

Appeal No. 22-15822

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

NATIONAL CENTER FOR PUBLIC POLICY RESEARCH,
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-02168-JAM-AC

**BRIEF OF CALIFORNIA WOMEN LAWYERS
AS *AMICUS CURIAE*
IN SUPPORT OF APPELLEE**

MELANIE GOLD
JOHANNA SCHIAVONI
COMPLEX APPELLATE LITIGATION GROUP LLP
501 WEST BROADWAY, SUITE 800
SAN DIEGO, CALIFORNIA 92101
TELEPHONE: (619) 642-2929
Counsel for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

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

/s/ Johanna Schiavoni
Johanna Schiavoni

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STATEMENT OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 29

California Women Lawyers as amicus curiae submits this brief supporting Appellee California Secretary of State's opposition to Appellant National Center for Public Policy Research's appeal from the dismissal of its claim raising a facial challenge to SB 826. Fed. R. App. 29(a)(4). Both parties consented to the filing of this amicus curiae brief, and this brief is timely filed. Fed. R. App. 29(a)(2), (a)(6).¹

Amicus provides the following statement 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 Amicus certifies 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 amicus 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.*

While this brief focuses on supporting the efforts to ensure the inclusion of women, amicus recognizes 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. Amicus further recognizes and supports the crucial need to 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 that 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.

In enacting SB 826,⁶ 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. 9th Cir. Doc. No. 27-2 at 69

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 SB 826 provides that by the end of 2019, any covered corporations had to 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 were required to 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 had to have at least three female directors. *Id.* § 301.3(b)(1)-(3).

of 370. The Legislature also found these barriers are self-perpetuating and will not be disrupted without governmental action. 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.

California Women Lawyers submits 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

National Center for Public Policy Research (“NCPPR”) concedes that laws may “be justified as a means of remedying concrete discrimination.” Appellant’s Opening Brief (“AOB”) at 10. In her brief, the Secretary demonstrates that the Legislature enacted SB 826 to remedy the long-standing and continuing discrimination that has denied women the full and equal opportunity to serve on boards of California’s publicly held corporations. Appellee’s Answering Brief (“AAB”) at 33-43. The Secretary also presents the case law recognizing

that laws may constitutionally use sex-based classifications to remedy entrenched business and employment discrimination against women.

Id. at 29-33.

Amicus submits this brief to shed further light on the broad scope of the historical and entrenched discrimination and the reason the law is needed to remedy this discrimination.

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, 540-41 (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, it is essential to understand the recruitment and appointment process for public company board seats.

These entrenched board selection practices erected discriminatory structural barriers excluding women from board positions.

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

“For the most part, one can only speculate as to what exactly occurs in boardrooms, since boards are an elite, closed environment accessible to few persons (and few academics).” James Fanto, Lawrence M. Solan, and John M. Darley, *Justifying Board Diversity*, 89 N.C. L. Rev. 901, 914 (2011). The corporate board recruitment and appointment process reflects this “elite, closed environment.”

The process is kept extremely private, with the vetting conducted “behind closed doors.” 9th Cir. Doc. No. 27-2 at 34, 168 of 370. There is little opportunity to apply, or for a candidate to know whether she was considered, or to know the basis for the decision. *See id.* at 43, 168, 250. Appointments are made by invitation, most commonly without public notice or an open application process. *See id.*; *see also* discussion *infra* at §§ I.B, I.F.

Furthering the secretive processes, board members who have reached the “corporate elite” by securing their board positions often “feel pressure (and have been instructed in the ‘vetting’ process) to conform” to existing processes, thus perpetuating the existing structural barriers

for women to reach those ranks. Fanto, *Justifying Board Diversity*, 89 N.C. L. Rev. at 929.

Even if open board positions are made public, there often are no criteria, or criteria that are only loosely stated and subjective. 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) (“[C]orporate directors are most often chosen based on subjective qualities including interpersonal and communication skills, leadership skills, culture fit, and passion.”). 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).

