

# The University of Chicago Business Law Review

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Volume 3 | Number 2

Article 4

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9-1-2024

## How Did Corporations Get Stuck in Politics and Can They Escape?

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### Recommended Citation

Fisch, Jill E. and Schwartz, Jeff (2024) "How Did Corporations Get Stuck in Politics and Can They Escape?," *The University of Chicago Business Law Review*. Vol. 3: No. 2, Article 4.

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# How Did Corporations Get Stuck in Politics and Can They Escape?

Jill E. Fisch & Jeff Schwartz\*

*Corporations have always been involved in politics, but today is different. They are taking public positions, either directly or indirectly, on contested political and social issues unrelated to their businesses. In contrast to the conventional wisdom, we argue that this practice, which we term “corporate political posturing,” is problematic. First, it is of dubious value to the corporation and its stakeholders. Corporate political posturing often backfires, it does so unpredictably and potentially catastrophically, and it is particularly susceptible to agency costs. Second, it is harmful to society. The fundamental problem is that corporations are institutionally ill-equipped to take center stage in policy debates. They are inherently self-interested economic actors with goals that often conflict with those of society. This manifests in statements that tend to polarize rather than enlighten and actions that undermine the positions that they back publicly.*

*We surmise that corporations themselves are ambivalent about taking policy positions but are caught in a feedback loop in which customers, employees, and investors demand political involvement. Corporations thus engage in response to competitive pressure, which normalizes the conduct and leads to escalating expectations for further engagement. We see several ways to break this cycle. One possibility, which we consider and reject, is to subject political posturing to distinctive governance rules. A second option is voluntary disarmament. Borrowing from the Business Roundtable Statement on Corporate Purpose, we suggest that corporations could voluntarily and publicly commit to refrain from political posturing. A third option is for corporations to provide greater transparency, either voluntarily or in response to regulatory requirements. If corporations disclosed the extent to which their actions were consistent with their public positions, we predict that fewer corporations would engage in posturing and those that do would back their statements with conduct that matches.*

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I. INTRODUCTION .....	326
II. CORPORATE INVOLVEMENT IN POLITICS .....	332
A. The Rise of Political Posturing .....	332
B. Understanding the Rise of Political Posturing .....	338
III. IMPLICATIONS OF THE RISE OF POLITICAL POSTURING .....	343
A. The Business Risks of Political Posturing .....	343
B. Who Speaks for the Corporation? .....	346
C. The Social Costs of Political Posturing .....	347
IV. CAN CORPORATIONS GET UNSTUCK? .....	354
V. CONCLUSION .....	359

## I. INTRODUCTION

Corporations have had a deep and longstanding relationship with politics. In the 1930s, they were heavily involved in responding to the regulatory implications of Franklin D. Roosevelt's New Deal.<sup>1</sup> During the civil rights era, many corporations stood against segregation.<sup>2</sup> For some corporations, political engagement and lobbying have been critical components of implementing their business model.<sup>3</sup> And corporations have consistently participated in the political process through political donations and expenditures, initially through PACs and trade groups<sup>4</sup> and, after the Supreme Court's decision in *Citizen's United*, through uncapped super PACs.<sup>5</sup>

But today something is different. Corporations are increasingly participating in political debates, even when those debates have little or no relationship to their operations. Corporations

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<sup>1</sup> A.C. PRITCHARD & ROBERT B. THOMPSON, *A HISTORY OF SECURITIES LAWS IN THE SUPREME COURT* 37–66 (Oxford Univ. Press 2023).

<sup>2</sup> Tom C. W. Lin, *Incorporating Social Activism*, 98 B.U. L. REV. 1535, 1541–42 (2018).

<sup>3</sup> Jill E. Fisch, *How Do Corporations Play Politics?: The FedEx Story*, 58 VAND. L. REV. 1495, 1501 (2005) (“[P]olitical activity is . . . an integral and necessary part of a corporation's operating strategy.”).

<sup>4</sup> See *id.*; see also Jill E. Fisch, *Frankenstein's Monster Hits the Campaign Trail: An Approach to Regulation of Corporate Political Expenditures*, 32 WM. & MARY L. REV. 587 (1991) (describing corporate efforts to participate in political process through independent expenditures).

