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## PERSPECTIVE

## Arguments on California's corporate board gender mandate

By Jen Rubin

California's groundbreaking gender parity law for public company boards is the subject of two legal challenges, one of which came before the 9th U.S. Circuit Court of Appeals for oral argument this week.

Senate Bill 826, which became effective in 2019, mandates that public companies with a principal executive office in California must meet certain minimum gender goals for their boards. Companies subject to the law were obligated to elect at least one female director to their boards by Dec. 31, 2019, and must elect two or more female directors, depending upon the size of the board, by Dec. 31, 2021. They face penalties of \$100,000 for a first violation and up to \$300,000 for each subsequent violation.

Creighton Meland, a shareholder of California-based OSI Systems, Inc., sued the state in the Eastern District of California shortly after SB 826 was signed into law. He claims the law's gender mandate is an unconstitutional gender quota.

Last year, District Judge John A. Mendez granted the state's motion to dismiss the *Meland v. Padilla* case. Judge Mendez found Meland lacked standing to challenge the law as an OSI Systems shareholder, given that the company itself had not challenged the law as the potential recipient of a state-imposed penalty. Prior to the election of a female board member in 2019, the OSI Systems board had been entirely male. Judge Mendez

reasoned that SB 826 does not injure shareholders because the corporation, not its shareholders, is the subject of any prospective state-imposed penalty for noncompliance.

Meland appealed the ruling to the 9th Circuit, which heard arguments in the case on Tuesday.

The issue before the 9th Circuit is whether shareholders have standing to bring an equal protection challenge to a law requiring them to vote for board members in a discriminatory way — i.e., on the basis of gender. Meland also challenged the district court's alternative ground of dismissal that the suit was moot in light of the fact that the OSI Systems shareholders had voted to seat a female on its board, claiming this injury will occur each time he is asked to vote for board seats.

At argument, Meland said that the so-called "The Woman Quota" (his term for SB 826) deprives shareholders of the right to vote for board members without regard to gender. The state argued that the law only applies to corporations, not their shareholders, each of which are distinct legal entities who suffer harm (or prospective harm) in ways unique to their status. In addition, SB 826 does not require Meland to vote in a certain way, or even to vote at all, and notwithstanding his voting decision, the penalty to be imposed for noncompliance would be imposed on the corporation, not shareholders.

The panel (Circuit Judges M. Margaret McKeown, Sandra Ikuta and Daniel A. Bress) focused on the entity on whom the penalty

was imposed (the corporation) and the apparent absence of harm on Meland as a corporate shareholder, who was free to vote for whomever the corporation's nominating committee included on its candidate slates. The panel noted that the corporation itself had standing to challenge the law's enforcement. It tested Meland's allegations that he was injured by a sex-based quota because the state was not coercing him to vote in any particular way. In response, Meland argued that the law changed the dynamics of a shareholder vote and affected his ability to choose a board candidate without regard to gender. The panel explained that board slates are generally put forth by governance and nominating committees as opposed to individual shareholders. Moreover, allegations of wrongdoing or irregularities within the nominating process were absent, nor was there an allegation that any candidate Meland proposed was not considered due to gender.

The panel also tested the state's position, suggesting that an injury to shareholders could result from depriving them of the right to select board members, or to limit the pool of candidates as a result of the individual's gender. This potential "cloud" on Meland's ability to vote freely as a shareholder for a candidate of his choice, occurring within a framework that arguably was discriminatory, might suggest personal harm distinct from the harm to the corporation as a separate entity.

In addition to the *Meland* case, another case challenging SB 826 remains pending in a Los Angeles County Superior Court (*Crest v. Padilla*, 19STCV27561) and is scheduled for a June trial. In addition, legislation passed in 2020 building on SB 826 — SB 979, applying the same legal requirements to corporate boards but for members of underrepresented communities — is the subject of at least one pending legal challenge in L.A. Superior Court (*Crest v. Padilla*, 20STCV37153).

The 9th Circuit's decision in *Meland* will not necessarily touch upon the merits of this case or the constitutionality of SB 826, as the issue on appeal rests entirely on standing and subject matter jurisdiction issues. And even if the 9th Circuit reversed the decision of Judge Mendez below, that ruling will likely not address whether SB 826 will ultimately survive an attack on its constitutionality. ■

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