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. 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,

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

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 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. Thomas, *Bias in the Boardroom*, 102 Marq. L. Rev. at 559, n.125 (“in a Harvard Business 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);¹⁰ Fanto, *Justifying Board Diversity*, 89 N.C. L. Rev. at 909 (noting that existing board members are “significant in the selection of board members and can thus affect the number of qualified, diverse candidates for board positions”); see also Matt Huffman & Lisa Torres, *It’s Not Only ‘Who you Know’ That*

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>

¹⁰ <https://hbr.org/2013/06/dysfunction-in-the-boardroom>

Matters: Gender, Personal Contacts, and Job Lead Quality, 16 *Gender & Soc’y* 793, 796 (2002).¹¹

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’ Networks and Regulatory Approaches in Selection Processes for Female Directors* at 39, 40 (Jan. 15, 2021).¹² 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 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”).

A study published in the MIT Sloan Management Review, which surveyed more than 5,000 corporate board members between October 2015 and June 2016, found dramatic gender disparities in the process for selecting board members. J. Yo-Jud Cheng & Boris Groysberg, *Gender Diversity at the Board Level Can Mean Innovation Success*, MIT Sloan

¹¹ <https://tinyurl.com/huffman-torres>

¹² https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3768833

Management Review at 2-3 (Jan. 22, 2020).¹³ Within the United States, 40% of publicly held companies considered *no* women candidates for nonexecutive board seats. *Id.*

The MIT study also revealed that the recruitment disparities result from a “diversity feedback loop.” *Id.* at 3; *see id.* at 4 (finding that “gender segregation in recruiting networks reinforces imbalance” in board recruitment). Among publicly held companies, boards that had more women directors “tended to consider both a larger pool of candidates and a higher proportion of women candidates when filling vacancies.” *Id.* “At the other end of the distribution,” 81% of boards without any women failed to consider even a single woman candidate for their most recent vacancy. *Id.*

Even when corporate boards rely on a recruiting firm, board nominating committees commonly rely on internal networking to select new members. Thomas, *Bias in the Boardroom*, 102 Marq. L. Rev. at 549, 552, 558-59. This 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. *Id.* at 559; Brown, *Why Men Still Dominate Corporate Boardrooms* (“[T]hose

¹³ <https://sloanreview.mit.edu/article/gender-diversity-at-the-board-level-can-mean-innovation-success/>

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).¹⁴

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% 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.

¹⁴ <https://www.hsph.harvard.edu/ecpe/why-diversity-matters-women-on-boards-of-directors/>

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. 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”);¹⁵ Teresa Dean, *Double Bind: Women of Color in Business Leadership*, Baylor University Honors Thesis 1, 14-36 (Dec. 2016);¹⁶ *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

¹⁵ <https://hbr.org/2021/02/research-how-companies-committed-to-diverse-hiring-still-fail>

¹⁶ https://baylor-ir.tdl.org/bitstream/handle/2104/9883/Teresa_Dean_Thesis.pdf?sequence=1

Leadership Education for Asian Pacifics).¹⁷ 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).¹⁸ McChrystal acknowledged his “network” is how he landed some of his corporate board seats. *Id.*¹⁹

C. SB 826 Promotes Board Selection Based on Merit, Rather Than One Steeped in Structural, Discriminatory Barriers

NCPPR claims that SB 826 “incorporates stereotypes about female behavior” and that “a candidate’s background, perspective, experience, or

¹⁷ <https://www.nytimes.com/2021/06/07/us/women-minorities-underrepresented-corporate-boardrooms.html>

¹⁸ <https://www.washingtonpost.com/politics/2021/09/04/mcchrystal-afghanistan-navistar-consulting-generals/>

¹⁹ 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>.

skill set, are irrelevant unless the candidate is a woman.” AOB 12, 14; *see also* AOB at 19-21. Yet, the law does just the *opposite*.

