NO. 20-15762

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CREIGHTON MELAND, JR.,

Plaintiffs-Appellants,

v.

ALEX PADILLA, in his official capacity as
Secretary of State for the State of California,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of California
No. 2:19-cv-02288-JAM-AC
The Honorable John A. Mendez
United States District Court Judge

Brief of Amicus Curiae Independent Women's Law Center

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Corporate Disclosure Statement

Pursuant to Fed. Rule of App. Proc. Rule 26.1, I hereby certify that Amicus Curiae Independent Women's Law Center states that it does not issue stock or have a parent corporation.

/s/ Amanda L. Narog

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Pursuant to Federal Rule of Appellate Procedure 29 and Ninth Circuit Local Rule 29-2, the Independent Women's Law Center respectfully submits this brief amicus curiae in support of Petitioner-Appellant's appellate brief. All parties have consented to this filing.

Interest of Amicus Curiae

Independent Women's Law Center is a project of Independent Women's Forum (IWF), a nonprofit, non-partisan 501(c)(3) organization founded by women to foster education and debate about legal, social, and economic policy issues. IWF promotes access to free markets and the marketplace of ideas, and supports policies that expand liberty, encourage personal responsibility, and limit the reach of government. Independent Women's Law Center supports this mission by advocating – in the courts, before administrative agencies, in Congress, and in the media – for equal opportunity, individual liberty, and respect for the American constitutional order.

Independent Women's Law Center opposes most sex-based quotas because they are demeaning to women and fail to account for different life choices that men and women often make. Independent Women's Law Center is particularly concerned that California's corporate gender quota law forces shareholders of

California companies to discriminate on the basis of sex in violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution.

Summary of the Argument

California's gender quota law discriminates on the basis of sex in violation of the United States Constitution. By forcing corporate shareholders to make decisions based on sex when they elect board members, SB 826 harnesses the power of the state to force individuals to discriminate, thereby conferring standing on shareholders to challenge the law in federal court.

Argument

In signing his state's gender-quota bill into law, former California Governor Jerry Brown noted "serious legal concerns" that might "prove fatal to its ultimate implementation."[1] Governor Brown was right. SB 826 forces corporate shareholders to discriminate on the basis of sex in violation of the United States Constitution.

I. SB 826 Compels Shareholders and Corporations to Discriminate on the Basis of Sex in Violation of the Equal Protection Clause of the Fourteenth Amendment.

The Equal Protection Clause of the 14th Amendment prohibits state action that

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[1] Patrick McGreevy, *Gov. Jerry Brown signs bill requiring California corporate boards to include women*, Los Angeles Times, Sept. 30, 2018, available at https://www.latimes.com/politics/la-pol-ca-governor-women-corporate-boards-20180930-story.html.

"den[ies] to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amend. XIV. This prohibition on government discrimination applies even when the state acts with good intentions. See *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701 (2007) (public schools may not assign students to schools solely on the basis of race for the purpose of achieving racial integration). Rigid racial quotas, therefore, violate the Equal Protection Clause even where their objective is to increase minority representation in certain sectors where they previously lacked representation. See *e.g., Regents of the University of California v. Bakke*, 438 U.S. 265, 289, 320 (1978) (plurality opinion) (state medical school may not reserve sixteen out of one hundred seats in its class for disadvantaged minorities); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (state university may not apply a fixed number of points to minority applications); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989) (city may not require prime contractors to set aside 30% of each contract for "Minority Business Enterprises").

Although the Equal Protection Clause was adopted to protect newly freed slaves after the Civil War, its language is broad and also prohibits government discrimination on the basis of sex.[2] See *e.g., Reed v. Reed*, 404 U.S. 71 (1971) (a

