwise identical male counterparts. This bias, in turn, hampers the

¹² <https://www.hsph.harvard.edu/ecpe/why-diversity-matters-women-on-boards-of-directors/>

advancement of women to high level leadership roles like board membership.”).

Additional studies show that biases against women of color are even greater as they face a “double bind” of gender and race discrimination. See Judd Kessler and Corinne Low, *Research: How Companies Committed to Diverse Hiring Still Fail*, Harvard Bus. Rev. (Feb 11, 2021) (study showing “a surprising amount of race and gender bias” in resume review decisions by “prestigious employers” that “claim to be seeking diversity”);¹³ Teresa Dean, *Double Bind: Women of Color in Business Leadership*, Baylor University Honors Thesis 1, 14-36 (Dec. 2016);¹⁴ *Claim Your Seat* Report 2021 at 2, 4, 9-19 (discussing underrepresentation of women of color on boards).

Boards ignore women as viable board candidates because they are looking elsewhere. “[B]oards are basically fishing from the same pond instead of looking at the broader ocean.’” Alisha Hardasani Gupta, *Surprise: Women and Minorities Are Still Underrepresented in Corporate Boardrooms*, The New York Times (June 7, 2021) (quoting Linda Akutagawa, chair for Alliance for Board Diversity and chief executive of

¹³ <https://hbr.org/2021/02/research-how-companies-committed-to-diverse-hiring-still-fail>

¹⁴ https://baylor-ir.tdl.org/bitstream/handle/2104/9883/Teresa_Dean_Thesis.pdf?sequence=1

Leadership Education for Asian Pacifics).¹⁵ This point recently was echoed by retired military general Stanley McChrystal—a board member or adviser for at least 10 companies since 2010—when he observed regarding corporate board selection, “‘You fish in the pond you’re standing around.’” Isaac Stanley-Becker, *Corporate boards, consulting, speaking fees: How U.S. generals thrived after Afghanistan*, Washington Post (Sept. 4, 2021).¹⁶ McChrystal acknowledged his “network” is how he landed some of his corporate board seats. *Id.*¹⁷

Meland (and his amici) claim that SB 826 is nothing more than gender stereotyping and actually harms women because it is based on the assumption that women cannot obtain corporate board positions on their own. AOB 10, 16-17. The law does just the opposite. By promoting diversity on corporate boards, SB 826 breaks down stereotyping and

¹⁵ <https://www.nytimes.com/2021/06/07/us/women-minorities-underrepresented-corporate-boardrooms.html>

¹⁶ <https://www.washingtonpost.com/politics/2021/09/04/mcchrystal-afghanistan-navistar-consulting-generals/>

¹⁷ As the Washington Post article points out, many top military generals have gone on to obtain lucrative board positions. Notably, women were barred from serving in military combat positions until a policy reversal in late 2013, which then took several more years to effectuate. Because of the prior combat exclusion policy and continuing legal and structural barriers impeding women reaching the highest military ranks, women have not been included in the military network drawn for corporate board seats. See Kristy N. Kamarck, *Women in Combat: Issues for Congress* 1, 12-18 (Dec. 13, 2016), <https://sgp.fas.org/crs/natsec/R42075.pdf>.

advances meritocracy by encouraging companies to seek directors based on merit rather than searching only in their own narrow, existing male-dominated business and social networks.

C. Board Vacancies Are Rare, Meaning Seats Infrequently Open for New Candidates

In addition to disrupting the insular recruitment process, SB 826 addresses the historic lack of corporate board turnover precluding any real progress in remedying corporate board discrimination. *E.g.*, SER 549-50, 584, 644; *see 2020 Spencer Stuart Board Index Survey 2 (2020)*.¹⁸ The Legislature found that, at current rates, it would take “as many as 40 to 50 years” to achieve fair gender diversity on corporate boards, absent measures like SB 826. Cal. Stat. 2018, Ch. 954, § 1(f)(1)-(2); *see also* SER 657.