<sup>5</sup> *Citizens United v. FEC*, 558 U.S. 310, 365 (2010); Dorothy S. Lund & Leo E. Strine, Jr., *Corporate Political Spending Is Bad Business*, HARV. BUS. REV., (Jan.–Feb. 2022); *Ten Years After Citizens United*, PUBLIC CITIZEN (2020), <https://perma.cc/9RWD-H3CQ> (“More than 2,200 corporations reported \$313 million on election-related spending, primarily contributions to super PACs [since *Citizens United*].”).

flocked to issue statements in support of racial justice in the wake of the murder of George Floyd and the Black Lives Matter protests, and many coupled those statements with pledges of financial commitments.<sup>6</sup> Hundreds of corporations and their executives signed a statement opposing legislative efforts to restrict voting rights.<sup>7</sup> Following the Supreme Court's *Dobbs* decision, which overturned constitutional limits on abortion restrictions,<sup>8</sup> dozens of companies made public statements supporting abortion rights and committing to provide their employees with funding to travel out of state to obtain legal abortions.<sup>9</sup> Some businesses made national headlines when they refused service to members of the Trump administration.<sup>10</sup>

We term such efforts “political posturing” and challenge the conventional view that it is something to celebrate.<sup>11</sup> Our argument concerns only the practice where corporations make public statements<sup>12</sup> on controversial political and social issues<sup>13</sup> that are

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<sup>6</sup> Tracy Jan, Jena McGregor & Meghan Hoyer, *Corporate America's \$50 Billion Promise*, WASH. POST (Aug. 23, 2021), <https://perma.cc/C2F7-MWH5>.

<sup>7</sup> David Gelles & Andrew Ross Sorkin, *Hundreds of Companies Unite to Oppose Voting Limits, But Others Abstain*, N.Y. TIMES (Apr. 14, 2021), <https://perma.cc/WP78-HNC7>.

<sup>8</sup> *Dobbs v. Jackson Women's Health Org.*, 587 U.S. 215 (2022).

<sup>9</sup> Isaac Lozano, *Commentary: Corporations Supporting Abortion Rights? Their Political Donations Tell a Different Story*, L.A. TIMES (July 22, 2022), <https://perma.cc/YU7C-CSZY>; see also Anna Toniolo, *Corporate Participation in Social Debates*, 3 U. CHI. BUS. L. REV. 361 (2024) (analyzing corporate public statements in reaction to the *Dobbs* decision).

<sup>10</sup> Eric Orts & Elizabeth Sepper, *Politics over Profit: When Is It Right to Turn Away Customers?*, KNOWLEDGE AT WHARTON (July 19, 2018), <https://perma.cc/DX4W-33GP>.

<sup>11</sup> See *infra* note 100 and accompanying text. We note that corporations can engage in politics in a variety of ways. See, e.g., Andrew Winston, Elizabeth Doty & Thomas Lyon, *The Importance of Corporate Political Responsibility*, MIT SLOAN MGMT. REV. (Oct. 24, 2022), <https://perma.cc/G7CF-8G5D> (describing political influence as “actions intended to influence the electoral, governing, or civic affairs processes of a nation, state, or municipality, directly or via third parties, including political spending, lobbying and advocacy, employee communication, and external communication and other influence on civic discourse”). We do not attempt to provide a complete taxonomy of such engagement. Nor do we consider the potential First Amendment issues implicated by corporate political speech, a topic that has received extensive attention elsewhere.

<sup>12</sup> Our definition distinguishes between statements and actions, such as donating money, adopting hiring policies and reducing carbon emissions. As in the First Amendment context, it is difficult to draw a bright line distinguishing between speech and conduct. See, e.g., Frederick Schauer, *On the Distinction Between Speech and Action*, 65 EMORY L.J. 427, 427 (2015) (questioning whether the First Amendment’s “necessary distinction between speech and action is . . . sustainable”).

<sup>13</sup> We define a “controversial political and social issue” as one on which a significant portion of the population is divided and which is part of public debate. Statements or marketing campaigns that offend a small group with extreme views would not constitute posturing.

not intrinsic to their operations.<sup>14</sup> We include statements by the corporation and its CEO, as well as advertisements, marketing, and promotional campaigns.

