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8 CALIFORNIA WOMEN LAWYERS

9 UNITED STATES DISTRICT COURT  
10 EASTERN DISTRICT OF CALIFORNIA

11 CREIGHTON MELAND, JR.,

12 Plaintiff,

13 v.

14 SHIRLEY N. WEBER, in her official  
15 capacity as Secretary of State of the State  
16 of California,

17 Defendant.

No. 2:19-cv-02288-JAM-AC

**BRIEF OF *AMICUS CURIAE***  
**CALIFORNIA WOMEN LAWYERS IN**  
**OPPOSITION TO PLAINTIFF'S MOTION**  
**FOR A PRELIMINARY INJUNCTION**

**Brief submitted with the consent of all**  
**parties**

Judge: Hon. John A. Mendez

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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 *amicus curiae* is not a subsidiary of any other corporation and no publicly held corporation owns 10% or more of its stock.

/s/ Johanna S. Schiavoni  
Johanna S. Schiavoni

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1 California Women Lawyers is the only statewide bar association dedicated primarily to  
2 advancing the status of women in the law and society. Given its legacy, California Women  
3 Lawyers focuses on legal issues having a significant impact on women, and seeks to ensure  
4 removal of gender barriers to women’s full participation in professional settings and in society.<sup>5</sup>

5  
6 The brief sets out an independent perspective on the constitutional questions presented,  
7 and provides additional context relevant to those questions. *See California, et al., v. U.S. Dep’t of*  
8 *the Interior*, 381 F.Supp.3d 1153, 1164 (N.D. Cal. 2019) (“an individual seeking to appear as  
9 amicus must merely make a showing that [the] participation is useful or otherwise desirable to the  
10 court.”); *Earth Island Institute v. Nash*, 19-cv-01420-DAD-SAB2019, 2019 WL 6790682, \*1  
11 (E.D. Cal. Dec. 12, 2019) (noting that district court has broad discretion to accept briefs from  
12 *amici curiae* and granting motion to file amicus brief submitted in support of defendant’s  
13 opposition to motion for preliminary injunction).  
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25 <sup>5</sup> While this brief focuses on gender, California Women Lawyers recognizes the amplified effects  
26 of discrimination, exclusion, and structural barriers to the participation on corporate boards by  
27 women of color, those from the LGBTQIA+ community, and women from other  
28 underrepresented communities, and the crucial need to continue to address and remedy these  
specific issues.

1 INTRODUCTION

2 The first two female corporate directors in the United States were Clara Abbott in 1900  
3 and Lettie Pate Whitehead in 1934, both of whom had husbands who were their corporations’  
4 founders.<sup>1</sup> Despite these early appointments, during the next 84 years public corporate boards  
5 remained bastions of men. By 2018 when SB 826 was enacted only a small percentage of  
6 California’s public company board seats were held by women and numerous companies had *no*  
7 women on their boards of directors.<sup>2</sup>

9 In enacting SB 826, the Legislature found the gross underrepresentation of women on  
10 California public company boards results from discrimination based on pernicious stereotypes  
11 and “impenetrable walls of discrimination” inherent in the secretive and closed-network board  
12 appointment process. The Legislature also determined these barriers are self-perpetuating and  
13 will not be disrupted without governmental action. In response to these and other findings, the  
14 Legislature adopted this tailored measure as a necessary first step to removing the obstacles to  
15 women’s full participation in the boardroom and the global economy.

17 California Women Lawyers submits this brief to provide additional context on the  
18 discriminatory structural barriers leading corporations to exclude women from their boardrooms,  
19 to explain the need for governmental action to halt this discrimination against women at the  
20 highest levels of business leadership, and to highlight the many experienced and well-qualified  
21 women who are willing and able to serve on public company boards.

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23 <sup>1</sup> Nicolena Farias-Eisner, *Gender Diversity in Corporate Boardrooms: Do Equal Seats Mean*  
24 *Equal Voices?* 13 J. Bus. Entrepreneurship & L. 1, 1-2 (2019),

25 <https://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1203&context=jbel>

26 <sup>2</sup> SB 826 added sections 301.3 and 2115.5 to the California Corporations Code. As is relevant  
27 here, the statute provides that by the end of 2019, any covered corporation must have “a  
28 minimum of one female director on its board.” *Id.* § 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).

1 **ARGUMENT**

2 Increased gender diversity on corporate boards serves two recognized important interests,  
3 which were the legislation’s dual aims: (i) remedying pervasive gender discrimination and  
4 structural barriers that kept women off public company boards, and (ii) protecting and promoting  
5 the economic health of the state. This brief focuses on the first objective, and how SB 826 is  
6 substantially related to achieving that interest and ensuring women have equal opportunities to  
7 serve in these vital business leadership roles.  
8

9 **I. Discriminatory Barriers Preclude Women from Obtaining Corporate Board Seats**

10 Unlike the many gains women have obtained in other contexts, women’s progress in  
11 obtaining fair representation on corporate boards has long been “stalled,” “static,” and “clogged,”  
12 and efforts at achieving such representation by voluntary means were ineffectual. *See* Debbie  
13 Thomas, *Bias in the Boardroom: Implicit Bias in the Selection and Treatment of Women*  
14 *Directors*, 102 Marq. L. Rev. 539, 540-541 (2018); Barbara Black, *Stalled: Gender Diversity on*  
15 *Corporate Boards*, 37 U. Dayton L. Rev. 7 (2011); Lisa Fairfax, *Clogs in the Pipeline: The Mixed*  
16 *Data on Women Directors and Continued Barriers to Their Advancement*, 65 Md. L. Rev. 579,  
17 586 (2006) (“data undermines the notion that women’s board representation will improve with the  
18 passing of time.”).  
19

20 To understand why this is so—and why SB 826’s remedial requirement setting the floor for  
21 gender diversity on boards is necessary—it is essential to understand the recruitment and  
22 appointment process for public company board seats. The process is secretive; the search criteria  
23 are unstated and subjective; board vacancies are rare; recruitment relies on “in-group” bias; and  
24 outreach and vetting for positions is based on an insider’s network largely comprised of men.  
25 These entrenched practices erected discriminatory structural barriers that have excluded, and  
26 continue to exclude, women from board positions. Doc. 32-11, Schipani Decl. ¶¶ 91-98, 103, 111.  
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1           **A.     The Barriers Are Structural: The Board Recruitment Process Is Secretive,**  
2           **and the Criteria Are Unstated or Highly Subjective**