By promoting diversity on corporate boards, SB 826 breaks down stereotyping and 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. *See* Concilla, *A Glimmer of Hope for California’s Well-Intentioned Attempt to Put More Women in the Boardroom*, 93 So. Cal. L. Rev. at 627 (“Thus, by adding women to corporate boards, California would be advancing the appearance of—and perhaps even actual—meritocracy in corporate board selection by requiring corporations to seek board members outside of their regular talent pools.”); *id.* at 626 (“requiring corporations to include women on their boards would encourage meritocracy in a system marked by inequity”); Black, *Stalled: Gender Diversity on Corporate Boards*, 37 U. Dayton L. Rev. at 20 (“The lack of progress [toward gender diversity on corporate boards] is profoundly discouraging for those who believe in meritocracy.”).

D. 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 that precludes

any real progress in remedying corporate board discrimination. See Cal. Stat. 2018, Ch. 954, § 1(f)(1)-(2); *2020 Spencer Stuart Board Index Survey 2* (2020).²⁰ 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).

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).²¹

In 2018, 50% of Russell 3000 companies and 43% 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).²² 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

²⁰ www.spencerstuart.com/-/media/2020/december/ssbi2020/2020_us_spencer_stuart_board_index.pdf

²¹ <https://www.bizjournals.com/bizwomen/news/latest-news/2019/04/low-turnover-slows-diversity-on-corporate-boards.html?page=all>

²² <https://corpgov.law.harvard.edu/2019/05/17/reasons-for-male-and-pale-boards/>

board service keep women off boards—*not* a lack of qualified female board candidates).

E. 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* at 1. 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).²³ “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.*

²³ <https://corpgov.law.harvard.edu/2020/02/26/want-to-join-a-corporate-board-heres-how/>

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 (Mar. 21, 2019).²⁴

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

Counsel for amicus 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. 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.

²⁴ <https://www.bloomberg.com/graphics/2019-women-on-boards/>

An attorney, Liliana,²⁵ 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.”

Jocelyn²⁶ runs a company that handles corporate board placement and has helped more than 300 women obtain public and private board roles in recent years. She believes SB 826 is vital to combat gender discrimination arising from boards relying on their network of male

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

²⁶ Name changed per the interviewee’s confidentiality request. Notes are on file with counsel.

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 successfully 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,²⁷ 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 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

²⁷ Name changed per the interviewee’s confidentiality request. Notes are on file with counsel.

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.

II. There Is a Vast and Growing Pool of Qualified Female Candidates

At the SB 826 legislative hearings, the bill author and numerous witnesses discussed the numerous databases identifying thousands of experienced and qualified women ready and willing for corporate board service. 9th Cir. Doc. No. 27-2 at 13, 15, 23-24, 28, 62, 70, 79 of 370; *see also id.* at 176, 222, 257 of 370. The data continue to show that 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 KPMG Board Leadership Center at 2, 4-7 (2020) (“*KPMG Report 2020*”).²⁸ Even as women recover from some pandemic job losses, in 2021, women represented 47% of the total U.S. labor force, and earned more than 50% of bachelors and masters and doctoral degrees. *Women in the Workforce: United States*

²⁸ <https://boardleadership.kpmg.us/relevant-topics/articles/2020/the-women-changing-california-boardrooms.html>

(*Quick Take*), Catalyst (Aug. 29, 2022)²⁹; *see also* Erica Hersh, *Why Diversity Matters* at 3.

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* Rhode & Packel, *Diversity on Corporate Boards*, 39 Del. J. Corp. L. at 404 (“ ‘no widely accepted’ research demonstrating that active CEOs make better board members or lead to improved advice or monitoring by the board”). Research contravenes 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://www.catalyst.org/research/women-in-the-workforce-united-states/>

‘active-CEO directors [are] better than average directors.’”); *accord* Heidrick & Struggles, *Board Monitor U.S. 2019* at 6.³⁰

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. *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.”).

III. The Data Show That the Law Is Working, Yet There Remains an Ongoing Need for the Legislation

The data show that SB 826 is working to achieve its remedial purposes to eliminate discriminatory practices and provide highly qualified women opportunities to join corporate boards. Yet there is an ongoing need for the law to achieve these important government interests.