There are potential positives to such posturing. When a well-known corporation speaks out about important causes, it can galvanize support for them. Corporations are large and powerful, and they control resources that enable their positions to be politically influential. These resources allow corporations both to coordinate and to amplify the voices of their executives, employees, customers, and investors.<sup>15</sup> In addition, many corporate stakeholders value the opportunity to engage with corporations that publicly support their political views.

Political posturing, however, carries significant downsides. First, there are substantial risks to the corporation and its shareholders. Aligning the corporation with a cause may win it customers, employees, and investors who feel the same way.<sup>16</sup> At the same time, however, posturing risks triggering a backlash from stakeholders and politicians who disagree with the corporation's political message, the involvement of corporations in political issues, or both. The animus political posturing generates among those who disagree with the corporation's political engagement may outweigh the potential reputational benefits.<sup>17</sup> When Coca-Cola publicly objected to Georgia's new voting rights law, the company was criticized by conservatives for engaging in politics and by liberals for failing to do more.<sup>18</sup> Conservatives have boycotted

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<sup>14</sup> We explicitly exclude from our definition of posturing statements that are made internally within the corporation, such as a corporation's pledge to its employees to fund out-of-state travel for an abortion. We distinguish those statements, however, from public statements committing to such support. See, e.g., Emma Goldberg, *These Companies Will Cover Travel Expenses for Employee Abortions*, N.Y. TIMES (Aug. 19, 2022), <https://perma.cc/783U-362E> (reporting on companies making such public statements).

<sup>15</sup> See, e.g., Susan S. Kuo, *The Political Economy of Corporate Exit*, 71 VAND. L. REV. 1293, 1306 (2018) ("A group that is powerless in majoritarian terms within individual states may have the savvy to activate corporate power in order to have a greater impact on democratic discourse."); see also Jennifer S. Fan, *Woke Capital: The Role of Corporations in Social Movements*, 9 HARV. BUS. L. REV. 441 (2019).

<sup>16</sup> Max Zahn, *Companies Increasingly Using Politics in Marketing, But There are Risks: Experts*, ABC NEWS (Aug. 23, 2022), <https://perma.cc/3BDS-A75K> ("As partisan polarization deepens, companies see an opportunity to draw in consumers on the basis of strongly held political identities, the experts said.").

<sup>17</sup> See generally Shanto Iyengar, Yphtach Lelkes, Matthew Levendusky, Neil Mahotra & Sean J. Westwood, *The Origins and Consequences of Affective Polarization in the United States*, 22 ANN. REV. POLIT. SCI. 129 (2019) (describing increasing animus based on partisan differences).

<sup>18</sup> Rachel Treisman, *'Based on a Lie'—Georgia Voting Law Faces Wave of Corporate Backlash*, NPR (Apr. 1, 2021), <https://perma.cc/B9WS-NMXA>; David Gelles, *Delta and*

Bud Light over its promotional campaign with a transgender activist and influencer.<sup>19</sup> Florida Governor Ron DeSantis retaliated against Disney after the company spoke out against restrictions on teaching issues of gender identity in public schools.<sup>20</sup>

Such downside risks are compounded because the decision about whether to engage, already uncertain and fraught, may be tainted by agency costs. Corporate leaders may use their platform to advance their personal political views or ambitions at the expense of their shareholders and other stakeholders.<sup>21</sup> This potential illustrates a deeper problem with political posturing, which is that the source of the values that corporations espouse is often unclear, and it is equally unclear whom corporations should speak for. Uncertainty about how a corporation derives and should derive its political identity provides further reason to question whether involvement is good for the corporation and its stakeholders.

More importantly, political posturing is bad for society. The core problem is that corporations are not designed to be political thought leaders. They engage to serve their own interests or those of their executives, and these interests may not align with the interests of society. The disconnect manifests in a number of ways. One key problem is that these statements tend to polarize rather than inform, further entrenching partisan divides.<sup>22</sup> Even today, liberal consumers may flock to Starbucks, while conservatives patronize Black Rifle Coffee. Another problem is that corporate commitments are often cheap talk. There are many examples

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*Coca-Cola Face Backlash from Republicans After Opposing Georgia Voting Law*, N.Y. TIMES (Apr. 1, 2021), <https://www.nytimes.com/2021/04/01/business/delta-coca-cola-georgia-voting-law.html> (last visited Sept. 8, 2024).