Studies confirm that changes to board membership are rare. One quarter of Russell 3000 directors stay in their position for more than 15 years, and the average tenure exceeds ten years. Anne Stych, *Low turnover slows diversity on corporate boards*, The Business Journals: BizWomen (Apr. 29, 2019).¹⁹

¹⁸ www.spencerstuart.com/-/media/2020/december/ssbi2020/2020_us_spencer_stuart_board_index.pdf

¹⁹ <https://www.bizjournals.com/bizwomen/news/latest-news/2019/04/low-turnover-slows-diversity-on-corporate-boards.html?page=all>

In 2018, 50 percent of Russell 3000 companies and 43 percent of S&P 500 companies disclosed no board membership change. Cydney Posner, *Reasons for “Male and Pale” Boards*, Harvard Law School Forum on Corporate Governance (May 17, 2019).²⁰ If there was a change, it occurred in only one seat. *Id.* (observing that lengthy director tenure, rare vacancies, and preferences for directors with previous corporate board service keep women off boards—not a lack of qualified female board candidates).

While the lack of board turnover is a contributing factor to women’s discriminatory exclusion, the “transparency” alternatives Meland offers on appeal, *see* AOB 29, would not eliminate the embedded structural barriers. As the record shows, the persistent gap in the number of women on boards “even in the face of decades of women’s equal or better qualifications demonstrates that neither the market nor societal and business pressures will rectify the ways in which firms limit the pool of potential candidates, and that regulation is needed to change entrenched hiring practices and ingroup preferences.” ER 171 ¶73.

²⁰ <https://corpgov.law.harvard.edu/2019/05/17/reasons-for-male-and-pale-boards/>

D. The Personal and Financial Benefits for Director Roles Have Long Disincentivized Vacancies and Incentivized Existing (Male) Directors to Keep Board Seats within Their Own (Male) Networks

Male directors have substantial incentives to remain on boards with no external pressure to leave. Directors generally are not subject to term limits or review procedures that could trigger an involuntary departure. *See Posner, Reasons for “Male and Pale” Boards.* And, they derive significant personal and financial gains from corporate board service that encourage them to remain on the board, and to keep board recruitment in their existing (male) networks.

Serving on a board provides “massive” networking opportunities. Susan Muck, *Want to Join a Corporate Board? Here’s How*, Harvard Law School Forum on Corporate Governance (Feb. 26, 2020).²¹ “Developing good relationships with [Board] colleagues will exponentially increase [an individual’s] professional reach in ways that can pay off dramatically in the future. Fellow directors will have connections, skills and expertise that may be valuable to you outside your board service.” *Id.* “In the business world, obtaining a corporate board director seat is a very important professional opportunity and network building step for any high-level executive or business leader hoping to add value and further

²¹ <https://corpgov.law.harvard.edu/2020/02/26/want-to-join-a-corporate-board-heres-how/>

advance their careers. Boards enable professionals to . . . expand their networks, and develop additional business connections.” ER 187 ¶19. “[F]or women, being elected to a board is [often] a precursor to . . . being named the CEO of a company.” ER 188 ¶21.

Additionally, board members earn substantial financial benefits from board service. Muck, *Want to Join a Corporate Board?* “For many people in business and finance, it’s a coveted role, a part-time gig that confers access to a wide network of powerful people as well as annual compensation that can run to \$300,000 or more.” Jeff Green, et al., *Wanted: 3,732 Women to Govern Corporate America*, Bloomberg Businessweek (March 21, 2019).²² “[E]xecutives later in their careers seek to position themselves for seats on corporate boards . . . so that they can receive additional annual earnings long after they retire from their full-time jobs.” ER 187 ¶20. According to investor Warren Buffet, “[d]irector compensation has now soared to . . . three to four times the annual median income of U.S. households.” *Id.*

E. The Experiences of Professional Women Confirm the Secretive, Subjective, and Insular Selection Process for Corporate Board Positions

A seasoned corporate director, who also is a lawyer, investment banker, and hedge fund manager, Susanne Meline, explains in a

²² <https://www.bloomberg.com/graphics/2019-women-on-boards/>

declaration filed in this case: “[b]ecause there is no transparency in the board nominations and selections process, neither I nor any other woman who is qualified to serve as a corporate director will ever know that, with respect to a specific corporate board, whether we have been overlooked or rejected in favor of a male candidate.” ER 193 ¶35; *see* ER 184-86 ¶¶2-17. In speaking on the record, Meline acknowledges the personal and professional risk of potential retaliation, which she accepted to help “bring about change for other qualified women,” to decrease “the risk of corporate failure,” and to increase the likelihood of corporate success “by seeking to remove the barriers to women’s participation on public company boards.” ER 197 ¶46.

