NO. 20-15762

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CREIGHTON MELAND, JR.,
Plaintiff-Appellant,

v.

ALEX PADILLA,
In his 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, Sacramento
Honorable John A. Mendez, District Judge

BRIEF OF *AMICUS CURIAE* HAMILTON LINCOLN LAW INSTITUTE IN SUPPORT OF APPELLANTS AND REVERSAL FILED WITH CONSENT OF ALL PARTIES

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Interest of Amicus Curiae

Hamilton Lincoln Law Institute ("HLLI") is a public interest organization dedicated to protecting free markets, free speech, limited government, and separation of powers, and against regulatory abuse and rent-seeking. Attorneys at HLLI, which is independent of the parties to this action, litigate subjects relevant to this case, such as protecting shareholders from abusive class-action settlements and practices and against rent-seeking litigation and government-imposed burdens. *See, e.g.*, *In re Walgreen Co. Stockholder Litig.*, 832 F.3d 718 (7th Cir. 2016). To this end, HLLI often files amicus curiae briefs in cases that involve harm to shareholders or government overreach. *See, e.g.*, *House v. Akorn, Inc.*, No. 19-2401, Dkt. 29 (7th Cir. Nov. 25, 2019).

HLLI files this amicus brief in support of reversal of the district court's decision. Counsel for the parties to this appeal have consented to the filing.

Federal Rule of Appellate Procedure 29 Statement

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), HLLI affirms that no counsel for a party authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person other than amicus, its members, or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

Summary of Argument

In 2018, the Governor of California signed into law SB 826, adding §§ 301.3 and 2115.5 to the California Corporations Code. Under this law, any public corporation

whose principal executive offices are located in California was required to have at least one female director on its board by the end of 2019. By the end of 2021, corporations subject to the law must have additional female board members, with the specific number tied to the total size of the board of directors. *See* ER 26. The Secretary of State recently began publishing reports detailing compliance with SB 826, and is authorized to impose penalties on corporations whose shareholders fail to elect the prescribed number of women. Fines range from $100,000 for the first violation and $300,000 for each violation thereafter. *See* ER27.

In this case, the district court dismissed a suit challenging SB 826 by a shareholder of OSI Systems, which is subject to the law. The court found that the shareholder, Creighton Meland, Jr., lacked standing because SB 826 "does not impair [Meland's] voting rights." ER16. Hamilton Lincoln Law Institute submits this brief because the decision disregards fundamental shareholder voting rights and the importance of protecting those rights from state interference and protecting the ability of shareholders to invest in companies unhindered by SB 826.

The right of shareholders to choose the directors who will oversee business strategy and management is fundamental to corporate governance and key among shareholders' limited abilities to influence the corporations in which they hold an ownership interest. By creating a sex-based quota system, SB 826 impairs the voting rights of Meland and other shareholders who do not want to vote based on a nominee's sex. SB 826 not only imposes a stiff penalty on the corporation for shareholders' failure to vote a certain way, it also harms shareholders by telling them to discriminate on the basis of sex in their voting decisions. *See* Section I.

Shareholders such as Meland may have many reasons for rejecting the quotas imposed by SB 826 and for not wanting to consider the sex of a nominee simply to ensure a state-mandated ratio of women when they choose directors for their corporations. SB 826 wrongly attempts to delegitimize those reasons while unnecessarily burdening shareholder voting rights. *See* Section II. Finally, because a woman quota could negatively affect corporate governance, SB 826 harms shareholders' interests in investing in companies that are not hindered by its requirements. *See* Section III.