3           The corporate board recruitment and appointment process is private and secretive. Doc.  
4 32-1, Berkhemer-Credaire Decl. ¶¶ 18-26. “Corporate Board searches are held very  
5 confidentially and behind closed doors.” Doc. 33 at 72 of 333 (RJN, Exh. 6 at 3, Cal. Assem.  
6 Approps. Committee Hearing 8/8/2018) (testimony of Amy Bernard Bond, experienced  
7 consultant to corporate boards, attorney, and previous corporate HR officer); *accord id.* at 65 of  
8 333 (RJN, Exh. 5 at 10, Cal. Assem. Judiciary Comm. Hearing 6/26/2018) (testimony of Anne  
9 Staines, president of National Association of Women Business Owners-California).

10           Board member recruitment is unlike a job search for an executive position, “where there  
11 are people compared against one another.” Doc. 33 at 21, 19 of 333 (RJN, Exh. 1 at 14, 12, Sen.  
12 Banking and Financial Institutions Comm. Hearing 4/18/2018) (testimony of Betsy Berkhemer-  
13 Credaire, search firm executive and CEO of 50/50 Women on Boards). There is no opportunity  
14 to apply, or for a candidate to know whether she was considered, or to know the basis for the  
15 decision. Doc. 32-1, Berkhemer-Credaire Decl. ¶¶ 18, 21, 26; Doc. 32-8, Meline Decl. ¶ 30.

16           A corporate board appointment is by invitation only. *See* Doc. 32-1, Berkhemer-Credaire  
17 Decl. ¶¶ 18-29. There is no public notice or open application process. *Id.* ¶¶ 17-18, 21, 26.  
18 Further, even if open board positions are made public, there often are stated criteria for the  
19 position and the vetting is conducted in secret. *Id.*; Doc. 32-8, Meline Decl. ¶ 30.

20           “[C]orporate directors are most often chosen based on subjective qualities including  
21 interpersonal and communication skills, leadership skills, culture fit, and passion.” Jacqueline  
22 Concilla, *A Glimmer of Hope for California’s Well-Intentioned Attempt to Put More Women in*  
23 *the Boardroom*, 93 So. Cal. L.Rev. 603, 626 (2020). The more subjective the desired  
24 qualifications, the easier it is to perpetuate stereotypes and hide biases. *See* Thomas, *Bias in the*  
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1 *Boardroom*, 102 Marq. L. Rev. at 549, 552, 559; Deborah L. Rhode & Manda K. Packel,  
2 *Diversity on Corporate Boards: How Much Difference Does Difference Make?*, 39 Del. J. Corp.  
3 L. 377, 406-07 (2014). And, even when a Board sets out a matrix or position description for its  
4 board candidate search, “[t]here is no requirement that a director position be filled by an  
5 individual who is qualified according to [the] criteria identified according to the matrix or  
6 position description.” Doc. 32-1, Berkheimer-Credaire Decl. ¶ 32.

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

10 When a board position opens, board members rely on their existing networks and friends  
11 to fill the position. Doc. 33 at 20 of 333 (RJN, Exh. 1 at 13, Sen. Banking and Financial  
12 Institutions Comm. Hearing 4/18/2018) (Berkheimer-Credaire testimony); *see* California Partners  
13 Project, *Claim Your Seat: Women of Color on California’s Public Company Boards* 21 (2021)  
14 (hereafter, “*Claim Your Seat Report 2021*”);<sup>3</sup> Cydney Posner, *Tackling the Underrepresentation*  
15 *of Women of Color on Boards*, Cooley PubCo at 3 (May 10, 2021);<sup>4</sup> Coco Brown, *Why Men Still*  
16 *Dominate Corporate Boardrooms*, Fortune Magazine (June 7, 2017);<sup>5</sup> *see* also Thomas, *Bias in*  
17 *the Boardroom*, 102 Marq. L. Rev. at 549, 552, 559 (“when . . . selecting board nominees,  
18 nominations tend to come from a small pool of individuals from personal networks”).

20 And these networks and friends are overwhelmingly comprised only of other men. Doc.  
21 32-1, Berkheimer-Credaire Decl. ¶¶ 24-25, 30-31, 35-36, 39; Doc. 32-8, Meline Decl. ¶¶ 30, 27-  
22 29, 37-38, 43-44, 41 (“The common way of sourcing directors from the personal networks of the  
23 CEO, the lead director or other board chair are limited by the single-sex nature of board  
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26 <sup>3</sup> <https://www.calpartnersproject.org/wocclaimyourseat>

27 <sup>4</sup> <https://cooleypubco.com/2021/05/10/underrepresentation-women-of-color-boards>

28 <sup>5</sup> <https://fortune.com/2017/06/07/most-powerful-women-career-advice-corporate-boardroom-diversity-workplace-inequality-favoritism>

1 leadership and their networks.”); see Matt Huffman & Lisa Torres, *It’s Not Only ‘Who you Know’*  
2 *That Matters: Gender, Personal Contacts, and Job Lead Quality*, 16 *Gender & Soc’y* 793, 796  
3 (2002). When asked why there are no female directors on their boards, executives frequently say  
4 “they do not know any qualified women.” Doc. 32-8, Meline Decl. ¶ 29; see also *id.* ¶¶ 31, 41.