Many women are not in a position similar to Meline’s, where they are comfortable publicly coming forward. Counsel for amici reached out to numerous professional women seeking personal stories regarding their experiences with corporate board recruitment and service. That outreach included dialogue with an attorney, professionals who work in corporate board recruiting and placement, an investor who has served on private company boards, and a corporate board member of two national public companies. Their experiences echoed Meline’s and were consistent with the other evidence in the record. That is, each of these individuals confirmed the secretive, closed, exclusive, and male-dominated nature of

Board recruitment, and the entrenched barriers that have persistently excluded women from service on public company boards.

An attorney, Liliana,²³ counsels corporations on ESG (“environment, social, and governance”) issues and is familiar with board recruitment processes. She related that board searches often are constructed so narrowly as to include only favored candidates within existing networks, and to exclude other potential candidates not in the known network of the board. She also noted that “skill sets are sometimes narrowly defined so that women are naturally excluded, *i.e.*, ‘board member must have had executive operating experience (CEO, CFO or CSO) with budgets in excess of \$200 million.’” She said, “in other words, the skill sets are posited in a manner that would primarily result in white male candidates, as opposed to articulating the skill sets in a somewhat more encompassing manner,” such as “operating experience with reporting lines of leadership and responsibility for significant or material aspects of the X business.”

Jocelyn²⁴ runs a company that handles corporate board placement and has helped more than 300 women obtain public and private board

²³ Name changed per the interviewee’s confidentiality request. Notes are on file with counsel.

²⁴ Name changed per the interviewee’s confidentiality request. Notes are on file with counsel.

roles in recent years. She agreed SB 826 is vital to combat gender discrimination arising from boards relying on their network of male contacts, a secretive process with limited board turnover, and narrow framing of their criteria for potential board candidates. She said: “It’s way too comfortable to exist the way boards have, and it’s way too uncomfortable to change.” She also noted boards often have been willing to nominate a male candidate with whom they are familiar even if he did not meet each of their desired qualifications, but this flexibility was not extended to unfamiliar female candidates. Finally, she said SB 826 prompted some companies to seek out directors with skillsets from highly qualified potential board candidates, many of whom are women ignored in the past.

Both Liliana and Jocelyn declined to be identified because of the fear of potential harm to their respective professional businesses as a result of speaking publicly.

Maria,²⁵ a high-tech investor who has served on several private company boards, related that based on her experience, the “old boys’ network is alive and well” in the corporate board setting. Though she has only served on private boards, she has been exposed to public company board networking and recruiting practices; she described the situation

²⁵ Name changed per the interviewee’s confidentiality request. Notes are on file with counsel.

that when a board vacancy opens on ABC company or someone is rotating off a board, the board members call friends in their personal or professional networks. Because women are not in these men's networks, she said they are not considered by boards when reaching out for positions. She declined to be named because she plans to seek board positions in the future and does not want to harm her chances.

F. Unlike Other Areas, There Is No Avenue to Seek Legal Redress or Relief When There Is Discrimination

Because there is *little to no transparency* in the board recruitment and selection process, there is no practical basis to challenge a discriminatory appointment decision or retaliation for complaining about a decision. ER 394 ¶¶40-41; ER 193 ¶35 (explaining women do not even know when or why they are not being considered and have no remedy); SER 603. And, as Meline made clear: “even if a woman has specific reasons to believe that she has not been placed on a board due to gender-based discriminatory factors, there are no protections for her against retaliation as there are for employees.” ER 193 ¶35.