Argument

I. SB 826 impinges on shareholders' fundamental freedom to vote independently.

Because shareholders are essentially owners of a company, they reap the benefits of a corporation's success. Despite this ownership role, management of the business is vested in the board of directors, which oversees the corporate executives and other managers. State corporate codes vest directors with "substantial authority and wide discretion," and "[i]t is generally agreed that directors are the ultimate managers of the business." Julian Velasco, *The Fundamental Rights of the Shareholder*, 40 U.C. Davis L. Rev. 407, 410 (2006) (citing Del. Code Ann. Tit. 8, § 141(a); Model Bus. Corp. Act. § 8.01(b)). The only ability shareholders have to exercise control over the corporation exists through their right to vote on certain important matters relating to the business—chiefly, the right to elect the directors. *See MM Cos. v. Liquid Audio, Inc.*, 813 A.2d 1118, 1126 (Del. 2002) ("The stockholders' power is the right to vote on specific matters, in

particular, in an election of directors.") "The number-one voting item in corporate elections is and always has been the election of directors." Ken Bertsch, *The Value of Shareholder Voting*, The CLS Blue Sky Blog (Apr. 23, 2020) (noting that shareholder voting is a "critical accountability structure").[1]

SB 826 recognizes the role of shareholders in electing directors, stating that "each director [of corporations subject to the law] is elected by shareholder vote." ER24. And, in fact, the shareholders of OSI Systems—including Meland—are responsible for electing the members of the corporation's board of directors. ER21.

For decades courts have protected shareholder voting rights from interference. In doing so, they recognize the "central importance of the [shareholder] franchise to the scheme of corporate governance." *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 659, 663 (Del. 1988) (setting aside board's action to expand the size of its membership for the primary purpose of interfering with shareholder vote in contested director election); *Liquid Audio, Inc.*, 813 A.2d 1118 (similar). "The shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests." *Blasius Indus.*, 564 A.2d at 659. It is what "legitimates the exercise of power by some (directors and officers) over vast aggregations of property that they do not own." *Id.*; *see also* Bertsch, *The Value of Shareholder Voting*, *supra*. The integrity and independence of the shareholder voting process, therefore, is essential to "[m]aintaining a proper balance in the allocation of power between the stockholders' right to elect directors and the board of directors' right to manage the corporation." *Liquid Audio*, 813 A.2d at 1127.

[1] Available at https://clsbluesky.law.columbia.edu/2020/04/23/the-value-of-shareholder-voting/.

This balance of power is important because, even unimpeded, shareholders' voting rights can be a relatively weak power. Directors control the proxy mechanism, and because of the diffuse control of shareholders, incumbent board members often become entrenched and are rarely voted out of office. Julian Velasco, *Taking Shareholder Rights Seriously*, 41 U.C. Davis L. Rev. 605, 612 (2007). Once elected, a director has tremendous influence over the affairs of the corporation, while shareholders have little. Shareholders vote only on the matters submitted to them, and, generally, corporate bylaws require that the directors first must propose such matters for voting. Even then, shareholders may only vote for or against a proposal; they may not modify it to suit their preferences. As a result, directors are often able to prevent a shareholder vote on many matters that the directors would prefer to avoid having shareholders decide. *Id.* at 612-13. Although shareholders can amend the bylaws to changes certain voting rules, the amendment process is difficult and can easily be undone by directors, who also have authority to amend the bylaws and can thus unwind any changes made by the shareholders. *Id.* at 614.

The initial election therefore takes on increased importance. In that initial election and even in the reelection of long-time directors, voting "provides a channel for communication between shareholders, the board, and management." David Yermack, *Shareholder Voting and Corporate Governance*, 2 Ann. Rev. Fin. Econ. 103 (2010). Any interference with this communication and this fundamentally important element of shareholder governance accordingly has been, and should be, rejected.

With SB 826, the State of California is effectively trying to control shareholder voting by punishing shareholders' rejection of a woman quota for corporate boards.

Specifically, SB 826 burdens the right of Meland, as an OSI shareholder, and all other shareholders of California-based corporations to freely choose directors to oversee the management and strategic direction of the company. SB 826 doesn't demand any action by the corporation; the action it targets is shareholder voting—generally the only process by which directors, either male or female, can be elected to a corporate board. ER21; ER24.