5  
6 Quantitative studies analyzing archival data have confirmed that male networks “are very  
7 influential in board selection and . . . represent a huge barrier for women,” resulting in “and  
8 reinforcing inequalities in the careers of men and women.” Isabelle Allerman et al., *Role of Old*  
9 *Boys’ Networks and Regulatory Approaches in Selection Processes for Female Directors*, Wiley  
10 Online Library 17, 18 (2021);<sup>6</sup> see also Thomas, *Bias in the Boardroom*, 102 *Marq. L. Rev.* at  
11 559 [“in a Harvard Business Review study of the experiences of female directors, even 33% of  
12 male directors interviewed believed that women face limited access to boards because of weaker  
13 networks and the ‘old boys’ club.”]; Boris Groysbert & Deborah Bell, *Dysfunction in the*  
14 *Boardroom*, *Harv. Bus. Rev.* 88, 95 (June 2013).<sup>7</sup> When “those who sit on boards – mostly white  
15 men – . . . comb their networks for people they can put forward (*which is how 87% of board seats*  
16 *are filled*), they find few women executives in their own circles.” Brown, *Why Men Still*  
17 *Dominate Corporate Boardrooms* (emphasis added).

18  
19 Even when a corporate board uses a recruiter, the Board’s nominating committee typically  
20 gives the recruiter a list of men they already know, and then asks the recruiter to vet only the  
21 individuals on that list. Doc. 33 at 20 of 333 (RJN, Exh. 1 at 13, Cal. Senate Banking and  
22 Financial Institutions Comm. Hearing on 4/18/2018) (Berkhemer-Credaire testimony). They  
23 “don’t want additional people who are strangers.” *Id.*; accord Doc. 33 at 63 of 333 (RJN, Exh. 5  
24 at 7, Cal. Assem. Judiciary Comm. Hearing 6/26/2018) (Berkhemer-Credaire testifying that  
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28 <sup>6</sup> <https://onlinelibrary.wiley.com/doi/epdf/10.1111/1467-8551.12485>

<sup>7</sup> <https://hbr.org/2013/06/dysfunction-in-the-boardroom>

1 existing CEO and board directors generally refer, interview, and nominate male candidates  
2 “because that is who [they] already know and trust and feel comfortable with.”)

3           The list would include primarily other men “whom they feel comfortable with . . . [who  
4 have] been university buddies or golf course buddies or friends they know through business.”  
5 Doc. 33 at 20 of 333 (RJN, Exh. 1 at 13, Cal. House and Senate Hearings, 4/18/2018)  
6 (Berkhemer-Credaire testimony).<sup>8</sup> “When the search firms vet the candidates, [the recruiting  
7 firm] come[s] back with a report to the corporate client that says, ‘This person has served on X  
8 amount of boards and never had a problem, or actually did.’ And then the nominating committee  
9 chooses their favorite . . .” *Id.* at 21 of 333. The selected candidate (or slate of candidates) is  
10 then presented to the shareholders (or intermediaries voting on behalf of shares’ beneficial  
11 owners) in an election that is almost always uncontested; the shareholders *vote only on the*  
12 *board’s chosen candidate.* Doc. 32-5, Jennings Decl. ¶¶ 14, 25-27, 36, 41 (“in practice, boards  
13 themselves usually determine who is nominated and the typical director election is uncontested”).  
14  
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16           That boards rely on internal networking to select new members results, in part, from a  
17 phenomenon known as “in-group” bias, which influences perceptions of competence and results  
18 in board members choosing someone who looks and acts like them. *See* Thomas, *Bias in the*  
19 *Boardroom*, 102 Marq. L. Rev. at 549, 552, 559; Brown, *Why Men Still Dominate Corporate*  
20 *Boardrooms* (“a systemic, in-group bias . . . keeps the top roles in [corporate] organizations out of  
21 reach for entire groups of qualified people . . . [T]hose who already have a seat at the table are far  
22 more likely to invite favorite members of their own networks to fill any spaces that open up  
23 beside them. And these networks are often comprised exclusively of people like them.”); Rhode  
24  
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26 <sup>8</sup> *Accord* Doc. 32-8, Meline Decl. ¶¶ 27-29, 34; Doc. 32-1, Berkhemer-Credaire Decl. ¶¶ 25, 30,  
27 35, 36; *Claim Your Seat Report* 2021 at 21 (board “[s]earch committees are most comfortable  
28 with candidates who are ‘known and vouched for’ leading boards to recruit new directors from  
their existing networks.”).

1 & Packel, *Diversity on Corporate Boards*, 39 Del. J. Corp. L. at 404-05; *see also* Carolyn Janiak,  
2 *The “Links” Among Golf, Networking and Women’s Professional Advancement*, 8 Stan. J.L. Bus  
3 & Fin. 317, 325 (2003). Studies show this occurs because it is assumed that similar people will  
4 “fit in better” or that is who makes up the “talent pool.” Erica Hersh, *Why Diversity Matters:  
5 Women on Boards of Directors*, Harvard T.H. Chan School of Public Health (July 21, 2016).<sup>9</sup>  
6

7 As to the former, board members have an incentive and self-interest to preserve ““social  
8 comfort levels and board cohesion.”” Farias-Eisner, *Gender Diversity in Corporate Boardrooms*  
9 13 J. Bus. Entrepreneurship & L. at 9. A survey of more than 500 hiring managers found 74  
10 percent of leaders reported their most recent hire had a personality similar to their own. Hersh,  
11 *Why Diversity Matters*. In one Harvard Business School study, business school students were  
12 given two case studies, identical, except that the name of the CEO differed (“John” or “Jane”).  
13 Students consistently rated “Jane” more negatively. Rhode & Packel, *Diversity on Corporate  
14 Boards*, 39 Del. J. Corp. L. at 407.<sup>10</sup>  
15

16 Women face “stereotypes and bias” based on “perceptions that they lack the qualities of  
17 effective [business] leaders.” Thomas, *Bias in the Boardroom*, 102 Marq. L. Rev. at 549; *accord*  
18 Doc. 32-10, Rosenblum Decl. ¶ 1; Doc. 32-11, Schipani Decl. ¶ 51 (“leadership roles are still  
19 widely perceived as not suitable for women, despite what their qualifications actually are,  
20 resulting in women leaders being evaluated more negatively compared to otherwise identical  
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23 <sup>9</sup> <https://www.hsph.harvard.edu/ecpe/why-diversity-matters-women-on-boards-of-directors/>

24 <sup>10</sup> Additional studies show that biases against women of color are even greater as they face a  
25 “double bind” of gender and race discrimination. *See* Judd Kessler and Corinne Low, *Research:  
26 How Companies Committed to Diverse Hiring Still Fail*, Harvard Bus. Rev. (Feb 11, 2021) (study  
27 showing “a surprising amount of race and gender bias” in resume review decisions by  
28 “prestigious employers” that “claim to be seeking diversity;” <https://hbr.org/2021/02/research-how-companies-committed-to-diverse-hiring-still-fail>; Teresa Dean, *Double Bind: Women of Color in Business Leadership*, Baylor University Honors Thesis 1, 14-36 (Dec. 2016) [https://baylor-ir.tdl.org/bitstream/handle/2104/9883/Teresa\\_Dean\\_Thesis.pdf?sequence=1](https://baylor-ir.tdl.org/bitstream/handle/2104/9883/Teresa_Dean_Thesis.pdf?sequence=1); *Claim Your Seat Report 2021* at 4 (discussing underrepresentation of women of color on boards).