³⁰ https://www.heidrick.com/-/media/heidrickcom/publications-and-reports/board_monitor_us_2019.pdf

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 13-16; see Annalisa Barrett, *Women on Boards of Public Companies Headquartered in California 2018 Report* at 4 (Oct. 24, 2019);³¹ California Partners Project, *Claim Your Seat: A Progress Report on Women's Representation on California Corporate Boards* at 6-7 (2020).³²

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 Heidrick & Struggles, *Board Monitor U.S. 2019* at 6 (reporting 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").

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

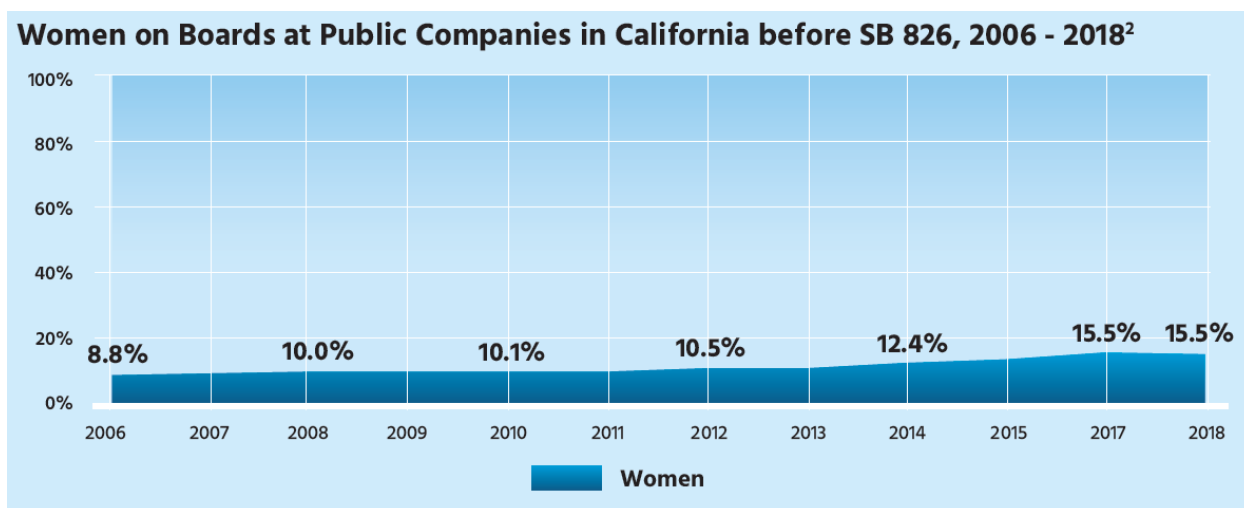
Governmental action such as SB 826 reduces "the negative effect of networks on female board membership" by "forcing boards to look outside

³¹ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3463510

³² <https://www.calpartnersproject.org/claimyourseat2020>

their networks to recruit female directors.” Allerman, *Role of Old Boys’ Networks and Regulatory Approaches in Selection Processes for Female Directors* at 2; Concilla, *A Glimmer of Hope for California’s Well-Intentioned Attempt to Put More Women in the Boardroom*, 93 So. Cal. L. Rev. at 626-27.

From 2006 to 2018, the percentage of women on public company boards in California grew only 6.7%, as illustrated in the chart below.



¹ Morgan Stanley, *Beyond the VC Funding Gap*, 2019.

² Kimball, A. *UC Davis Study of California Women Business Leaders: A Census of Women Directors and the Highest-Paid Executives*. UC Davis Graduate School of Management, 2015; Barrett, A. *Women on Board of Public Companies Headquartered in California*. *Board Governance Research*, 2018. All data in this report from 2017 and 2018 drawn from Board Governance Research reports.

California Partners Project, *The Big Picture: The Impact of California’s Groundbreaking Law to Advance Gender Diversity in Corporate Boardrooms* at 1 (May 20, 2022) (hereafter, “*The Big Picture Report 2022*”).³³

³³ <https://www.calpartnersproject.org/womenonboardsreports>

Additionally, before the legislation, 29% of California companies that would have been subject to the law had *all-male boards*; as of March 1, 2021, only 1.3% had all-male boards. *Claim Your Seat Report 2021* at 8; *KPMG Report 2020* at 3; Barrett, *Women on Boards of Public Companies Headquartered in California*, 2018 Report at 2.