<sup>19</sup> See Amanda Holpuch, *Behind the Backlash Against Bud Light*, N.Y. TIMES (Nov. 21, 2023), <https://www.nytimes.com/article/bud-light-boycott.html> (last visited Sept. 8, 2024).

<sup>20</sup> Mary Ellen Klas, *A Timeline of the DeSantis-Disney Fight in Florida*, TAMPA BAY TIMES (Apr. 17, 2023), <https://perma.cc/UDQ7-HVXB>.

<sup>21</sup> Adam Winkler argues that a concern over such agency costs was the dominant rationale for the original bans on corporate political contributions. See Adam Winkler, *"Other People's Money": Corporations, Agency Costs, and Campaign Finance Law*, 92 GEO. L. J. 871, 873 (2004) ("[C]ompany executives were opportunistically misappropriating the company owners' money to purchase legislation benefiting the executives themselves.").

<sup>22</sup> Zahn, *supra* note 16 (quoting Katharine Howie, a professor of marketing at The University of Southern Mississippi, "'It's a feedback loop,' she said. 'We live in our little silos and echo chambers, where we're all getting pulled further and further to the ends of the political spectrum, and companies are now engaging in more political conversation and political action, and that's pushing us even further apart'").

of companies backing away from stances, backing stances in public but financially supporting opposed candidates in private,<sup>23</sup> and failing to back up their stances with operational changes.<sup>24</sup> Such conduct detracts from or even harms the very causes corporations purport to support and potentially crowds out meaningful political initiatives.

We identify and evaluate several ways of reversing the growth in political posturing. First, we consider and reject the idea—which has been proposed in connection with political expenditures—of subjecting political posturing to distinctive governance rules such as heightened judicial scrutiny or mandated board oversight.<sup>25</sup> Although we acknowledge the possibility that some political posturing is based on the selfish motivations of corporate executives, we believe that the phenomenon we described is primarily motivated by sincere efforts to promote corporate value. Moreover, we do not view political posturing as sufficiently different from other business decisions to warrant specific governance mandates—or the line between political posturing and other forms of engagement in the political process as crisp enough to form a workable legal boundary.<sup>26</sup> Finally, corporate governance reforms are somewhat mistargeted: they may trim agency costs but do not address the broader societal problems with such engagements.

Instead, we argue that corporations can and should engage in voluntary disarmament, reducing their engagement in political posturing through voluntary collective action. We propose that corporations commit to depoliticization through a pledge akin to the Business Roundtable Statement on Corporate Purpose.<sup>27</sup> Such a commitment would strengthen the ability of

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<sup>23</sup> See Lund & Strine, *supra* note 5 (“[C]ompanies now donate to help elect candidates they hope will do their industry’s bidding or support a specific cause, even as they publicly advocate for the opposite stance.”).

<sup>24</sup> Lisa Fairfax terms this behavior “corporate hypocrisy.” See Lisa M. Fairfax, *ESG Hypocrisy and Voluntary Disclosure*, 26 N.Y.U. J. LAW & LIBERTY 127, 129 (2024).

<sup>25</sup> Lucian A. Bebchuk & Robert J. Jackson, Jr., *Corporate Political Speech, Who Decides?*, 124 HARV. L. REV. 83 (2010).

<sup>26</sup> Cf. *Simeone v. Walt Disney Co.*, 302 A.3d 956, 969 (Del. Ch. 2023) (describing “choosing to speak (or not speak) on public policy issues [as] an ordinary business decision”).

<sup>27</sup> *Business Roundtable Redefines the Purpose of a Corporation to Promote ‘An Economy That Serves All Americans,’* BUS. ROUNDTABLE (Aug. 19, 2019), <https://perma.cc/C7PY-E6NE>. Unlike the Business Roundtable statement, however, which reflected only the decisions of the signatory CEOs, we argue that this commitment should be reflected in formal board action. Cf. Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 98, 130–33 (2020).

corporate decisionmakers to withstand the significant pressure from stakeholders to take a stance on public debates.<sup>28</sup> We also propose reducing the incentive for corporations to engage in cheap talk by enhancing transparency. We argue that corporations should disclose the extent to which their actions match their posturing. Corporations could make such disclosures voluntarily, indeed, corporations face increasing shareholder pressure to make greater disclosures about their political activity,<sup>29</sup> or the Securities and Exchange Commission (SEC) could adopt rules requiring such transparency. Alternatively, the SEC could adopt a lighter touch approach through informal guidance indicating that political posturing inconsistent with corporate behavior could constitute securities fraud. It could back up this guidance with enforcement actions against corporations engaged in political hypocrisy.