This harm to shareholders is even worse than that in *Liquid Audio* and *Blasius* because it is imposed by the State, rather than by the corporation's directors, who have a fiduciary duty to the shareholders and to the corporation. Plaintiffs in both cases were shareholders of the corporations whose actions they challenged and who were directly harmed by the efforts to interfere with shareholder voting. Yet the district court decision here fails to recognize the harm to shareholders from SB 826's quota requirement. Instead, it found that because "SB 826 does not strip Plaintiff of his voting rights … [or] force Plaintiff to vote in any particular manner," shareholders such as Meland are not directly harmed by SB 826 and therefore lack standing to challenge it. ER15. Both California and Delaware law, however, have a more expansive view of direct harm to shareholders. This more expansive view is consistent with the importance of shareholder voting rights and the need to protect such rights from interference.

As the Delaware Supreme Court holds, whether a stockholder has a direct claim turns on whether it was the stockholder "who suffered the alleged harm," and "who would receive the benefit of any … remedy." *Tooley v. Donaldson, Lufkin & Jenrette*, 845 A.2d 1031, 1033 (Del. 2004). California law, meanwhile, examines whether a suit seeks

to enforce a right "which the stockholder possesses as an individual," rather than one in which the corporation "alone benefits from the [resulting court] decree." *Jones v. H.F. Ahmanson & Co.*, 460 P.2d 464, 470 (Cal. 1969); *see also Schuster v. Gardner*, 127 Cal.App.4th 305, 313 (2005) (applying *Jones* and noting suit to "enforce shareholder voting rights" as an "example" of direct shareholder harm).

Meland alleges that SB 826 harms him because it seeks to force him, as a shareholder, every year, to perpetuate sex-based discrimination in the election of directors. ER21. That SB 826 requires shareholders to engage in unconstitutional discrimination is a concern recognized even by the law's supporters. The Assembly Committee on Judiciary reported that "SB 826 would likely be challenged on equal protection grounds and the means that the bill uses, which is essentially a quota, could be difficult to defend." *Corporations: Boards of Directors*, Assembly Committee on Judiciary, SB 826 (June 26, 2018). Then-Governor Jerry Brown further recognized in his signing letter that "serious legal concerns have been raised" about the law and these "potential flaws … may prove fatal to its ultimate implementation."[2] The potential flaws included, of course, the sex-based preferences built into SB 826 that can be justified only by specific evidence and findings—absent from the legislative findings for SB 826—of past or present discrimination in the particular field subject to the preferences. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978).

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[2] *See* John Woolfolk, *California becomes first state to require women on corporate boards*, The Mercury News (Sept. 30, 2018), *available at* https://www.mercurynews.com/2018/09/30/california-becomes-first-state-to-require-a-woman-on-corporate-boards/.

The corporation cannot take the action required by SB 826 to avoid the imposition of a penalty; only shareholders can elect directors of OSI Systems. *See* ER21. This harm to Meland will be remedied by his requested relief—a declaratory judgment that the law is unconstitutional and a permanent injunction preventing the state from enforcing the law. ER23. By placing a burden on one of the most important shareholder rights, and mandating that shareholders discriminate on the basis of sex, SB 826 harms shareholders. The district court was wrong to hold otherwise. *See, e.g.*, *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 707 (9th Cir. 1997) ("A person required by the government to discriminate by ethnicity or sex against others has standing to challenge the validity of the requirement.").

II. SB 826 harms not just shareholders and their voting rights but also women.

The quota imposed by SB 826 harms not only corporate shareholders but also women—the very people it purports to help—and thus offers another reason shareholders are harmed by the law. Legally mandated quotas might appear to be a quick fix to increase the representation of women on a corporate board. But quotas do not remove the barriers, biases, and other systemic and structural impediments to achieving gender parity in corporate boardrooms. Instead of addressing barriers that may prevent more women from being elected in the first place, research shows that quotas like the one mandated by SB 826 create a sense of complacency and false belief that gender diversity has been achieved, while also undermining the perceived competence of the women serving as directors and discouraging qualified women from stepping forward to serve.