Now four years after SB 826's enactment in 2018, women's gains on public company boards have been measurable and significant, though the most recent data shows signs that progress has stalled.

Data for the third quarter 2022 show that "88% of the seats gained by women were seats added to a board, not replacing or waiting for a man to retire." 50/50 Women on Boards, *Gender Diversity Index Third Quarter 2022 Key Findings* at 1 (Nov. 22, 2022).³⁴

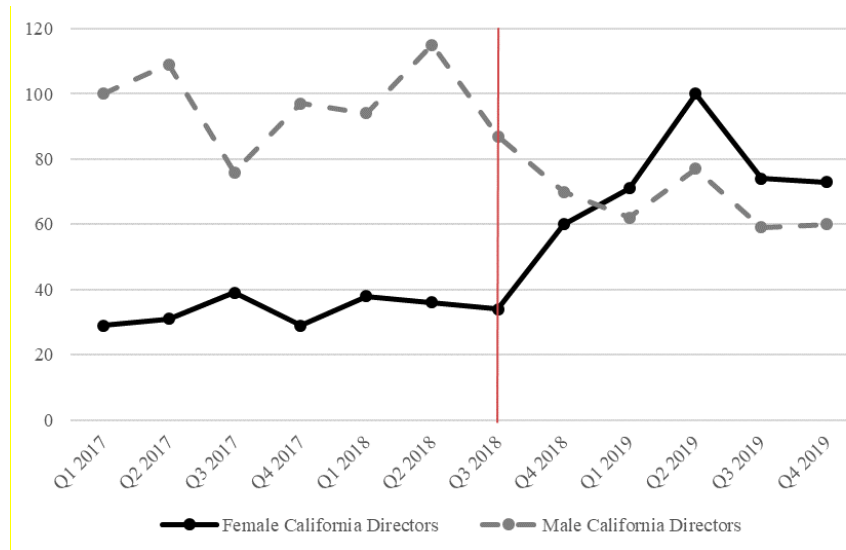
1. *The Number of Women Directors Surged After SB 826's Passage in 2018*

As the figures below starkly illustrate, the number of women joining corporate boards remained stagnant before SB 826, but surged after the law's enactment in 2018, with women overtaking men in *new* appointments by the first quarter of 2019. Daniel Greene, Vincent J. Intintoli, and Kathleen M. Kahle, *How Deep Is the Labor Market for*

³⁴ https://5050wob.com/wp-content/uploads/2022/11/5050WOB_Q3_22_Infographic_Final.pdf

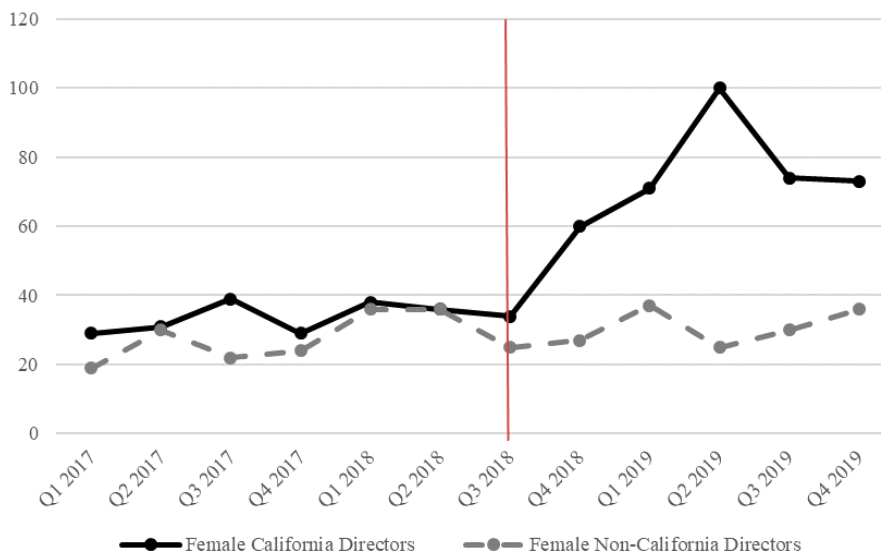
Female Directors? Evidence from Mandated Director Appointments (Dec. 23, 2021) at 37-38.³⁵

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



³⁵ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3943718

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.