Our analysis proceeds as follows. Part I documents the growth of political posturing and its cyclical nature. We show how corporate involvement is driven in part by stakeholder demands, but also by corporate efforts to monetize the value of partisanship, using values to compete in the market in addition to traditional factors like investor return, product quality, and worker pay. We argue that these corporate efforts, in turn, have affected stakeholder expectations, leading to broader demands for political involvement. Part II criticizes political posturing. We argue that such posturing poses significant and unpredictable risks to the corporation and its shareholders and that it is socially corrosive. In Part III, we evaluate potential solutions to liberate corporations from politics.

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(observing that the CEOs did not seek board approval before signing the Business Roundtable statement).

<sup>28</sup> Similarly, Professors Anthony J. Casey and Tom Ginsburg consider in this volume whether corporations should adopt internal policies akin to the University of Chicago's 1967 Calvin Report, which states that the university will not take a position on political issues that do not directly affect it. See Anthony J. Casey & Tom Ginsburg, *Kalven for Corporations: Should For-Profit Corporations Adopt Calvin?*, 3 U. CHI. BUS. L. REV. 305 (2024).

<sup>29</sup> See, e.g., Ki P. Hong, Melissa L. Miles & Karina Bakhshi-Azar, *Companies Face New Pressure From Shareholders and Regulators To Disclose Political Policies and Contributions*, SKADDEN'S 2022 INSIGHTS (Jan. 19, 2022), <https://perma.cc/JA9X-56K7> (reporting that "during the 2021 proxy season, shareholder proposals requesting disclosure of corporate political spending passed at the highest rate ever recorded").



## II. CORPORATE INVOLVEMENT IN POLITICS

## A. The Rise of Political Posturing

Corporations are involved in politics in many ways. They have always engaged on political issues that affect their rights, powers, and regulatory obligations, both as a general matter and as applied to their specific business interests. FedEx is actively engaged in regulations concerning the mail monopoly;<sup>30</sup> Exxon is closely involved with fracking laws;<sup>31</sup> and Pfizer makes its voice heard on drug pricing and patent rules.<sup>32</sup> Corporations hire dedicated teams of lobbyists, maintain public affairs offices in Washington D.C. and provide input into legislative and regulatory decisions by testifying, submitting comment letters, and working with hill staffers to develop or modify proposed legislation. Corporations also engage indirectly: they contribute money to industry trade groups who advocate on their behalf; they form political action committees that donate money to political candidates; and following the Supreme Court's decision in *Citizen's United*, corporations pour their money into super PACs that fund advertisements for preferred politicians.<sup>33</sup>

An early example of corporate political engagement involved the New Deal, which corporations "bitter[ly] opposed."<sup>34</sup> Corporations were also swept into the civil rights movement, demonstrating both support and opposition. Some corporations financially backed civil rights organizations and voluntarily desegregated,<sup>35</sup> while others refused to follow the Civil Rights Act or worked for its repeal.<sup>36</sup> Many others sat on the sidelines. The head

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<sup>30</sup> Fisch, *supra* note 3.

<sup>31</sup> Laura Peterson, *Exxon-Mobil Shows its Lobbying Hand But Hides Some Cards*, UNION OF CONCERNED SCIENTISTS: THE EQUATION (Apr. 4, 2022), <https://perma.cc/LFK2-CY6A>.

<sup>32</sup> *Political Partnership*, PFIZER (Feb. 11, 2024), <https://perma.cc/K4QG-82P9>.

<sup>33</sup> See *supra* note 5 and accompanying text. A broader variety of corporate actions can be described as having a political or at least a public affairs dimension, including making charitable donations, preparing sustainability reports, and providing non-monetary gifts and benefits to public officials. See, e.g., Jill E. Fisch, *Questioning Philanthropy from a Corporate Governance Perspective*, 41 N.Y. L. SCH. L. REV. 1091, 1101–02 (1997) (explaining that corporations may use charitable donations as a substitute for political contributions).