The harm from quotas goes beyond covering up the systemic barriers that women face at the highest rung of the corporate ladder. Legally mandated quotas risk creating stereotype threat—a vicious cycle whereby the group the law aims to help becomes scrutinized for underperformance and members of the group underperform because, by being reminded of the negative stereotype that underlies the quota, they subconsciously conform to it. *See* Anat Bracha, *et al.*, *Affirmative Action and Stereotype Threat* (Federal Reserve Bank of Boston, Working Paper No. 13-14, 2013) (finding that gender-based affirmative action "negatively affects high-ability women").[3] Amicus recognizes the benefit that a diversity of perspectives and life experiences may bring to business affairs, including by having women and other underrepresented groups on the board. But requiring shareholders to elect a woman—any woman, regardless of qualifications—on a specified timeline to avoid the punitive effect of a quota law risks creating stigma and resentment from those who do not qualify for special treatment. *Cf. Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (noting that laws that provide favorable treatment based on race-based classifications "may in fact promote notions of racial inferiority and lead to a politics of racial hostility"). Quotas can create a perception that once a corporation has checked the box of the state-prescribed quota, it has done enough. Without a set quota, shareholders may be more likely to go farther and thoughtfully consider a greater number of diverse candidates for election. SB 826's quota thus makes it more likely that female board members become a token for the

[3] Available at https://www.bostonfed.org/publications/research-department-working-paper/2013/affirmative-action-and-stereotype-threat.aspx.

company to point to as evidence of its diversity, allowing it to avoid the hefty fines of SB 826 and to call it a day.

These concerns are supported by empirical data. A study reported by Forbes found that a company's diversity quota caused both men and women to believe that "merit seemingly played a lesser role" than gender in hiring decisions. *See* Meir Shemla & Anja Kreienberg, *Gender Quotas in Hiring Drive Away Both Women and Men*, Forbes (Oct. 16, 2014) (discussing results of their study).[4] The same study found that this stigma prevented people from applying when they knew a diversity quota was involved. *Id.* ("gender quotas drive top talent away"). *Id.* Studies also show that there is no "trickle down" effect to the rest of a corporation when gender quotas are in effect. For example, in Germany and Sweden, where gender quotas have resulted in women holding 30% and higher of directorships, only 2% of CEOs are women. *See* Subodh Mishra, *Women in the C-Suite: The Next Frontier in Gender Diversity*, Harvard Law School Forum on Corporate Governance (Aug. 13, 2018).[5] It is thus no exaggeration to suggest that SB 826 creates "the risk of board gender diversity becoming a check-the-box exercise for boards without further diversity and inclusion in the entire organization." *See* Mikayla Kuhns, et al., *California Dreamin': The Impact of the New Board Gender Diversity Law*, The CLS Blue Sky Blog.[6]

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[4] Available at https://www.forbes.com/sites/datafreaks/2014/10/16/gender-quotas-in-hiring-drive-away-both-women-and-men/#466152dd1235.

[5] Available at https://corpgov.law.harvard.edu/2018/08/13/women-in-the-c-suite-the-next-frontier-in-gender-diversity/.

[6] Available at https://clsbluesky.law.columbia.edu/2019/01/04/california-dreamin-the-impact-of-the-new-board-gender-diversity-law/.

Moreover, quotas tend to result in companies appointing "diverse" people already in their own networks and who may already serve on other boards. A study from Norway—the first country to introduce gender quotas for corporate boards in 2003, serves as an example. Even as companies in Norway have met the legally mandated 40% board representation, only 7% of its companies have a female CEO or equivalent. *See Ten years on from Norway's quota*, The Economist (Feb. 17, 2018).[7] Board quotas have largely only helped women by benefiting the small, select group of elite women chosen to serve, many of whom hold multiple board positions. *See* Helen Raleigh, *Evidence from Norway Shows Gender Quotas Don't Work for Women*, The Federalist (Mar. 13, 2018).[8] Quotas exacerbate rather than remedy the broader problem of director candidates typically being drawn from a narrow segment of corporate executives, meaning that the those who realize any benefit from SB 826 will be those who have already achieved positions of or proximity to power and the attendant personal wealth associated therewith, while failing to increase opportunities for women more broadly. *See id.* Rather than expand opportunity, board quota laws allow the already elite to scoop up more opportunities for themselves.

There are superior ways to achieve the goals of SB 826. For example, increasing numbers of companies nationwide are signing a pledge to interview and consider at least one qualified woman and person of color for every open executive position and

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[7] Available at https://www.economist.com/business/2018/02/17/ten-years-on-from-norways-quota-for-women-on-corporate-boards.