2. *Data from 2018 to March 2022 Show Women’s Gains on Corporate Boards*

The deadline for compliance with SB 826 for California-headquartered public companies arose at the end of 2021. Cal. Corp. Code § 301.3(b)(1)-(3).

Data of the composition of corporate boards from 2018 through March 2022 show women’s substantial gains: “While the percentage of women on California’s public company boards has more than doubled, the

actual number of women has nearly tripled – from 766 to 2,055 – because California has 137 more public companies and 1,500 more public company board seats than it did in 2018.” California Partners Project, *The Big Picture Report* at 6, 24.³⁶

The chart on the following page illustrates this data.

³⁶ For the prior year report’s detailed data, see California Partners Project, *Mapping Inclusion: Women’s Representation on California’s Public Company Boards by Region and Industry* (Dec. 15, 2021) at 1, <https://www.calpartnersproject.org/mappinginclusion>.



The Big Picture Report 2022 at 6.

At a national level, women’s seats on Russell 3000 Index company boards has increased 10% from 2018 through mid-2022. *See 50/50 Women on Boards, 2022 Gender Diversity Index Report* (Nov. 14, 2022) at 7 (“As of June 30, 2022, women held 28% of Russell 3000 Index (R3K) Index board seats. This has been a continually rising percentage – up from 26% in 2021, 23% in 2020, 20% in 2019, and 18% in 2019 – and represents a 10% increase in just four years.”).³⁷ And, data from those Russell 3000 companies shows that California leads nationwide board diversity by 4%. *Id.* at 7, 16 (as of Q2 2022, California has 34.1% women, with the next closest states at 30%) (citing *50/50 Women on Boards, Gender Diversity Index Fourth Quarter 2021 Key Findings*, reporting data from Equilar through December 31, 2021 (Feb. 24, 2022)).³⁸

3. *Underrepresentation of Women Remains and as of Third Quarter 2022 Data Shows Progress Has Stalled*

Yet despite this progress, substantial underrepresentation persists. *Claim Your Seat Report 2021* at 2, 7 (discussing ongoing disparities in women’s representation on corporate boards, and severe underrepresentation of women of color in those roles); *accord Claim Your*

³⁷ <https://5050wob.com/wp-content/uploads/2022/11/5050-wob-annual-report-11142022.pdf>

³⁸ https://5050wob.com/wp-content/uploads/2022/02/5050WOB-Q4_Infographic_Final_02.22.221.pdf

Seat Report 2020 at 15. As of March 2022 data, assuming that company board sizes remain the same, 22% of California companies subject to SB 826 still needed to add one woman director to meet SB 826's requirements, and 8% of companies needed to add two or more women. *The Big Picture Report 2022* at 7 & n.9.

Moreover, the most recent quarterly report from 50/50 Women on Boards, reporting on the data from Equilar as to the gender composition of corporate boards in the Russell 3000 Index, shows that “the pace for women joining boards in Q3 2022, from July 1 – Sept. 30, 2022, has *stalled or remained flat* and is the lowest quarter-over-quarter progress since the first six months of 2020.” 50/50 Women on Boards, *Gender Diversity Index, Third Quarter 2022 Key Findings* at 1, 2 (emphasis added).

Thus, despite the progress since SB 826's enactment, there remains an ongoing need for the legislation to combat the longstanding and ongoing structural barriers to women's service on corporate boards.

CONCLUSION

Undersigned amicus respectfully urges this Court to affirm the district court's judgment dismissing the action for failure to state a facial challenge to SB 826.

Respectfully Submitted,

Date: December 5, 2022

By: /s/ Johanna Schiavoni

Melanie Gold

Johanna Schiavoni

Complex Appellate Litigation Group LLP

Counsel for Amicus Curiae

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Melanie Gold

Johanna Schiavoni

Complex Appellate Litigation Group LLP

Counsel for Amicus Curiae