[2]See Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?,* 43 Conn. L. Rev. 1059, 1067-74 (May 2011) (explaining

state statute preferring males to females in estate administration violates the Constitution's guarantee of equal protection); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (benefits given by the United States military to the family of service members cannot be given out differently on the basis of sex); *Orr v. Orr*, 440 U.S. 268 (1979) (a state cannot require husbands, but not wives, to pay alimony upon divorce); *Craig v. Boren*, 429 U.S. 190 (1976) (state may not prohibit the sale of 3.2% beer to males under the age of 21 but sell to females over the age of 18); *Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142 (1980) (workers' compensation laws may not automatically grant death benefits to widows but not widowers); *United States v. Virginia*, 518 U.S. 515 (1996) (Virginia Military Institute may not admit only male applicants). In order to pass constitutional muster, government policies that differentiate on the basis of sex must be "substantially related" to the achievement of "important governmental objectives."[3] *Boren*, 429 U.S. at 197; see also *Monterey Mech. Co. v. Wilson*, 125

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that the Equal Protection Clause was "designed to mitigate the effects of slavery on one minority group - Blacks" but because its language is general, courts have applied it broadly).

[3]Because it is almost never appropriate for the government to differentiate on the basis of race, race-specific policies are presumed unconstitutional unless necessary to achieve a compelling government interest. *Adarand Constructors v. Pena*, 515 U.S. 200, 235 (1995). By contrast, ordinary legislation is presumed constitutional so long as it is rationally related to a legitimate governmental purpose. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993) (statutes

F.3d 702, 712-13 (9th Cir. 1997) (gender-based preferential programs must be justified by an "'exceedingly persuasive justification'" and must "serve 'important governmental objectives'" through means that are "'substantially related to the achievement of those objectives'").

A. Increasing the number of elite women on corporate boards is not an important state interest.

It is difficult to see how the government has a substantial interest in carving out seats for elite women on corporate boards at all. But it is particularly difficult to understand the rationale for the government mandate contain in SB 826 when the private sector has made such incredible progress toward that goal without government interference. To wit, more than 20 percent of corporate board seats at our nation's top 3,000 publicly traded companies are today occupied by females.[4] Every company in the S&P 500 now has a woman on its board of directors.[5] And

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involving economic policy have a "strong presumption of validity.") Sex-based classifications receive an intermediate level of scrutiny, which takes into account actual biological differences between men and women that make it appropriate, in some circumstances, for government to differentiate between the sexes. *Boren*, 429 U.S. at 197.

[4] Charlotte Whelan, *IWF Policy Focus: Gender Board Quotas* (March 2020), available at https://www.iwf.org/wp-content/uploads/2020/03/iwf.orgwp-contentuploads202003policy-focus-gender-board-quotas.pdf.pdf.

[5] In 2019, women made up 27% of all board seats, a nearly 17% jump from 2012 when one in eight S&P 500 boards was still all-male. Ruth Umoh, *The Last All-Male Board On The S&P 500 Just Added A Female Member*, Forbes, (Jul. 25,

between 2010 and 2015, the share of women on the boards of global corporations has increased by 54 percent.[6] These milestones were reached without the help of government-imposed quotas. And, while quotas are not needed in order to further increase the number of women serving on corporate boards, evidence from Europe indicates that they may very well negatively impact the economy.[7]

Proponents of gender quotas and set-asides for women often argue that they are an important government tool for remedying systemic sex-discrimination. Although this argument might, in some circumstances, provide a basis for upholding the government's imposition of quotas *on itself*, see *Associated General Contractors of California, Inc. v. City and County of San Francisco*, 813 F.2d 922

2019), available at https://www.forbes.com/sites/ruthumoh/2019/07/25/the-last-all-male-board-on-the-sp-500-just-added-a-female-member/#d48ccab399d3

[6] Jennifer C. Braceras, *Corporate gender quotas reinforce privilege*, The Boston Globe (Aug. 5, 2019), available at https://www.bostonglobe.com/opinion/2019/08/05/corporate-gender-quotas-reinforce-privilege/WA4QjKBkb2aUxUdF59h0EO/story.html

[7]Evidence from Norway indicates that when governments interfere in corporate governance by mandating quotas, many companies move, go private, or even collapse. See Valerie Richardson, *California moves toward corporate gender quotas, ignoring Norway's failure*, The Washington Times (Sept. 4, 2018), available at https://www.washingtontimes.com/news/2018/sep/4/california-eyes-corporate-gender-quotas-despite-no/ (citing a 2012 paper by USC professor Kenneth R. Ahern and University of Michigan professor Amy K. Dittmar, finding that the number of public limited firms in Norway by 2009 was less than 70 percent of the number in 2001, while the number of privately held firms not subject to the gender quota jumped by more than 30 percent).