[8] Available at https://thefederalist.com/2018/03/13/evidence-from-norway-shows-gender-quotas-dont-work-for-women/.

to "speak up for, support and celebrate" the advancement of these individuals. *See* Becky Jacobs, *Utah businesses promise to interview at least one person of color for top-level jobs*, The Salt Lake Tribune (July 29, 2020).[9] These and other promising private market forces are driving an increase in corporate board diversity. "The record-breaking influx of female board members observed in the past [few] years is primarily driven by private ordering through company-shareholder engagement, shareholder proposals, and an increasing number of large asset managers adopting voting policies emphasizing board gender diversity." Kuhns, *supra*, The CLS Blue Sky Blog. These results show that state-mandated quotas unnecessarily burden shareholder voting rights and are not the optimal path to their intended outcome.

III. SB 826 harms shareholders' interests in investing in companies unhindered by the woman quota rule.

In addition to directly harming stareholders' voting rights, SB 826 also potentially harms shareholders' investment opportunities. *Chamber of Commerce of the United States v. SEC*, 412 F.3d 133 (D.C. Cir. 2005), is directly on point. In that case, the Chamber of Commerce (the "Chamber") was challenging a rule promulgated by the Securities and Exchange Commission (the "Commission") which required that mutual funds "must have a board (1) with no less than 75% independent directors and (2) an independent chairman." *Id.* at 136. The Chamber argued that it had standing to challenge the rule

[9] Available at https://www.sltrib.com/news/2020/07/29/utah-businesses-promise/#:~:text=NEWSLETTERS-,Utah%20businesses%20promise%20to%20interview%20at%20least%20one%20person%20of,top%2Dlevel%20positions%20at%20companies.

because it wanted to invest in funds that were unconstrained by the rule affecting board composition. *Id.* at 138.

The D.C. Circuit agreed: the "loss of the opportunity to purchase a desired product is a legally cognizable injury." *Id.* at 138; *see also Consumer Fed'n of Am. v. FCC*, 348 F.3d 1009, 1012 (D.C. Cir. 2003) (consumer had injury because merger deprived him of desired internet service); *Competitive Enter. Inst. v. Nat'l Highway Traffic Safety Admin.*, 901 F.2d 107, 112-13 (D.C. Cir. 1990) (consumer had injury because fuel regulation deprived consumers of opportunity to buy larger vehicles). The Commission argued that there was no evidence that a fund that was not subject to the rule's corporate governance conditions would perform any better. *Chamber of Commerce*, 412 F.3d at 138. But the D.C. Circuit rejected that argument, finding that "'the inability of consumers to buy a desired product … constituted injury-in-fact even if they could ameliorate the injury by purchasing some alternative product.'" *Id.* (quoting *Consumer Fed'n*, 348 F.3d at 1012).

The same is true here. Meland's injury includes his lost opportunity for investment in OSI Systems unhindered by SB 826's board composition requirements. *See* Opening Brief at 8; ER21. Like *Chamber of Commerce*, Medland alleges that SB 826 will impact board governance, ER22, but he need not prove it for standing purposes. Nor does Meland's ability to invest in companies outside of California that are not subject to SB 826 eliminate his standing to challenge SB 826 based on his interests in OSI Systems. SB 826 harms Meland and other shareholders because it deprives them of investments in companies unconstrained by the unlawful quota system.

Conclusion

HLLI respectfully asks the Court to reverse the district court's order and hold that Meland has standing to pursue his suit challenging SB 826.

Dated: July 29, 2020

Respectfully submitted,

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Certificate of Compliance
Pursuant to 9th Circuit Rule 32-1 for Case No. 20-15762

I certify that: This brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 3,469 words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Executed on July 29, 2020.

/s/ Anna St. John
Anna St. John

Proof of Service

I hereby certify that on July 29, 2020, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Ninth Circuit using the CM/ECF system, which will provide notification of such filing to all who are ECF-registered filers.

/s/Anna St. John
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