1 male counterparts. This bias, in turn, hampers the advancement of women to high level  
2 leadership roles like board membership.”).

3 Boards often ignore women as viable board candidates because they are looking  
4 elsewhere. “[B]oards are basically fishing from the same pond instead of looking at the broader  
5 ocean.” Alisha Hardasani Gupta, *Surprise: Women and Minorities Are Still Underrepresented in*  
6 *Corporate Boardrooms*, The New York Times (June 7, 2021) (quoting Linda Akutagawa, chair  
7 for Alliance for Board Diversity and chief executive of Leadership Education for Asian  
8 Pacific).<sup>11</sup> This point recently was echoed by retired U.S. military general Stanley  
9 McChrystal—a board member or adviser for at least 10 companies since 2010—when he recently  
10 observed “You fish in the pond you’re standing around.” Isaac Stanley-Becker, *Corporate*  
11 *boards, consulting, speaking fees: How U.S. generals thrived after Afghanistan*, Washington Post  
12 (Sept. 4, 2021).<sup>12</sup> McChrystal’s ‘network’ is how he landed some of his corporate board seats  
13 after retiring from the military: “McChrystal said he joined the board of Knowledge International  
14 . . . because a former boss, retired Gen. Bryan D. ‘Doug’ Brown, asked him to.” *Id.*<sup>13</sup>

17 By promoting diversity on corporate boards, SB 826 breaks down stereotyping and  
18 advances meritocracy by encouraging companies to seek directors based on merit rather than  
19 searching only in their own narrow, existing male-dominated business and social networks.  
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21 <sup>11</sup> [https://www.nytimes.com/2021/06/07/us/women-minorities-underrepresented-corporate-](https://www.nytimes.com/2021/06/07/us/women-minorities-underrepresented-corporate-boardrooms.html)  
22 [boardrooms.html](https://www.nytimes.com/2021/06/07/us/women-minorities-underrepresented-corporate-boardrooms.html)

23 <sup>12</sup> [https://www.washingtonpost.com/politics/2021/09/04/mcchrystal-afghanistan-navistar-](https://www.washingtonpost.com/politics/2021/09/04/mcchrystal-afghanistan-navistar-consulting-generals/)  
24 [consulting-generals/](https://www.washingtonpost.com/politics/2021/09/04/mcchrystal-afghanistan-navistar-consulting-generals/)

25 <sup>13</sup> As the Washington Post article points out, many top military generals have gone on to obtain  
26 lucrative board positions. Notably, women were expressly barred from serving in combat  
27 positions in the U.S. Armed Forces until a policy reversal in late 2013, which then took several  
28 more years to effectuate. A military Commission found “the combat exclusion policy limits  
women’s opportunities to attain the highest ranks in the military.” Kristy N. Kamarck, *Women in*  
*Combat: Issues for Congress* 1, 12-18 (Dec. 13, 2016), <https://sgp.fas.org/crs/natsec/R42075.pdf>.  
Because of the legal, structural barriers impeding women reaching the highest military ranks, they  
similarly have not been included in that network” ‘drawn upon for corporate board seats.

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

3           In addition to disrupting the insular recruitment process, SB 826 addresses the historic  
4 lack of corporate board turnover precluding any real progress in remedying the discrimination  
5 against women’s participation on corporate boards. *E.g.*, Doc. 32 at 19-20 of 333 (RJN, Exh. 1 at  
6 12-13); *id.* at 54 of 333 (RJN, Exh. 4 at 21); *id.* at 113 of 333 (RJN, Exh. 10 at 15, Sen. Judiciary  
7 Committee Bill analysis discussing Board’s ability to add a seat to address the issue of board  
8 seats rarely opening); *see 2020 Spencer Stuart Board Index Survey 2 (2020)*.<sup>14</sup> The Legislature  
9 was told that because of this lack of turnover and embedded structural discrimination, it would  
10 take 40 or more years to achieve fair gender diversity on corporate boards, absent measures like  
11 SB 826. Doc. 33 at 126 of 333 (RJN, Exh. 13 at 4, Cal. Sen. Rules Committee, Floor Bill  
12 Analysis prepared for 5/29/2018 hearing).

13  
14           Studies confirm that changes to board membership are rare. One quarter of Russell 3000  
15 directors stay in their position for more than 15 years, and the average tenure exceeds ten years.  
16 Anne Stych, *Low turnover slows diversity on corporate boards*, The Business Journals:  
17 BizWomen (Apr. 29, 2019).<sup>15</sup> OSI, the company at issue here, is a prime example: of its current  
18 seven-member board of directors with six independent directors, their service years have been 34  
19 (Good), 31 (Luskin), 11 (Ballhaus), 5 (Hawkins), 4 (Chizever) and 1 (Bernard). Doc. 32-12, Sze  
20 Decl. ¶ 2 (table). The first female director (Bernard), added to the Board in December 2019,  
21 replaced a director who served for 25 years (Mehra). *Id.*

22  
23           Moreover, in 2018, 50 percent of Russell 3000 companies and 43 percent of S&P 500  
24 companies disclosed no change in their board members. Cydney Posner, *Reasons for “Male and*  
25

26  
27 <sup>14</sup> [https://www.spencerstuart.com/-/media/2020/december/ssbi2020/2020\\_us\\_spencer\\_stuart\\_board\\_index.pdf](https://www.spencerstuart.com/-/media/2020/december/ssbi2020/2020_us_spencer_stuart_board_index.pdf)

28 <sup>15</sup> <https://www.bizjournals.com/bizwomen/news/latest-news/2019/04/low-turnover-slows-diversity-on-corporate-boards.html?page=all>

1 *Pale” Boards*, Harvard Law School Forum on Corporate Governance (May 17, 2019).<sup>16</sup> If there  
2 was a change, it occurred in only one seat, and there remains a very strong preference that even  
3 when a seat becomes available, to *not* fill it with a first-time director. *Id.* (observing that lengthy  
4 director tenure, rare vacancies, and preferences for directors with previous corporate board  
5 service keep women off boards—*not* a lack of qualified female board candidates).