Federal law prohibits discrimination and retaliation in the workplace based on gender, but it generally bars discrimination and retaliation against employees, and not directors. *See* 42 U.S.C. § 2000e-2, *et seq.*, § 2000e-3(a). California employment law is similar. *See* Cal.

Gov't Code, § 12900, *et seq.*, § 12940(h). Amici's counsel has not found cases in which these employment laws have been held to cover a prospective corporate director seeking an independent director seat on a company's board.

Even if there existed a legal basis to challenge an appointment (or lack thereof), highly qualified women have a strong incentive *not* to complain for fear of retaliation or being excluded from consideration in other contexts. *Supra* Argument I.E; ER 394 ¶41; *accord* ER 193 ¶35 (“Alleging discrimination by a specific corporate board by a female candidate will more than likely eliminate her chances of becoming a corporate director in the future.”).

II. Qualified Women Are Willing and Available to Serve on Corporate Boards

A. The Evidence Shows a Deep Pool of Qualified Female Candidates

Meland claims on appeal, as he did below, that women's underrepresentation on public company boards resulted from the lack of women in the relevant labor pool, rather than from discrimination. AOB 22; Dist. Ct. Doc. 23-1 at 9.

He cites no relevant support for these claims, and the record undermines his contentions. At the SB 826 legislative hearings, bill

author Senator Jackson discussed the large pool of qualified female candidates willing and able to serve as board directors. SER 585. Several additional witnesses detailed the numerous databases identifying qualified women ready and willing for corporate board service. SER 593 (testimony regarding the “thousands” of women “qualified” to “serve on corporate boards,” including “executive and experienced women”); SER 596 (“There are many, many [women] business owners who are qualified to serve on boards, but the doors are closed for even consideration for the most part.”).

The bill drew support from hundreds of individuals, organizations, and companies, including large and small companies covering a broad array of industries, who called attention to the deep pool of talented female candidates ready for board service. *See* SER 1047-1150. Other evidence before the district court shows the vast and growing pool of board-qualified women in California. ER 130 ¶¶89, 188-89 ¶¶23-24.²⁶ And, the Heidrick & Struggle 2019 report cited by Meland itself touted

²⁶ The identified groups include: “Woman Corporate Directors Network (2,500 members), Athena Alliance (1,000 members), Women’s Leadership Forum (250 members), Exceptional Women Awardees Foundation (75 members); Stanford Woman on Boards (over 1,000 members); Extraordinary Women on Boards (hundreds of women directors and growing); and Beyond Boards (approximately 100 members).” ER 189 ¶24; ER 109 ¶30; ER 110 ¶¶33-34 (discussing registries and other platforms with resumes and data for thousands of board-qualified prospective female candidates).

“[t]he good news . . . that there is a plentiful supply of board-ready candidates who are women and/or from racial or ethnic minorities” and that “boards can achieve greater diversity, with no sacrifice in quality, by casting a wider net.” Heidrick & Struggles, *Board Monitor U.S. 2019* at 6-7.²⁷

This evidence is consistent with the fact of widespread female participation in business and the professions. “The number of females in graduate schools surpassed the number of males in 1984; in 2008 women accounted for 59 percent of graduate school enrollment. Women have earned more master’s degrees than men since 1987, and more doctorate degrees than men since 2006.” ER 108-09 ¶29. Women represent 51 percent of the population, 50 percent of the labor force, and earn more than 50 percent of bachelors and masters and doctoral degrees. See Erica Hersh, *Why Diversity Matters* at 3; *Quick Take: Women in the Workforce-United States*, Catalyst (Oct. 14, 2020).²⁸

The data show boards had no difficulty finding qualified women to serve, once they began to look beyond their ‘ponds.’ See Annalisa Barrett, *The Women Changing California Boardrooms*, report published by

²⁷ https://www.heidrick.com/-/media/heidrickcom/publications-and-reports/board_monitor_us_2019.pdf

²⁸ <https://www.catalyst.org/research/women-in-the-workforce-united-states/>

KPMG Board Leadership Center at 2, 4-7 (2020) (“*KPMG Report 2020*”);²⁹ see ER 361 ¶¶11, 376-81 ¶¶39-45. Although many public corporate board members have prior CEO experience, and women with CEO or C-suite experience remain in the minority, corporations are increasingly recognizing that CEO experience is not a necessary qualification for board membership. See Thomas, *Bias in the Boardroom*, 202 Marq. L. Rev. at 548; Rhode & Packel, *Diversity on Corporate Boards*, 39 Del. J. Corp. L. at 403-04, & n.172 (“The number of active CEOs who serve on the boards of other public companies . . . has decreased significantly during the last decade”).

