No. 20-15762

In the

United States Court of Appeals

for the

Ninth Circuit

CREIGHTON MELAND,
Plaintiff-Appellant,

v.

ALEX PADILLA, Secretary of State of California, 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, No. 2:19-cv-02288-JAM-AC

BRIEF *AMICUS CURIAE* OF THE PHILANTHROPY ROUNDTABLE IN SUPPORT OF PLAINTIFF-APPELLANT

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The Philanthropy Roundtable is a nonprofit corporation organized under the laws of the New York. It has no parent corporation. No publicly held corporation owns ten percent or more of its stock.

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INTERESTS OF *AMICUS CURIAE*[1]

The Philanthropy Roundtable is a leading network of charitable donors. It has membership of over 620 individual philanthropists, family foundations, and private grantmaking institutions. Its mission is to foster excellence in philanthropy, protect philanthropic freedom, and help donors advance liberty, opportunity, and personal responsibility. The Philanthropy Roundtable believes that a robust private sector, supported by a free enterprise system, is the bedrock for the creation of the private wealth that makes philanthropy possible. Economic freedom and the success it makes possible are essential preconditions for the full exercise of philanthropic generosity. The Philanthropy Roundtable seeks to advance the principles and preserve the rights of private giving, including the freedom of individuals and private organizations to determine how and where to direct charitable assets.

The Philanthropy Roundtable represents the interests of its members in matters before the courts, Congress, the Executive Branch,

[1] All parties have consented to the filing of this brief. No counsel for a party authored any part of this brief. And no one other than the amicus curiae, its members, or its counsel financed the preparation or submission of this brief.

and state legislatures. It regularly files briefs in cases of concern to the nation's private sector and philanthropic community. *See, e.g.*, *Indep. Inst. v. FEC*, 137 S. Ct. 1204 (2017); *Ctr. for Competitive Politics v. Harris*, 136 S. Ct. 480 (2015); *Ams. for Prosperity Found. v. Becerra*, 903 F.3d 1000 (9th Cir. 2018), and Nos. 19-251 & 19-255 (S. Ct. 2019).

The Philanthropy Roundtable has grave concerns about the gender quotas established by Senate Bill (SB) 826 and similar laws that have begun to proliferate around the country. Hawaii, Illinois, Massachusetts, Michigan, New Jersey, New York, and Washington are all considering laws nearly identical to SB 826. *See* H.B. 2720, 30th Legis., Reg. Sess. (Haw. 2020); H.B. 2872, 101st Gen. Assemb. (Ill. 2019); S. 1879, 191st Gen. Court (Mass. 2019); S.B. 115, 100th Legis. (Mich. 2019); A.B. 1982, 219th Legis., Reg. Sess. (N.J. 2020); A.B. 6329, 2019 Legis., Reg. Sess. (N.Y. 2019); S.B. 6037, 66th Legis., Reg. Sess. (Wash. 2020). Although most of these laws are focused on public companies, others have trained their sights more broadly. For example, Connecticut legislators recently proposed a law that would have required public *and private* employers to have at least 10% female representation on their boards by 2021 and 30% by 2023. S.B. 68, 2019 Gen. Assemb., Jan. Sess. (Conn. 2019). Hawaii has

gone even further, targeting for-profit and *nonprofit* corporations. H.C.R. 103, 30th Legis., Reg. Sess. (Haw. 2020). And the California legislature has already once rejected a legislative effort to require every private, corporate, and operating foundation with assets over $250 million to collect and publicly disclose ethnic, gender, and sexual-orientation data pertaining to its governance and grantmaking. A.B. 624, 2008 Legis., Reg. Sess. (Cal. 2008). A similar national measure is still alive, as the House of Representatives recently passed a bill requiring certain companies to disclose the racial, ethnic, and gender composition of their boards of directors and executive officers. H.R. 5084, 116th Cong. (2019). The Philanthropy Roundtable has a strong interest in advocating against these types of laws because of their overreach and adverse impact on the charitable sector.

SB 826 imposes unconstitutional burdens on California business and thus severely damages philanthropy in the state. Although The Philanthropy Roundtable recognizes diversity is a laudable goal, SB 826 imposes coercive fines that will drain money from charitable causes and force businesses out of California. In short, The Philanthropy Roundtable

has a strong interest in standing against SB 826, which unconstitutionally discriminates on the basis of gender.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

California's SB 826 requires public companies headquartered in California to have a minimum number of women on their boards of directors. Cal. Corp. Code §301.3(a). Since December 31, 2019, SB 826 has required these companies to have at least one female director on their board. *Id.* More specifically, a company with four or fewer directors must have a minimum of one female director, and a company with five directors must have at least two. Cal. Corp. Code §301.3(a). Those minimums increase each year, so that by December 31, 2021, a company of six or more directors must have at least three women on its board. *Id.* at §301.3(b). California imposes a $100,000 fine on companies failing to satisfy this gender-based mandate, and a $300,000 fine for subsequent violations. *Id.* at §301.3(e)(1)(A)-(C).