7 While the lack of board turnover is a contributing factor to women’s discriminatory  
8 exclusion, even if more vacancies occur, that alone will not remedy the discriminatory barriers  
9 that women face with respect to corporate board selection.

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

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

19 Serving on a board provides “massive” networking opportunities. Susan Muck, *Want to*  
20 *Join a Corporate Board? Here’s How*, Harvard Law School Forum on Corporate Governance  
21 (Feb. 26, 2020).<sup>17</sup> “Developing good relationships with [Board] colleagues will exponentially  
22 increase [an individual’s] professional reach in ways that can pay off dramatically in the future.  
23 Fellow directors will have connections, skills and expertise that may be valuable to you outside  
24 your board service.” *Id.* “In the business world, obtaining a corporate board director seat is a

27 <sup>16</sup> <https://corpgov.law.harvard.edu/2019/05/17/reasons-for-male-and-pale-boards/>

28 <sup>17</sup> <https://corpgov.law.harvard.edu/2020/02/26/want-to-join-a-corporate-board-heres-how/>

1 very important professional opportunity and network-building step for any high-level executive or  
2 business leader hoping to add value and further advance their careers. Boards enable  
3 professionals to contribute their knowledge and experience to the success of a business as well as  
4 to expand their networks, and develop additional business connections.” Doc. 32-8 Meline Decl.  
5 ¶ 19. Studies also show that “[f]or women, being elected to a board is [often] a precursor to . . .  
6 being named the CEO of a company.” *Id.* ¶ 21.

8 Additionally, board members earn substantial financial benefits from board service.  
9 Muck, *Want to Join a Corporate Board?* Compensation for directors can range from six to seven  
10 figures, including stock awards and extra payments for meeting attendance and committee  
11 service. *Id.*; Doc. 32-8, Meline Decl. ¶ 20. “For many people in business and finance, it’s a  
12 coveted role, a part-time gig that confers access to a wide network of powerful people as well as  
13 annual compensation that can run to \$300,000 or more.” Jeff Green, et al., *Wanted 3,732 Women*  
14 *to Govern Corporate America*, Bloomberg Businessweek (March 21, 2019).<sup>18</sup> “It is well known .  
15 . . . that executives later in their careers seek to position themselves for seats on corporate boards . .  
16 . so they can receive additional annual earnings long after they retire from their full-time jobs.”  
17 Doc. 32-8, Meline Decl. ¶ 20. According to investor Warren Buffet, “director compensation has  
18 now soared to a level that . . . [is] . . . three to four times the annual median income of U.S.  
19 households.” *Id.* (quoting Buffett’s 2020 annual investment letter).

22 **E. The Experiences of Professional Women Confirm the Secretive, Subjective,  
23 and Insular Recruitment Process for Corporate Board Positions**

24 A seasoned corporate director, who also is a lawyer, investment banker, and hedge fund  
25 manager, Susanne Meline, explains in a declaration filed in this case: “[b]ecause there is no  
26 transparency in the board nominations and selections process, neither I nor any other woman who  
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28 <sup>18</sup> <https://www.bloomberg.com/graphics/2019-women-on-boards/>

1 is qualified to serve as a corporate director will ever know that, with respect to a specific  
2 corporate board, whether we have been overlooked or rejected in favor of a male candidate.”  
3 Doc. 38-2, Meline Decl. ¶ 35; *id.* at ¶¶ 2-17. In speaking on the record, Meline acknowledges the  
4 personal and professional risk of potential retaliation, which she accepted to help “bring about  
5 change for other qualified women,” to decrease “the risk of corporate failure,” and to increase the  
6 likelihood of corporate success brought about by optimizing boards “by seeking to remove the  
7 barriers to women’s participation on public company boards.” *Id.* ¶ 46.

9 Many women are not in a position similar to Meline’s, where they are comfortable  
10 publicly coming forward. Counsel for undersigned *amicus curiae* reached out to numerous  
11 professional women seeking personal stories regarding their experiences with corporate board  
12 recruitment and service. That outreach included dialogue with an attorney; professionals who  
13 work in corporate board recruiting and placement; an investor who has served on private  
14 company boards; and a public corporate board member of two national public companies. Their  
15 experiences echoed Meline’s and were consistent with the other evidence in the record before the  
16 Legislature and this Court. That is, each of these individuals confirmed the secretive, closed,  
17 exclusive, and male-dominated nature of Board recruitment, and the entrenched barriers that have  
18 persistently excluded women from service on public company boards.

20 An attorney, Liliana,<sup>19</sup> counsels corporations on ESG (“environment, social and  
21 governance”) issues and is familiar with board recruitment processes. She related that board  
22 searches often are constructed so narrowly as to include only favored candidates within existing  
23 networks, and to exclude other potential candidates not in the known network of the board. She  
24 also noted that “skill sets are sometimes narrowly defined so that women are naturally excluded,  
25 *i.e.*, ‘board member must have had executive operating experience (CEO, CFO or CSO) with  
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28 <sup>19</sup> Name changed per the interviewee’s confidentiality request. Notes are on file with counsel.

1 budgets in excess of \$200 million.” She said, “in other words, the skill sets are posited in a  
2 manner that would primarily result in white male candidates, as opposed to articulating the skill  
3 sets in a somewhat more encompassing manner,” such as “operating experience with reporting  
4 lines of leadership and responsibility for significant or material aspects of the X business.”