The claim that CEO experience is essential reflects explicit and implicit bias, and an unjustified unwillingness to move from the board’s shallow pond to the wider ocean. See *id.* at 404 (“ ‘no widely accepted’ research demonstrating that active CEOs make better board members or lead to improved advice or monitoring by the board”). The record does not support the notion that a board member with prior CEO experience results in better leadership or corporate productivity. See *id.* (“In fact, one survey found that 79% of corporate directors do not believe that

²⁹ <https://boardleadership.kpmg.us/relevant-topics/articles/2020/the-women-changing-california-boardrooms.html>

‘active-CEO directors [are] better than average directors.’”); *accord* Heidrick & Struggles, *Board Monitor U.S. 2019* at 6.

Many women seeking board membership have demonstrated business acumen and leadership in other equivalent contexts such as on large nonprofit boards and government commissions. ER 393 ¶37; *see* ER 171 ¶73. Research also shows corporate boards are recognizing the importance of other critical skill sets, such as research and development, human resources, risk management, sustainability, and political/government, most of which are possessed by more female than male director candidates. ER 125-26 ¶78 (citing studies); *Claim Your Seat Report 2021* at 15, 22 (“Optimal board composition requires thinking broadly about a number of skills and experiences that are critical to the success of a company – for example, relevant technical, commercial, strategic, or operational leadership, or international experience.”).

B. The Claim That Adding Women to California Company Boards Caused Shareholder Losses Is Incorrect

Amicus Philanthropy Roundtable cites a study finding—based on a “back of the envelope calculation”—that SB 826 caused a “total loss in value” in excess of \$60 billion because of an *initial* negative stock market reaction to the legislation. *See* Daniel Greene, Vincent Intintoli, and Kathleen M. Kahle, *Do Board Gender Quotas Affect Firm Value?*

Evidence from California Senate Bill No. 826 (2020) 60 J. Corp. Fin. 1, 2.³⁰ The study authors hypothesized that this negative reaction resulted from shareholder opposition to SB 826 because of the *perceived* insufficient supply of qualified female directors. *Id.* at 2-15, 19.

Importantly, in a December 2021 study, those *same three authors* analyzed the data *after* companies added more women and concluded that those companies *did not* suffer financial losses *due to the appointment of women directors*. Daniel Greene, Vincent J. Intintoli, and Kathleen M. Kahle, *How Deep Is the Labor Market for Female Directors? Evidence from Mandated Director Appointments* (Dec. 23, 2021) at 4, 21-22 & Tables 7-8.³¹ Specifically, they found that stock market reaction was statistically indistinguishable after companies announced *either* female or male directors – in other words, the market did *not* see the addition of women directors as a negative. *Id.* at 4, 21-22. The authors also concluded that “female director quality does not deteriorate following SB 826 relative to that of male directors appointed to California boards.” *Id.* at 4.³²

³⁰ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3463844

³¹ <https://ssrn.com/abstract=3943718>

³² Amicus Philanthropy Roundtable also cites Marina Gertsberg, et al., *Gender Quotas and Support for Women in Board Elections*, Nat'l Bureau of Econ Research Working Paper No. 28463 (Feb. 2021), but that study found any initial adverse effects on corporate stock value was more

III. The Law Is Working and Promotes the Public Interest

The district court found SB 826 strongly benefits the public interest. It found the law is “clearly working” to achieve its remedial purposes to eliminate discriminatory practices and provide “highly qualified women” opportunities to join corporate boards. ER 22-23.