SB 826 baldly discriminates on the basis of gender by mandating that California Shareholders elect a certain number of female directors. At best, this scheme is of questionable lawfulness. At worst, it is blatantly unconstitutional. California's Senate Judiciary Committee itself questioned the bill's validity, determining that it "potentially conflicts with a number of federal and state constitutional provisions" and might

be "unenforceable." Senate Judiciary Committee, SB 826 (Jackson) 10-11 (Apr. 23, 2018), bit.ly/2ZJ7nSG. Even Governor Brown acknowledged "serious legal concerns" with SB 826, conceding that its "potential flaws … may prove fatal to its ultimate implementation." Letter from Edmund G. Brown Jr., to the Members of the California State Senate (Sep. 30, 2018), bit.ly/32JiM6Z.

Notwithstanding its fatal flaws, the California legislature passed SB 826, and Governor Brown signed it into law. They did so with the intended goal of improving both the diversity of California corporations and improving their corporate decisionmaking. But SB 826 has failed to achieve these goals: SB 826 does not achieve the firm performance goals its supporters claim, because board diversity does not change corporate decisionmaking. Moreover, gender diversity of corporations has increased without the help of SB 826 and other coercive mandates. Mikayla Kuhns et al., *California Dreamin': The Impact of the New Board Gender Diversity Law*, Columbia L. Sch. Blue Sky Blog (Jan. 4, 2019), bit.ly/2DWb1ju.

Worse still, SB 826 actively harms California businesses and charitable causes. Even aside from the fact that it requires California

Shareholders to discriminate on the basis of gender, SB 826 imposes compliance costs on companies, impairs the voting rights of California Shareholders, negatively impacts stock prices, and is likely to drive businesses out of California. Europe has already run this experiment, and it has proven an unmitigated disaster.

Appellant is a shareholder of a Delaware company headquartered in California who challenged SB 826 as a violation of the Fourteenth Amendment. The district court ruled against Appellant on standing, holding that SB 826 imposed its gender quota only on corporations, not their shareholders, and therefore Appellant suffered no injury. (ER 9).

Amicus agrees with Appellant that the Court erred in two respects: First, it erred in holding that it "need not determine whether California law or Delaware law applies." (ER 15). Delaware law *does* apply, because Appellant's company is incorporated in Delaware (ER 5), and this Court's precedent dictates that courts must "rely upon state law to determine whether the plaintiffs' claims are direct or derivative," *Lapidus v. Hecht*, 232 F.3d 679, 682 (9th Cir. 2000).

Second, the court misinterpreted Delaware law in holding that a statute requiring certain voting outcomes does not restrict Appellant's

voting rights. In Delaware, "[s]hareholder voting rights are sacrosanct." *EMAK Worldwide, Inc. v. Kurz*, 50 A.3d 429, 433 (Del. 2012). SB 826 plainly and "purposefully interferes with the shareholders' right to elect" board members. *Carmody v. Toll Bros. Inc.*, 723 A.2d 1180, 1188-89 (Del. Ch. 1998). Indeed, in voting for a position under SB 826's gender-based quota, Appellant's vote for a male director is a nullity. And "[b]ecause the right to vote is a contractual right … the claimed wrongful interference with that right states an individual cause of action." *Id.* at 1189. In short, SB 826 deprives Appellant of "the ability to vote for the directors [he] wants," *Kurz*, 50 A.3d at 433, and *Amicus* thus agrees that he has "alleged an Article III injury and has standing to challenge the quota." App. Br. 3.

Amicus writes separately to (1) underscore how harmful SB 826 is to the public companies it regulates and more broadly to California and the rest of the nation, and (2) further explain how the proliferation of laws like SB 826 threaten further harm to public companies and charitable entities across the country.

ARGUMENT

I. SB 826 Harms Californians.

SB 826 plainly discriminates on the basis of gender. As Appellant explains, it strongarms California Shareholders into facilitating that discrimination. *See* App. Br. at 13 ("SB 826 imposes a quota that *only* shareholders can ultimately decide whether to follow."). In addition to impairing shareholder rights, SB 826 harms the very companies it was supposed to help and threatens to cause untold financial harm to businesses across the country.