5  
6 Jocelyn<sup>20</sup> runs a company that handles corporate board placement and has helped more  
7 than 300 women obtain public and private board roles in recent years. She agreed SB 826 is vital  
8 to combat gender discrimination arising from boards relying on their network of male contacts, a  
9 secretive process with limited board turnover, and narrow framing of their criteria for potential  
10 board candidates. She said: “It’s way too comfortable to exist the way boards have, and it’s way  
11 too uncomfortable to change.” She also noted boards often have been willing to nominate a male  
12 candidate with whom they are familiar even if he did not meet each of their desired qualifications,  
13 but this flexibility was not extended to unfamiliar female candidates. Finally, she said SB 826  
14 prompted some companies lacking board gender diversity to seek out directors with skillsets from  
15 highly-qualified potential board candidates, many of whom are women ignored in the past.  
16

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

19  
20 Maria,<sup>21</sup> a high-tech investor who has served on several private company boards, related  
21 that based on her experience, the “old boys’ network is alive and well” in the corporate board  
22 setting. Though she has only served on private boards, she has been exposed to public company  
23 board networking and recruiting practices; she described the situation that when a board vacancy  
24 opens on ABC company or someone is rotating off a board, the board members call friends in  
25 their personal or professional networks. Because women are not in these men’s networks, she  
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27 \_\_\_\_\_  
28 <sup>20</sup> Name changed per the interviewee’s confidentiality request. Notes are on file with counsel.

<sup>21</sup> Name changed per the interviewee’s confidentiality request. Notes are on file with counsel.

1 said they are not considered by boards when reaching out for positions. She declined to be named  
2 because she plans to seek board positions in the future and does not want to harm her chances.

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

5 Because there is *little to no transparency* in the board recruitment and selection process,  
6 there is no practical basis to challenge a discriminatory appointment decision or retaliation for  
7 complaining about a decision. Doc. 32-1, Berkhemer-Credaire Decl. ¶¶ 40-41; Doc. 32-8, Meline  
8 Decl. ¶ 35 (explaining that the lack of transparency means women do not even know when or  
9 why they are not being considered and have no remedy); Doc. 33 at 72 of 333 (RJN, Exh. 6 at 3  
10 (Bond testimony)). And, as Meline made clear: “even if a woman has specific reasons to believe  
11 that she has not been placed on a board due to gender-based discriminatory factors, there are no  
12 protections for her against retaliation as there are for employees.” *Id.* ¶ 35.

14 Title VII of the Civil Rights Act of 1964 prohibits discrimination and retaliation in the  
15 workplace based on gender, but it generally bars discrimination and retaliation against employees,  
16 and not directors. *See* 42 U.S.C. § 2000e-2, *et seq.*, § 2000e-3(a). California employment law is  
17 similar. *See* Cal. Gov’t Code, § 12900, *et seq.*, § 12940(h). Counsel for undersigned *amicus*  
18 *curiae* has not found cases in which these employment laws have been held to cover a prospective  
19 corporate director seeking an independent director seat on a company’s board.  
20

21 Even if there existed a legal basis to challenge an appointment (or lack thereof), highly  
22 qualified women have a strong incentive *not* to complain for fear of retaliation or being excluded  
23 from consideration in other contexts. *Supra* at 11-14; Doc. 32-1, Berkhemer-Credaire Decl. ¶ 41;  
24 Doc. 32-8, Meline Decl. ¶ 35 (“Alleging discrimination by a specific corporate board by a female  
25 candidate will more likely eliminate her chances of becoming a corporate director in the future.”).  
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1           **G. Measures Taken Before SB 826 Were Ineffective, Yet Comparing Board**  
 2           **Composition Before and After the Legislation Confirms the Law Is Working**

3           Until SB 826’s passage, little change occurred, despite 2013 Senate Resolution 62,  
 4 development of extensive registries, and robust pools of qualified female board candidates. Doc.  
 5 32-11, Schipani Decl. ¶ 88; Doc. 32-4, Grounds Decl. ¶ 34; Annalisa Barrett, *Women on Boards*  
 6 *of Public Companies Headquartered in California 2018 Report* at 4 (Oct. 24, 2019);<sup>22</sup> California  
 7 Partners Project, *Claim Your Seat: A Progress Report on Women’s Representation on California*  
 8 *Corporate Boards* 6-7 (2020) (hereafter, “*Claim Your Seat Report 2020*”).<sup>23</sup> Rather, the record  
 9 before the Legislature and this Court shows the entrenched nature of the barriers to women’s  
 10 service on corporate boards continued to keep women out of the corporate board room. *See* Doc.  
 11 32-8, Meline Decl. ¶¶ 44-45; Doc. 32-11, Schipani Decl. ¶¶ 88-98.

12           Governmental action such as SB 826 reduces “the negative effect of networks on female  
 13 board membership” by “forcing boards to look outside their networks to recruit female directors.”  
 14 Allerman, *Role of Old Boys’ Networks and Regulatory Approaches in Selection Processes for*  
 15 *Female Directors* at 2. And it is beginning to work. Two years after SB 826’s enactment, the  
 16 early progress has been measurable, “significant” and “has increased at a much faster pace since  
 17 SB 826 was passed.” Doc. 32-4, Grounds Decl. ¶¶ 35, 38; *id.* ¶¶ 29-38; Doc. 32-10, Rosenblum  
 18 Decl. ¶¶ 74, 79, 90. In 2016, just 208 corporate board seats were newly filled by women; by  
 19 about 2020 that number grew to 739; and, in the first quarter of 2021, women filled 45% of public  
 20 company board appointments in California. *See Claim Your Seat Report 2021* at 2. Indeed,  
 21 before the legislation, 29% of California companies that would have been subject to the law “had  
 22 all-male boards, [and] as of March 1, 2021, only 1.3% . . . have all-male boards.” Doc. 32-4,  
 23 Grounds Decl. ¶ 35; *see* Annalisa Barrett, *The Women Changing California Boardrooms*, report

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<sup>22</sup> [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3463510](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3463510)

<sup>23</sup> <https://www.calpartnersproject.org/claimyourseat2020>



1 published by KPMG Board Leadership Center 3 (2020) (“*KPMG 2020 Report*”);<sup>24</sup> *see also* Mot.  
2 at 3 (acknowledging progress after SB 826’s enactment).