Before California enacted SB 826, men held 84.5 percent of corporate board seats on California public companies on the Russell 3000 Index, and 29 percent of California public companies had no female corporate board directors. ER 370-71 ¶¶29-30. The district court found credible the Secretary’s evidence that women have made substantial gains since the law’s 2018 enactment and that the alarming, ongoing underrepresentation of women on corporate boards would not have been remedied without government intervention. ER 22-23. The record strongly supports these findings.

A. Measures Taken Before SB 826 Were Ineffective

As the Secretary details in her brief, until SB 826’s passage, little change occurred despite numerous efforts at a national and state level, including the 2013 Senate Resolution 62, development of extensive registries, and robust pools of qualified female board candidates. AAB 12-15; see ER 130 ¶88; ER 374 ¶34; Annalisa Barrett, *Women on Boards*

likely driven by entrenched board dynamics, rather than negative reactions to new female nominees. *Id.* at 25.

of Public Companies Headquartered in California 2018 Report at 4 (Oct. 24, 2019);³³ California Partners Project, *Claim Your Seat: A Progress Report on Women’s Representation on California Corporate Boards* 6-7 (2020).³⁴ Rather, the entrenched nature of the barriers to women’s service on corporate boards continued to keep women out of the corporate board room. *See* ER 12-13; AAB 4-15; ER 196-97 ¶¶44-45, 130-31 ¶¶88-98.

B. Comparing Board Composition Before and After the Legislation Confirms the Law Is Working

Governmental action such as SB 826 reduces “the negative effect of networks on female board membership” by “forcing boards to look outside their networks to recruit female directors.” Allerman, *Role of Old Boys’ Networks and Regulatory Approaches in Selection Processes for Female Directors* at 2. And, as the district court found, it is “clearly working.” ER 23.

Women’s gains since SB 826 are illustrated in an analysis of the data before and after the law’s passage in September 2018. As the figures below starkly illustrate, the number of women joining corporate boards remained stagnant before a surge after SB 826’s passage, with women overtaking men in *new* appointments by the first quarter of 2019.

³³ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3463510

³⁴ <https://www.calpartnersproject.org/claimyourseat2020>

Greene, Intintoli, and Kahle, *How Deep Is the Labor Market for Female Directors? Evidence from Mandated Director Appointments* at 37-38.

Figure 1 shows “[q]uarterly director appointments to boards of California firms,” with the vertical bar representing the passage of SB 826.

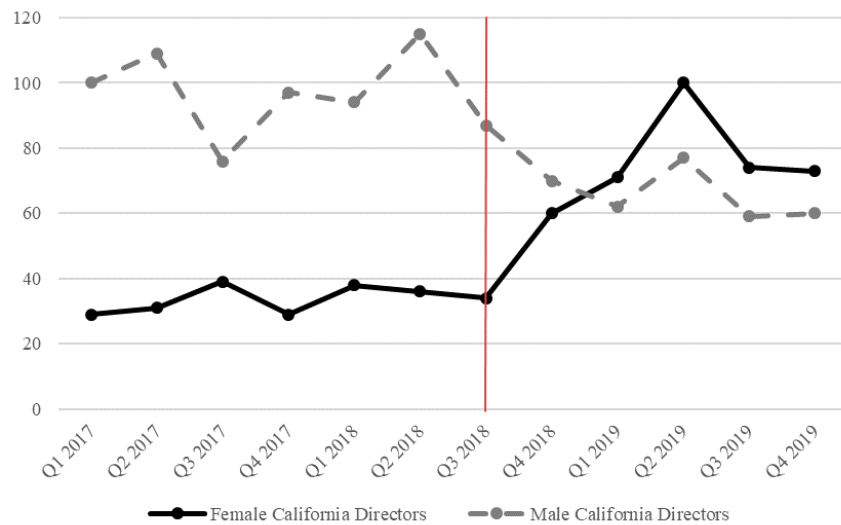
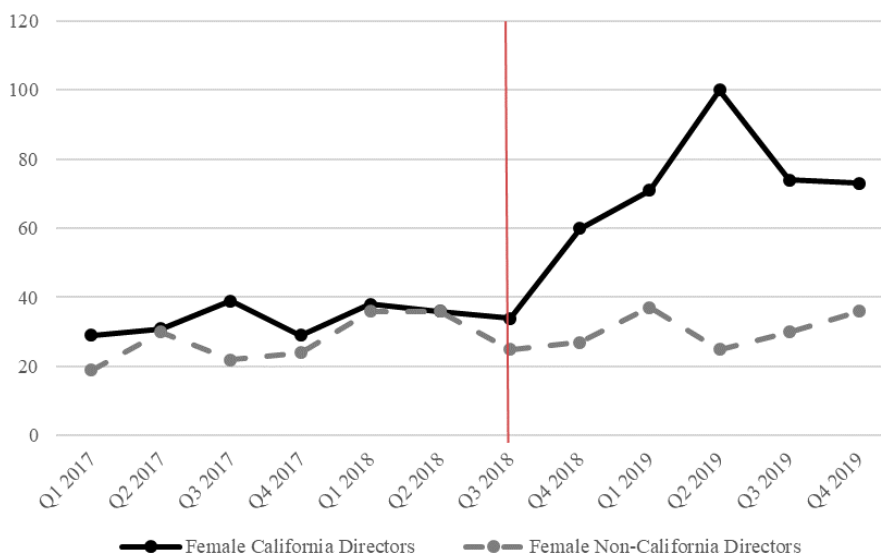