(9th Cir. 1987) (upholding a facial challenge to a San Francisco ordinance giving city contracting preferences to women-owned businesses where the city's *own* contracting procedures perpetuated disadvantages for female business owners), it cannot possibly justify the imposition of quotas on the free enterprise system overall. This is particularly true where, as here, the gender quotas do not benefit women generally but rather provide a perk for a small group of women who are already at the top of their professions.[8]

Nor can California justify imposing quotas upon the private sector on the basis of a purported government interest in "diversity." The U.S. Supreme Court has made clear that quotas imposed solely for the purpose of increasing diversity is "discrimination for its own sake" and is forbidden by the Constitution. *Bakke*, 438 U.S. at 307. This is particularly true where policies intended to create diversity are based on "overbroad generalizations about the different talents, capacities, [and] preferences of males and females." *Virginia*, 518 U.S. at 533. Here, California's law is based on the assumption that, unless the state threatens to financially penalize a corporation, sexism will keep women off corporate boards. Such an assumption, however, potentially worsens sexism by perpetuating the

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[8]Braceras, *supra* note 6 (noting that corporate gender quotas have led to what has been called a "golden skirt" phenomenon, where the same elite women scoop up multiple seats on a variety of boards).

stereotype corporations will not add women to corporate boards without threat of financial punishment and, more generally, that women need special treatment in order to succeed.[9] Moreover, California cannot possibly claim an interest in promoting gender diversity where the law in question *only forbids all make boards* and does impose any gender-diversity requirement on all female boards. Thus, clearly, the purpose of SB 826 is not foster diversity *per se* but to help members of one sex obtain certain positions. As such, the state cannot assert an interest in diversity to support the constitutionality of SB 826.

B. California's gender-quota is not substantially related to its asserted purpose.

Even if government has an important interest in remedying sex-discrimination generally, California cannot possibly demonstrate a sufficiently close fit between its rigid quota system–a system that distinguishes among individuals based on sex–and the achievement of that objective. "[G]eneral assertions of societal discrimination are insufficient to satisfy [the government's] burden absent some indication that the 'members of the gender benefited by the classification actually suffer[ed] a disadvantage related to the classification.'" *Mich. Rd. Builders Ass'n, Inc. v. Milliken*, 834 F.2d 583 (6th Cir. 1987), *summarily aff'd*, 489 U.S. 1061 (1989). More specifically, as this Court noted in *Associated General Contractors*,

[9] See Whelan, *supra* note 4.

the government "may not close its eyes to the rich texture of our economic landscape and ignore the very real differences in the status of women in various businesses and professions; nor may it ignore the substantial progress women have made and continue to make in business and the professions." 813 F.2d at 942. (internal citations omitted).

Here, there is simply no reason to believe that women are disadvantaged in all of the various industries covered by the law. And yet, SB 826 applies its rigid formula in perpetuity to *all* publicly traded firms in *all* sectors of the economy– even if a particular firm or industry has no history of discrimination against women and even if, in the future, a particular company's board is 100 percent female. See *Back v. Carter,* 933 F.Supp. 738 (N.D. Ind. 1996) (permanent gender quotas imposed on a sector without a history of past discrimination cannot stand).

Nor is there evidence that quotas for female directors can help remedy the sex discrimination that does exist or that they will improve corporate governance in any way. In fact, studies from Europe indicate that adding women to corporate boards does not improve workplace conditions for female employees or lead to more female promotions throughout the ranks. Claims that adding female directors improves corporate governance are not only false,[10] they are based on overbroad

[10] See *e.g.,* Kimberly Krawiec, *What Does Corporate Boardroom Diversity Accomplish?,* New York Times, April 1, 2019 (citing academic studies that

generalizations and sexist stereotypes about female behavior and decision-making that the Supreme Court has cautioned against. See *infra*. Thus, SB 826 merely mandates window dressing that is in no way achieves any purported state interest.[11]

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conclude that gender diversity on boards can negatively impact company performance), available at https://www.nytimes.com/roomfordebate/2015/04/01/the-effect-of-women-on-corporate-boards/what-does-corporate-boardroom-diversity-accomplish. See also *The old girls network: Ten years on from Norway's quota for women on corporate* https://www.economist.com/business/2018/02/17/ten-years-on-from-norways-quota-for-women-on-corporate-boards ("the evidence so far undermines the business case for quotas").