A. SB 826 impairs California Shareholders' right to vote for directors.

Under SB 826, California Shareholders are no longer free to choose who they want to serve as board members. Through gender-based quotas, SB 826 forces them to either replace existing male directors (irrespective of their performance as directors) or expand the board to accommodate new female directors. *See* Daniel Greene et al., *Do Board Gender Quotas Affect Firm Value? Evidence from California Senate Bill No. 826*, 60 J. Corp. Fin. 101526, 2 (2020), bit.ly/2CUB5v6. This effectively means that California Shareholders will no longer be able to vote based on merit or other performance-based criteria. In fact, it means that California Shareholders will not even be able to pursue other kinds of diversity for

the director seats covered by SB 826. That is, in a vote between a minority male and a white female, SB 826 forces California Shareholders to vote for the white female, because SB 826 "elevates [gender] as a priority over other aspects of diversity." Letter from California Chamber of Commerce et al., to Members of the California State Senate (May 29, 2018), bit.ly/3eKkjMf.

SB 826 directly interferes with Appellant's right to vote for who he wants to direct the company. As Delaware has recognized, and as this Court must follow, *Lapidus*, 232 F.3d at 682, "wrongful interference with [the right to vote] states an individual cause of action," *Carmody*, 723 A.2d at 1189. Because Appellant must choose to either vote for a woman or else violate the law, SB 826 "purposefully interferes with [Appellant's] right to elect a new board." *Id.*

B. SB 826 harms the companies it is intended to help.

Despite claims that gender diversity boosts company performance, statistical evidence demonstrates that SB 826 fails to achieve its supposed benefits. "Rigorous, peer-reviewed studies suggest that companies do not perform better when they have women on the board. Nor do they perform worse." *Does Gender Diversity on Boards Really*

Boost Company Performance?, Wharton (May 18, 2017), whr.tn/3jox7eU. SB 826's state-mandated, one-dimensional diversity thus yields no benefits insofar as corporate decisionmaking is concerned.

Moreover, requiring gender diversity under threat of financial penalty "constrains board composition and imposes additional costs on the firm." Greene, *supra* at 11. The most recent multivariate analysis of the bill's effects found "a statistically significant and economically large stock market reaction of –1.2% at the announcement," which equates to "a total loss in value in excess of $60 billion," "suggesting that SB 826 is costly for affected firms." *Id.* at 2. This is not surprising, given that the law sweeps under its coverage a massive number of companies. In 2019, "89 percent of California-based companies [would have needed] to make changes to their board composition in the next three years to meet the new law's requirements." Kuhns, *supra*.

Sadly, the brunt of SB 826's financial hit lands upon smaller, younger companies—those least likely to survive. The law costs the smallest firms an average of $176,101 per year, which is a shocking 13.2% of sales. Greene, *supra* at 16-17. And "the negative effect of SB 826 is strongest for firms that are below the median age." *Id.* at 2. For firms

that fall short of the requirement (which tend to be smaller firms), "[m]ultivariate analysis implies a 0.50% decline in shareholder wealth for every female director that the firm is required to add by 2021." *Id.* at 2, 5. The evidence is clear: SB 826 harms California businesses and falls particularly hard on smaller, younger companies.

Decreasing California wealth will directly harm philanthropy of the top five most charitable U.S. companies that are headquartered in California. *See* Chelsea Greenwood, *10 of the Companies That Give the Most to Charity in the US*, Bus. Insider (Nov. 14, 2018), bit.ly/2Elp4zt. California companies are fleeing the state in droves because of increased regulatory costs imposed by laws like SB 826. *See 1,800 Companies Left California in a Year—With Most Bound for Texas*, Southstar Communities (Jan. 1, 2019), bit.ly/2BtXe2L ("During the study period, 275,000 jobs and $76.7 billion in capital funds were diverted out of California."). And when these companies—along with their employees and capital—leave California, so do their philanthropic dollars.[2]

[2] For example, "[s]ince 2010, Charles Schwab Foundation has donated over $37 million in direct grants to organizations like Mobile Loaves and Fishes," Charles Schwab, *We're Invested in Giving Back* bit.ly/2BKqZN6, but Charles Schwab recently left California for Texas, Dom DiFurio, *Schwab Is the Latest Company Leaving California for*

C. SB 826 harms California as a whole.

In addition to damaging California businesses, SB 826 will harm California more broadly. The stock-market dip alone caused by SB 826 significantly damaged Californian investments. And this reaction was not a one-time event, as SB 826 continues to ratchet up the quotas and fines: a six-member board with no female directors in 2021 would be fined $700,000 each year. Cal. Corp. Code §301.3. Consequently, "[s]tock returns are decreasing in the number of female directors needed, with a mean of –1.06% (–1.64%) for firms that must add one (three) female director(s) by 2021." Greene, *supra* at 2. Less money invested in California business means less charitable giving benefiting Californians. SB 826 has already caused "a total loss in value in excess of $60 billion," *id.*, and as more businesses suffer costs, pay fines, and leave the state, Californians will continue to pay the increasing price for the discriminatory quota.