<sup>34</sup> Robert M. Collins, *Positive Business Responses to the New Deal: The Roots of the Committee for Economic Development, 1933-1942*, 52 BUS. HIST. REV. 369, 369 (1978).

<sup>35</sup> Lin, *supra* note 2, at 1541–42.

<sup>36</sup> *Id.* at 1543; Tony Dokoupil & Martin Finn, *More Big Companies are Weighing in on Political and Social Issues. Here's Why*, CBS NEWS (June 1, 2023), <https://perma.cc/9Y2D-72D2>.

of US Steel likely spoke for many when he said at the time that speaking out on political questions was “quite beyond what a corporation should do.”<sup>37</sup>

Within the last decade, the nature of corporate participation in politics has shifted dramatically. Companies now routinely make public statements that seek to align themselves explicitly with certain—usually progressive—political views that have no tie to their underlying business interests. There are countless examples.

Some of these examples involve indirect political engagement, largely in the form of advertisements that make a political statement or express support for a political position. In 2017, for example, Pepsi ran an advertisement where Kendall Jenner calms tensions between marching protestors and police by handing a peacekeeping officer a Pepsi.<sup>38</sup> The ad was an unsubtle nod to the BlackLivesMatter (BLM) protests. That same year, Airbnb ran a Super Bowl advertisement emphasizing the company’s commitment to global and racial inclusiveness in response to a Trump administration order temporarily banning refugees from certain Muslim countries.<sup>39</sup> In 2018, Nike launched an advertising campaign with Colin Kaepernick, who was controversial for taking a knee during the national anthem of NFL football games as a protest against racial inequality and police brutality.<sup>40</sup> In 2019, Gillette ran an advertisement showing men taking a stand against bullying, harassment, and other forms of toxic masculinity, asking whether such behaviors were “the best a man can be.”<sup>41</sup> It was widely viewed as establishing the brand’s association with the #MeToo movement. In 2023, Target ran a promotional LGBTQ+ collection of merchandise in its stores, including trans-friendly swimwear.<sup>42</sup> That same year, Bud Light ran a promotion with a transgender influencer and activist, Dylan Mulvaney, who is well-known for detailing her gender transition in TikTok

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<sup>37</sup> Dokoupil & Finn, *supra* note 36.

<sup>38</sup> Daniel Victor, *Pepsi Pulls Ad Accused of Trivializing Black Lives Matter*, N.Y. TIMES (Apr. 5, 2017), <https://perma.cc/XE6P-9KXS>.

<sup>39</sup> Kate Birch, *9 Companies Taking a Stance on Political or Social Issues*, BUS. CHIEF (Aug. 26, 2022), <https://perma.cc/H59Z-CJBN>.

<sup>40</sup> Ricky Nave, *Do Political Boycotts of Companies Work? [12 Case Studies]*, AXIOM ALPHA, <https://perma.cc/QD9T-33RE>.

<sup>41</sup> Michael Baggs, *Gillette Faces Backlash and Boycott Over ‘#MeToo advert.’* BBC NEWS (Jan. 15, 2019), <https://perma.cc/4DEM-4G2N>.

<sup>42</sup> Anne D’Innocenzio, *After Backlash and Threats, Target Pulls Some LGBTQ+ Merchandise from Store*, PBS NEWS HOUR (May 24, 2023), <https://perma.cc/59PP-KMD7>.

videos,<sup>43</sup> in which it provided her a novelty Bud Light can with her picture, which she promoted on Instagram.<sup>44</sup> Only a few months later, Nike launched an advertising campaign with Ms. Mulvaney modeling its women's athleticwear.<sup>45</sup>

Companies also make explicit statements advancing political positions. Citigroup, among others, has taken a stance against gun violence. In a 2018 statement, it advocated for the adoption of "common-sense measures that would help prevent firearms from getting into the wrong hands."<sup>46</sup> Citibank backed up its statement with a new policy requiring its "retail sector clients or partners" to sell firearms only to those who have passed a background check, not to sell firearms to those under 21 years old, and not to sell "bump stocks or high-capacity magazines."<sup>47</sup>