[11] To the extent that SB 826 seeks only to advantage elite women by providing them with additional opportunities for advancement, the private sector is better suited to achieving that objective, and indeed is already doing so. Thus, Professor Joseph Grundfest of Stanford Law School has argued that a more effective way to increase board diversity is through shareholder activism and other policies that seek to inquire and persuade, rather than coerce. Grundfest notes that institutional investors, such as BlackRock Inc. and State Street, have made board diversity a focus of their corporate governance policies, and argues that the impact of such institutional investor engagements "far exceeds any effect that SB 826 might have" particularly because it is not limited to corporations chartered in California. Joseph Grundfest, *Mandating Gender Diversity in the Corporate Boardroom: The Inevitable Failure of California's SB 826*, Rock Center For Corporate Governance, Working Paper Series No. 232. Sept. 12, 2018, available at https://poseidon01.ssrn.com/delivery.php?ID=032102104004098029121077002019068028042048049042095026105086109064086090113099120000043045125052037037114122065066113086095118118061035009009023097012104069085120097042039047125010023126089066097000026087103122088122099065080025030025023124104103072004&EXT=pdf.

II. Since California's Gender Quota Law Forces Shareholders to Make Corporate Governance Decisions on the Basis of Sex in Violation of the U.S. Constitution, Shareholders Have Standing to Challenge the Law.

The District Court here ruled that SB 826 injures corporations, not shareholders. This is incorrect. The Equal Protection Clause not only prohibits the government from unfairly discriminating on the basis of sex, it also ensures that the state will not force individuals to commit discrimination themselves. See *RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1056 (9th Cir. 2002); see also *Monterey Mech. Co.*, 125 F.3d at 707 ("[e]ven if a [plaintiff] suffers no discrimination itself, it is hurt by a law requiring it to discriminate, or to try to discriminate, against others on the basis of their ethnicity or sex. . . [and] has standing to challenge the validity of the requirement.") Simply put, "[a] person required by the government to discriminate . . . against others has standing to challenge the validity of the requirement." *RK Ventures, Inc.,* 307 F.3d at 1055-56.

In this case, the District Court construed the facts pleaded in this case so disjunctively as to fabricate a separation from the harm and the harmed. The court ignored the actual harm–compelled discrimination–and determined that only the corporation can suffer harm here because only it can be fined under the law. That decision is in error.

A. Having to discriminate on the basis of sex when selecting a board member is a separate and distinct injury.

While California imposes harsh and successive penalties against a corporation for it's shareholder's failure to ensure a requisite number of women are elected to the board, those penalties, while also felt by the shareholder, are separate and apart from the essential harm that SB 826 inflicts upon the shareholder individually. California's unnecessary imposition of a hobson's choice upon the voting ownership of its publicly traded corporations serves only to either coerce the shareholder into active discrimination in voting or sacrifice his and the company's financial health to cast his vote free of a bias that would be wholly illegitimate in any other context.

Critically, that law also bans for one sex what it concedes would be perfectly lawful for the other: a board constituted of only men is subject to penalty, but a board constituted solely of women would trumpet the success of California's scheme. It is that juxtaposition that perfectly manifests that invidious harm that SB 826 visits upon this shareholder and all those similarly situated statewide.

1. That Injury Satisfies the Direct Injury Requirement of Article III.

SB826's requirement that the shareholders of all publicly traded companies headquartered in California to elect at least one female to the board of directors is sufficient to establish Article III standing here. "A plaintiff seeking relief in federal court must establish the three elements that constitute the 'irreducible

constitutional minimum' of Article III standing, namely, that the plaintiff has '(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision,' *Friends of Santa Clara River v. United States Army Corps of Engineers,* 887 F.3d 906, 918 (9th Cir. 2018) (internal citations omitted). The claimed injury must be alleged to be both "concrete and particularized" to survive a motion to dismiss. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1545, 194 L. Ed. 2d 635 (2016), as revised (May 24, 2016).