3 Yet substantial underrepresentation persists. A recent study by the Alliance for Board  
4 Diversity and Deloitte found that women still represent only about one fifth of all board seats  
5 nationwide. *See* Gupta, *Surprise: Women and Minorities Are Still Underrepresented in*  
6 *Corporate Boardrooms*, The New York Times; Neysa Dillon-Brown, *Women and Minorities are*  
7 *Still Unrepresented in the Boardroom*, Altopartners (Mar. 12, 2019)<sup>25</sup> (“while women account for  
8 half of the population of the U.S., they hold less than 25 percent of board seats in the Fortune  
9 100.”). A large disparity also persists in California-headquartered companies. Doc. 32-4,  
10 Grounds Decl. ¶¶ 10, 46-49; *Claim Your Seat Report 2020* at 15; *Claim Your Seat Report 2021* at  
11 2, 7 (reporting that even several years after SB 826, women hold just “26.5% of California’s  
12 public company board seats”). Thus, there remains an ongoing need for the legislation to combat  
13 the longstanding, structural barriers to women’s service on corporate boards.  
14  
15

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

17 Plaintiff claims that women’s underrepresentation on public company boards is the result  
18 of the lack of women “in the relevant labor pool,” rather than from discrimination. Mot. at 9. He  
19 suggests that “[d]isparities may arise as a result of any number of factors, including the individual  
20 characteristics, wants, needs, and choices of the people involved . . . [including] the number of  
21 women who attend business school . . . or the number of women who seek out positions as board  
22 members.” *Id.*  
23  
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26 <sup>24</sup> [https://boardleadership.kpmg.us/relevant-topics/articles/2020/the-women-changing-california-  
27 boardrooms.html](https://boardleadership.kpmg.us/relevant-topics/articles/2020/the-women-changing-california-boardrooms.html)

28 <sup>25</sup> [https://altopartners.com/news/2019-women-and-minorities-are-still-underrepresented-in-the-  
boardroom](https://altopartners.com/news/2019-women-and-minorities-are-still-underrepresented-in-the-boardroom)

1 Plaintiff cites no relevant support for these arguments, and the record undermines his  
2 contentions. At the SB 826 legislative hearings, bill author Senator Jackson discussed the large  
3 pool of qualified female candidates willing and able to serve as board directors. Doc. 33 at 55 of  
4 333 (RJN, Exh. 4 at 22, Cal. Assem. Comm. on Banking and Finance Hearing, 6/25/2018).  
5 Several additional witnesses detailed the numerous databases identifying qualified women ready  
6 and willing for corporate board service. Doc. 33 at 62 of 333 (RJN, Exh. 5 at 5, Cal. Assem.  
7 Judiciary Comm. Hearing 6/26/2018) (Berkhemer-Credaire testifying there are “thousands” of  
8 women “qualified” to “serve on corporate boards,” including “executive and experienced  
9 women” and “those who have been certified by UCLA, by Stanford, and other institutions outside  
10 our California borders”); *id.* at 65 of 333 (RJN, Exh. 5 at 10) (Staines testifying: “There are many,  
11 many [women] business owners who are qualified to serve on boards, but the doors are closed for  
12 even consideration for the most part”).  
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15 The bill drew support from hundreds of individuals, organizations, and companies,  
16 including large and small companies covering a broad array of industries, who called attention to  
17 the deep pool of talented female candidates ready for board service. *See* Doc. 33-1 at 195-298 of  
18 298 (RJN, Exh. 32, letters in support of SB 826 submitted in the legislative records of the  
19 California Assembly Judiciary Committee on Banking and Finance); *e.g., id.* at 210 of 298 (RJN,  
20 Exh. 32 at 15, 4/13/2018 Letter from Elaine Hollifield, President, NAWBO-Ventura County  
21 (“Looking at just the 100 California companies in the Russell 3000 with NO women directors  
22 currently, a minimum of 100 new women directors would be required in 2019. According to the  
23 2016 study by UC Davis, there are 191 women C-suite executives among the state’s largest  
24 companies, plus at least 200 qualified women CEOs of their own companies.”); *id.* at 207 of 298  
25 (RJN Exh. 32, 3/13/2018 Letter from CEO of Sunrun, a female-founded and operated energy  
26 company with \$3B in solar installations); *id.* at 205 of 298 (RJN Exh. 32, 3/20/2018 Letter from  
27  
28

1 NAWBO-LA supporting SB 826 as the voice of 544,000 women-owned businesses in greater Los  
 2 Angeles). Other evidence before this Court shows the vast and growing pool of board-qualified  
 3 women in California. Doc. 32-11, Schipani, ¶ 89; Doc. 32-8, Meline Decl. ¶¶ 23-24 (“the number  
 4 of qualified women . . . vastly exceeds the number of [California] board seats available . . .  
 5 identifying specific “groups comprised of” hundreds and thousands of “board-ready women”).<sup>26</sup>