In 2021, many companies spoke out against new voting restrictions in Georgia that potentially made "it disproportionately more difficult for poorer voters and voters of color to cast their ballots."<sup>48</sup> Ed Bastian, Delta's chief executive, called "the final bill . . . unacceptable" because it did not "match Delta's values."<sup>49</sup> Coca-Cola echoed that it "does not support this legislation, as it makes it harder for people to vote, not easier."<sup>50</sup> Larry Fink, the chief executive of BlackRock, said the company was "concerned about efforts that could limit access to the ballot."<sup>51</sup> The head of Microsoft, Brad Smith, wrote on behalf of the company criticizing the bill and arguing that people should "work together to press the Georgia legislature to change it."<sup>52</sup> More than a dozen other companies took similar stands.<sup>53</sup> The Business Roundtable, an influential lobbying organization that represents hundreds of top

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<sup>43</sup> Cheyenne Derksen, *Bud Light Taps Trans Activist Dylan Mulvaney as March Madness Spokesperson*, OKLAHOMAN (Apr. 5, 2023), <https://perma.cc/P4L5-SWXG>.

<sup>44</sup> Holpuch, *supra* note 19.

<sup>45</sup> Jamie Burton, *Nike Makes Dylan Mulvaney Sports Bra Model, Days After Bud Light Furor*, NEWSWEEK (Apr. 6, 2023), <https://perma.cc/W3Q4-KX25>.

<sup>46</sup> Ed Skyler, *Announcing Our U.S. Commercial Firearms Policy*, CITI (Mar. 22, 2018), <https://perma.cc/587G-82J8>.

<sup>47</sup> *Id.*

<sup>48</sup> Peter W. Stevenson, *Expand Access? A Historic Restriction? What the Georgia Voting Law Really Does*, WASH. POST (Apr. 5, 2021), <https://perma.cc/7JKS-Y2HY>.

<sup>49</sup> David Gelles, *Delta and Coca-Cola Reverse Course on Georgia Voting Law, Stating 'Crystal Clear' Opposition*, N.Y. TIMES (Mar. 31, 2021), <https://perma.cc/LP27-5HLE>.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Shawna Chen, *Flood of CEOs, Corporations Speak Out Against Georgia's Voting Restrictions*, AXIOS (Apr. 2, 2021), <https://perma.cc/EB9U-UXV8>.

CEOs, joined them.<sup>54</sup> Further still, the former CEO of American Express and the outgoing CEO of Merck authored an open letter calling on CEOs to join the denunciations.<sup>55</sup> Companies also expanded their internal DEI efforts and made contributions to racial justice causes.<sup>56</sup>

In 2022, Disney took a stance against a Florida law prohibiting instruction regarding sexual orientation and gender identity before the fourth grade.<sup>57</sup> According to a statement from then-CEO Bob Chapek:

Florida’s HB 1557, also known as the ‘Don’t Say Gay’ bill, should never have passed and should never have been signed into law. Our goal as a company is for this law to be repealed by the legislature or struck down in the courts, and we remain committed to supporting the national and state organizations working to achieve that. We are dedicated to standing up for the rights and safety of LGBTQ+ members of the Disney family, as well as the LGBTQ+ community in Florida and across the country.<sup>58</sup>

Relatedly, over 300 companies signed a Business Statement on Anti-LGBTQ State Legislation drafted by the Human Rights Campaign, which reads in part “We are deeply concerned by the bills being introduced in state houses across the country that single out LGBTQ individuals—many specifically targeting transgender youth—for exclusion or differential treatment.”<sup>59</sup>

In response to the Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization*, which overruled *Roe v. Wade* and the right to abortion for which it stood, over 100 companies enacted health care policies covering travel expenses for abortions.<sup>60</sup> Some of these companies accompanied these policies with announcements articulating their support for abortion

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Jan et al., *supra* note 6.

<sup>57</sup> Matt Lavietes, *Here’s What Florida’s ‘Don’t Say Gay’ Bill Would Do and What it Wouldn’t Do*, NBC NEWS (Mar. 16, 2022), <https://perma.cc/FY46-RFWP>.

<sup>58</sup> Nave, *supra* note 40.

<sup>59</sup> *Business Statement on Anti-LGBTQ+ State Legislation*, HUMAN RIGHTS CAMPAIGN, <https://perma.cc/S66A-2QL9> (last visited Feb. 14, 2024).