The injury claimed in this case, as pleaded, meets the constitutional requirements. The shareholder has shown that he has suffered the harm of being coerced by the state to consider the sex of the potential board member, and that without such discrimination against males in favor of females, the corporation would have been substantially fined. That is a personal harm that he alone individually suffered; a harm that is recognized as a violation of the Equal Protection Clause in this circuit. See *supra* II. That harm is indisputably traceable to SB 826. And that harm can be rectified by this Court.

The district court's conclusion that because the shareholder will not himself be fined he cannot suffer injury is an abstraction that renders meaningless the nature of the shareholder's purpose and rights. While the district court not only held that

the voting shareholder did not have an injury sufficient to confer jurisdiction upon that court, the court additionally appeared to assume that either the corporation or the shareholder could suffer injury under that law, but not both.[12] SB 826, however, does not merely seek to influence shareholders to consider women for board positions, it rather requires shareholders to so discriminate or see their own investment devalued as a result. The district courts careful parsing of circumstances alone cannot overcome the fact that both can–and the shareholder already has–suffered a sufficient Article III injury to survive dismissal.

2. The Shareholder's Direct Injury is Sufficient for Prudential Standing.

In this case, the shareholder's "'personal stake in the lawsuit is sufficient to make out a concrete 'case' or 'controversy' to which the federal judicial power may extend under Article III, § 2," but there are "'judicially self-imposed limits on the exercise of federal jurisdiction." *City of Los Angeles v. Cty. of Kern*, 581 F.3d 841, 845 (9th Cir. 2009) (internal citations omitted). These limiting, prudential considerations have been described by the Supreme Court as "threshold

[12] The district court cited to *Warth v. Seldin* to state that "[i]t is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." 422 U.S. 490 (1975). But the court ignored that there can be more than one target of state regulation, and that both can suffer individual, yet different types of harm.

determinants of the propriety of judicial intervention." *Warth v. Seldin*, 422 U.S. 490, 518, 95 S.Ct. 2197, 45 L. Ed. 2d 343 (1975). But the need to analyze such prudential concerns is obviated here by the shareholder's concrete, direct, and personal constitutional injury.

Specifically, the shareholder's rights and interests are not tethered to those of the corporation, and thus are not derivative in nature. Nonetheless, the district court incorrectly determined that the shareholder did not have standing under the shareholder rule despite the shareholder's own pleaded injury. See *RK Ventures*, 307 F.3d at 1057. This is so because the district court disregarded the harm actually claimed by the shareholder. Rather, the court reduced the universe of possible harms to the fine authorized for violation of SB 826 and looked no further. That myopic view failed to properly consider the claims as pleaded and the possibility that multiple injuries could occur.

But here, the shareholder sufficiently carried his burden of demonstrating a separate injury to himself, apart from any harm to the corporation he serves. This is perfectly demonstrated by the very nature of the injuries at bar: the shareholder claims an injury he has *already* suffered, while the corporation's harm–though likely–has yet to occur. Thus, because the shareholder has suffered his own personal injury that can be rectified in this forum, there is no need for this Court to

wade into the often amorphous arena of prudential constraint.

Conclusion

For the reasons stated above, the amici respectfully request this Court reverse the district court's judgment and remand this case for further proceedings.

Dated: July 29, 2020

Respectfully Submitted,

/s/ Amanda L. Narog

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* *Admission Filed and Pending*

Certificate of Compliance Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1 for Case Number 11-35854

I certify that, pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached Brief of Amicus Curaie Independent Women's Law Center is proportionately spaced, has a typeface of 14 points or more and contains 13,997 words.

DATED this 29 day of July, 2020.

/s/ Amanda L. Narog
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Certificate of Service

I, Amanda Narog, hereby certify that on July 29, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Amanda L. Narog
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