Figure 2 represents the “quarterly female director appointments to boards of California firms and non-California matched firms.”



Id. And, when comparing the California and non-California data, this shows that absent remedial measures like SB 826, the number of female corporate directors remains significantly lower.

The record before the district court confirmed that two years after SB 826’s enactment, progress has been measurable, “significant” and “has increased at a much faster pace since SB 826 was passed.” ER 374 ¶¶35, 38; ER 370-76 ¶¶29-38; ER 171, 173, 177 ¶¶74, 79, 90. In 2016, just 208 corporate board seats were newly filled by women; by about 2020 that number grew to 739; and, in the first quarter of 2021, women filled 45% of public company board appointments in California. *See Claim Your Seat Report 2021* at 2. Indeed, before the legislation, 29% of

California companies that would have been subject to the law “had all-male boards, [and] as of March 1, 2021, only 1.3% . . . have all-male boards.” ER 374 ¶35; *see KPMG Report 2020* at 3 (2020).

According to the most recent statistical report from the California Partners Project, “[a]s of September 30, 2021, 1,844 seats are held by women – up from 766 in 2018. That means that women hold over 29% of the public company board seats in California, compared to 15.5% in 2018. That’s an increase of *nearly eleven hundred women* to those boards in just three years.” California Partners Project, *Mapping Inclusion: Women’s Representation on California’s Public Company Boards by Region and Industry* (Dec. 15, 2021) at 1;³⁵ *see also* 50/50 Women on Boards, *Gender Diversity Index Fourth Quarter 2021 Key Findings*.³⁶

Yet despite this progress, substantial underrepresentation persists. ER 361 ¶10, 381-83 ¶¶ 46-49; *Claim Your Seat Report 2020* at 15; *Claim Your Seat Report 2021* at 2, 7 (reporting that even several years after SB 826, women hold just “26.5% of California’s public company board seats”). Moreover, extensive “social science research provides strong evidence that external requirements are necessary to combat structural sexism and provide equal opportunity for women on corporate boards.” ER 171

³⁵ <https://www.calpartnersproject.org/mappinginclusion>

³⁶ https://5050wob.com/wp-content/uploads/2022/02/5050WOB-Q4_Infographic_Final_02.22.221.pdf

¶73. Thus, there remains an ongoing need for the legislation to combat the longstanding, structural barriers to women’s service on corporate boards.