7 This evidence is consistent with the fact of widespread female participation in business  
 8 and the professions. “The number of females in graduate schools surpassed the number of males  
 9 in 1984; in 2008 women accounted for 59 percent of graduate school enrollment. Women have  
 10 earned more master’s degrees than men since 1987, and more doctorate degrees than men since  
 11 2006.” Doc. 32-11, Schipani Decl. ¶ 29. Women represent 51 percent of the population, 50  
 12 percent of the labor force, and earn more than 50 percent of bachelors and masters and doctoral  
 13 degrees. See Erica Hersh, *Why Diversity Matters* at 3; *Quick Take: Women in the Workforce-*  
 14 *United States*, Catalyst (Oct. 14, 2020).<sup>27</sup> Women also own business, create jobs, and have  
 15 extensive purchasing power in California’s economy. Doc. 33-1 at 209 of 298 (RJN, Exh. 32  
 16 4/13/2018 Letter from Elaine Hollifield, President, NAWBO-Ventura County (California has  
 17 “more than 1.55 million established women business owners who provide jobs to another 1.9  
 18 million people, and generate \$3.182 Billion in annual revenues”); *id.* at 246 of 298 (4/6/2018  
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21  
 22 <sup>26</sup> The identified groups include: “Woman Corporate Directors Network (2,500 members), Athena  
 23 Alliance (1,000 members), Women’s Leadership Forum (250 members), Exceptional Women  
 24 Awardees Foundation (75 members); Stanford Woman on Boards (over 1,000 members);  
 25 Extraordinary Women on Boards (hundreds of women directors and growing); and Beyond  
 26 Boards (approximately 100 members).” Doc. 32-8, Meline Decl. ¶ 24; Doc. 32-11, Schipani  
 27 Decl. ¶ 30 (citing 2012 Committee for Economic Development Report finding that “our own  
 28 review of the many organizations that maintain lists of qualified female board candidates cases  
 substantial doubt on the validity of th[e] perception” that qualified female applicants are lacking),  
 ¶¶ 33-34 (discussing registries and other platforms with resumes and data for thousands of board-  
 qualified prospective female candidates).

<sup>27</sup> <https://www.catalyst.org/research/women-in-the-workforce-united-states/>

1 Letter from Scott Hague, President of Small Business of California) (women “represent the  
2 majority of consumer purchasing power, and understand supplier/vendor relationships.”).

3 Of the women added to previously all-male California boards during 2019, 73 percent are  
4 employed, most commonly in C-suite roles, and 76 percent have an advanced degree, with an  
5 MBA being the most common advanced degree held. *KPMG 2020 Report* at 2. The data show  
6 boards had no difficulty finding qualified women to serve, once they began to look beyond their  
7 ‘ponds.’ *See id.* at 2, 4-7; *see* Doc. 32-4, Grounds Decl. ¶¶ 11, 39-45.

9 Although many public corporate board members have prior CEO experience, and women  
10 with CEO or C-suite experience remain in the minority, corporations are increasingly recognizing  
11 that CEO experience is not a necessary qualification for board membership. *See* Thomas, *Bias in*  
12 *the Boardroom*, 202 Marq. L. Rev. at 548; Rhode & Packel, *Diversity on Corporate Boards*, 39  
13 Del. J. Corp. L. at 403-04, & fn. 172 (“The number of active CEOs who serve on the boards of  
14 other public companies . . . has decreased significantly during the last decade”). Moreover, the  
15 claim that CEO experience is essential for every board member reflects explicit and implicit bias,  
16 and an unjustified unwillingness to move from the board’s shallow pond to the wider ocean. *See*  
17 Rhode & Packel, *Diversity on Corporate Boards*, 39 Del. J. Corp. L. at 404 (“no widely  
18 accepted’ research demonstrating that active CEOs make better board members or lead to  
19 improved advice or monitoring by the board”). The record does not support the notion that a  
20 board member with prior CEO experience results in better leadership or corporate productivity.  
21 *See id.* (“In fact, one survey found that 79% of corporate directors do not believe that ‘active-  
22 CEO directors [are] better than average directors.’”).

25 Many women seeking board membership have demonstrated business acumen and  
26 leadership in other equivalent contexts such as on large nonprofit boards and government  
27 commissions. Doc. 32-1, Berkhemer-Credaire Decl. ¶ 37. Research also shows corporate boards  
28

1 are recognizing the importance of other uncommon skill sets, such as research and development,  
2 human resources, risk management, sustainability, and political/government, most of which are  
3 skill sets possessed by more female than male director candidates. Doc. 32-11, Schipani Decl. ¶  
4 78 (citing studies); *Claim Your Seat* Report 2021 at 15, 22 (“Optimal board composition requires  
5 thinking broadly about a number of skills and experiences that are critical to the success of a  
6 company – for example, relevant technical, commercial, strategic, or operational leadership, or  
7 international experience”). Plaintiff’s claim that the small number of women on public company  
8 boards stems from a lack of willing and qualified board-ready women is contrary to the evidence.  
9

### 10 CONCLUSION

11 The state has important government interests in addressing discriminatory barriers to  
12 women’s participation on public company boards and enhancing the economic benefits to the  
13 state that arise from boards with increased gender diversity. SB 826 provides a tailored approach  
14 to increasing such gender diversity where other methods have failed. For the reasons discussed  
15 here and in Defendant’s opposition to Plaintiff’s motion for a preliminary injunction, California  
16 Women Lawyers respectfully urges this Court to deny the requested preliminary injunction.  
17

18  
19 DATED: October 8, 2021

Respectfully submitted,

21 /s/ Johanna S. Schiavoni  
22 JOHANNA S. SCHIAVONI

23 Attorney for *Amicus Curiae*  
24 CALIFORNIA WOMEN LAWYERS  
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**CERTIFICATE OF SERVICE**

*Meland v. Weber*

D.C. No. 2:19-cv-02288-JAM-AC  
Eastern District of California

I hereby certify that on October 8, 2021, I electronically filed the foregoing with the Clerk of the Court of the U.S. District Court for the Eastern District of California by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Court's CM/ECF system.

/s/ Johanna S. Schiavoni  
Johanna S. Schiavoni

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

CREIGHTON MELAND, JR.,

Plaintiff,

v.

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

Defendant.

No. 2:19-cv-02288-JAM-AC

**ORDER DIRECTING FILING OF *AMICUS*  
*CURIAE* BRIEF SUBMITTED BY  
CALIFORNIA WOMEN LAWYERS IN  
OPPOSITION TO PLAINTIFF'S MOTION  
FOR A PRELIMINARY INJUNCTION**

Judge: Hon. John A. Mendez

1           On October 8, 2021, with the consent of both parties, California Women Lawyers timely  
2 submitted an *amicus curiae* brief in support of the Defendant’s opposition to Plaintiff’s motion  
3 for a preliminary injunction.

4           It is hereby ORDERED that the submitted amicus brief, Document No. 43, is considered  
5 filed in this action.  
6

7  
8 IT IS SO ORDERED.  
9

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12 Judge John A. Mendez  
13 United States District Judge  
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