Texas and It Won't Be the Last, Expert Says, Dallas News (Nov. 29), 2019), bit.ly/2X6UmAm.

D. Europe has implemented similar laws that have had detrimental effects on public companies.

In Europe, where these laws have been in place for over a decade, the results have been disastrous. In 2008, Norway began requiring its public companies to reserve at least 40% of their director seats for women. In the face of forced compliance, many businesses left the public sector and relisted as private companies. *See Ten Years On From Norway's Quota for Women on Corporate Boards*, The Economist (Feb. 17, 2018), econ.st/2OFzGuG. This naturally results in fewer board positions, which means fewer positions that women may fill. The Nordic Labor Journal reported that "[w]hen the law was introduced there were 452 public limited companies." *Norway's Female Boardroom Quotas: What Has Been the Effect?*, Nordic Labor J. (May 21, 2015), bit.ly/30sYSu5. By 2013, "there were only 257, since many companies had changed their company type." *Id.* Astonishingly, the "number of board seats dropped from 2,366 in 2008 to 1,423 in 2013." *Id.* In its attempt to require gender diversity of corporate boards, Norway forced out nearly half of its public companies, slashed the number of available board positions, and ultimately reduced opportunities for women.

The experience in other European countries has been the same. In France, companies simply reduced the size of their boards rather than hire more women. The Economist, *supra*. In Germany, "a shortage of qualified women" resulted in out-of-country hires who tend to have less experience with German business. *Id.* And even in Norway itself, "the quotas had no effect on the representation of women in senior management in the firms where it applied." *Id.*

California has just made the same mistake. It is thus no surprise that SB 826 has pushed companies out of California. *See* Keith Bishop, *Academicians Find Firms With All-Male Boards Have Left California*, Nat'l Law Rev., (Jan. 8. 2020). Naturally, driving business out of California drives philanthropic dollars out of California.

II. The Proliferation of Laws Like SB 826 Threatens to Magnify These Harms in California and Beyond.

A. SB 826's damaging effects will extend well beyond California.

The harms of SB 826 do not stop at California's border. Because many American businesses are headquartered in California, SB 826's detrimental effects will extend more broadly across the entire United States. California is home to over 12% of all public U.S. firms, meaning the law will sweep more than one-eighth of the nation's public companies

under its mandate. Greene, *supra* at 2; *see also Fortune 500*, Fortune, bit.ly/2ODi0A6 (accessed July 20, 2020) (48 of the Fortune 500 companies are headquartered in California, representing nearly 10% of the nation's leading businesses). Not surprisingly, the law's financial toll is massive; in total, "the mandate affects a large and diverse set of firms with a combined market capitalization of over $5 trillion." Greene, *supra* at 2. The effects of SB 826 will ripple through the American economy, causing economic damage even beyond what California is already experiencing.

B. The proliferation of laws like SB 826 threatens massive harm to American business and philanthropy.

Several states are considering director quotas akin to SB 826. If the folly of SB 826 is left uncorrected, this will greenlight the passage of these and numerous similar laws. For example, Hawaii, Illinois, Massachusetts, Michigan, New Jersey, New York, and Washington are already considering laws nearly identical to SB 826. *See supra* 2-3. Like California, all of these states will impose fines starting at $100,000 if a corporation fails to elect enough female board members. Many other states have passed or are considering laws requiring board-composition disclosure or similar inducements for gender diversity. *See* Michael

Hatcher et al., *States are Leading the Charge to Corporate Boards: Diversify!*, Harv. L. Sch. F. Corp. Gov. (May 12, 2020), bit.ly/32D7GQQ.

The false promises of California's disastrous legislation have already induced other states to follow suit. If left uncorrected, discriminatory laws like SB 826 are likely to continue to sprout up, causing financial harm to American businesses and our economy. Of course, this financial harm extends to the philanthropic sector as business generates fewer dollars to go to philanthropic causes. Moreover, the green-lighting of laws like SB 826 will spur similar mandates that target the non-profit and philanthropic segment more directly, like the legislative efforts recently advanced in Connecticut and Hawaii. S.B. 68, 2019 Gen. Assemb., Jan. Sess. (Conn. 2019); H.C.R. 103, 30th Legis., Reg. Sess. (Haw. 2020).

CONCLUSION

The Court should reverse the judgment of the district court.

Respectfully submitted,

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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 via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

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