Amicus Hamilton Lincoln Law Institute claims that SB 826 does “not remove the barriers, biases, and other systemic and structural impediments to achieving gender parity in corporate boardrooms,” and posits instead that it is a “check the box” exercise that “undermin[es] the perceived competence of the women serving as directors and discourage[s] qualified women from stepping forward to serve.” 9th Cir. Doc. No. 19 at 4, 7. Those broad claims are not supported by citations to evidence, *see generally id.*, and are contrary to the extensive record evidence and data showing that the law is working.

The district court specifically noted the numerous “highly qualified women” who strongly desired to join corporate boards by utilizing “the opportunities provided by SB 826.” ER 21. There is *no evidence* these highly qualified women are discouraged from seeking a seat at the table because they view the law as a meaningless “check the box” exercise or that these women are not fully competent to serve.

C. Meland’s Claim That the Law Is Unnecessary Is Unsupported by the Record and Contrary to the District Court’s Findings

Meland contends the law was unnecessary because the percentage of women on boards was already increasing before the law was enacted. AOB 7, 8, 35. Meland points to evidence and reports that do not support his claim, and which instead support the district court’s contrary finding. *See* AOB 7 (citing declarations of J. Grounds and C. Schipani). Indeed, evidence before the district court—which the court found credible—made clear that although there was some limited increase in female board member numbers before 2018, the pace of increase was glacial. ER 11-12; *see also* AAB 50 (addressing district court’s findings rejecting Meland’s reliance on cited reports).

In her declaration, Jessica Grounds explained that “the trend toward increasing the numbers . . . progressed quickly in the three years since SB 826 first passed,” far surpassing the growth rate in the prior several years. ER 382 ¶47. For example “[w]hereas in 2018 . . . 29% of California companies . . . subject to SB 826 had all-male boards, as of March 1, 2021, only 1.3 % of [those] corporations have all male boards.” ER 374 ¶35. Cindy Schipani’s declaration discussed similar findings, and noted that the United States Government Accountability Office found in 2015 that it could take four decades to eliminate the disparity between

women and men on corporate boards assuming the current growth rate. ER 106-07 ¶21, 108 ¶25.

Meland also claims that “hiring patterns” showed boards had already increased female board representation before SB 826 was passed. AOB 7-8 (citing 2019 Heidrick & Struggles report). In fact, that report states that despite small increases, the overall percentages of women on corporate boards before 2019 had “remained stubbornly low” and that the recent surge in women directors was driven in part by the “new law in California.” Heidrick & Struggles, *Board Monitor U.S. 2019* at 6. Likewise, the Greene report—relied upon by amicus Philanthropy Roundtable—confirms that a statistical comparison of pre- and post-SB 826 board composition showed the increase in women on boards after the law’s enactment was “*not* driven by a general trend of increasing female board representation.” Daniel Greene, et al., *Do Board Gender Quotas Affect Firm Value? Evidence from California Senate Bill No. 826*, 60 J. Corp. Fin. at 3 (italics added).

Based on the entire record before it, the district court found that enjoining a law that was not clearly unconstitutional “at this early stage may deny highly qualified women who are eager and seeking to join corporate boards the opportunities provided by SB 826.” ER 22. The court declined to “override the legislature’s determination” that SB 826

was necessary to prevent continuing discrimination against women, precluding them from a seat at the table at the highest levels of business leadership. The court found no ground to “enjoin a law that the evidence shows is clearly working.” ER 23. The district court’s decision is well supported by the law and the record.

CONCLUSION

Undersigned amici respectfully urge this Court to affirm the district court’s order denying the requested preliminary injunction.

Respectfully Submitted,

Date: April 4, 2022

By: /s/ Johanna Schiavoni

Melanie Gold

Johanna Schiavoni

California Appellate Law Group LLP

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

Counsel for amici curiae certifies:

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). This brief contains 6,920 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).
2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

Respectfully Submitted,

Date: April 4, 2022

By: /s/ Johanna Schiavoni

Melanie Gold

Johanna Schiavoni

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Counsel for Amici Curiae

CERTIFICATE OF FILING AND SERVICE

I hereby certify 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 CM/ECF system on April 4, 2022. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system, which constitutes service pursuant to Federal Rule of Appellate Procedure 25(c)(2) and Ninth Circuit Rule 25-5(g).

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