<sup>60</sup> Jeffrey Sonnenfeld, Steven Tian & Georgia Hirsty, *A List of Companies Supporting Abortion Rights After the Roe v. Wade Ruling Shows Which Firms Are Stepping Up, and Why*, FORTUNE (June 30, 2022), <https://perma.cc/4HKC-GC42>.

rights.<sup>61</sup> Levi Strauss, for example, said that “Protection of reproductive rights is a critical business issue impacting our work force, our economy and progress toward gender and racial equity” and called on “business leaders ... to make their voices heard.”<sup>62</sup>

Corporations have also weighed in, through advertisements, social media, public statements, or lawsuits related to North Carolina’s “bathroom bill,”<sup>63</sup> the 2017 “Unite the Right” rally in Charlottesville,<sup>64</sup> the end of DACA,<sup>65</sup> the January 6, 2021 insurrection,<sup>66</sup> shrinking public lands,<sup>67</sup> and more. It is safe to say that any public controversy now stirs a corporate response.<sup>68</sup>

While political posturing usually favors progressive causes, this is not always the case. Chick-fil-A is famous for its opposition to gay marriage.<sup>69</sup> The CEO of Goya Foods has repeatedly praised former President Trump and repeated election falsehoods.<sup>70</sup> The CEO of Papa John’s spoke at the Conservative Political Action Conference in 2022.<sup>71</sup>

We acknowledge there is no precise way to define what is a political issue and that the definition can change over time.<sup>72</sup> Issues such as abortion rights or climate change have become highly partisan, although there is no theoretical reason for them to be, and that may change in the future.<sup>73</sup> Consequently, we do not consider the message sent by most inclusive advertising to be

<sup>61</sup> Goldberg, *supra* note 14.

<sup>62</sup> *Id.*

<sup>63</sup> Lin, *supra* note 2, at 1547–49.

<sup>64</sup> *Id.* at 1552–53.

<sup>65</sup> *Id.* n.4, at 1553–54.

<sup>66</sup> See, e.g., Ellen S. Podgor, *The Role of Business in Combatting Corrupt Criminal Conduct*, 83 OHIO ST. L. J. ONLINE 175, 176 (2022).

<sup>67</sup> David Gelles, *Patagonia v. Trump*, N.Y. TIMES (May 5, 2018), <https://perma.cc/Y86E-HDV9>; Toria Rainey, *For Companies, Talking Politics or Opining on Social Issues Can Be Like Stepping on a Landmine*, B.U. TODAY (July 23, 2020), <https://perma.cc/SV32-46JP>.

<sup>68</sup> As discussed, *infra* note 134 and accompanying text, the Israel-Hamas conflict is a notable counterexample.

<sup>69</sup> Gaby Del Valle, *Chick-fil-A’s Many Controversies, Explained*, VOX (Nov. 19, 2019), <https://perma.cc/7QHL-UADH> (describing Chick-fil-A’s long history of anti-gay advocacy).

<sup>70</sup> Andrea Salcedo, *Goya’s CEO Falsely Claims Trump is the ‘Real,’ ‘Legitimate’ President. Critics Call for a Boycott*, WASH. POST (Mar. 1, 2021), <https://perma.cc/YX8W-Z4RY> (recounting Goya CEO Robert Unanue’s remarks praising Donald Trump and resulting backlash especially from Latino customers).

<sup>71</sup> Jose Karlo Mari Tottoc, *15 Republican Companies with Conservative Values*, INSIDER MONEY (July 28, 2023), <https://perma.cc/J7KD-K2XA>.

<sup>72</sup> See, e.g., Tori Peglar *How Did Everything Get So Political?*, COLORADAN ALUMNI MAGAZINE (Mar. 6, 2023), <https://perma.cc/8YBB-2MGZ> (observing how issues like climate change and abortion have become “swept up into partisan politics”).

<sup>73</sup> *Id.* (“Not all issues stay political.”).

political at the present time, although others may disagree.<sup>74</sup> As a result, advertisements featuring interracial or same-sex couples or diverse actors would not, in our view, constitute political posturing. Such actions do not signal the company's views on current social movements or controversial laws. We distinguish transgender rights, however, because they are squarely at the center of today's culture wars.

A notable distinction between political posturing and prior corporate engagements in politics is the limited connection between the social or political issue in question and the corporation's operations. While a lunch counter of necessity must determine whether to implement segregated policies or not, and in so doing, is making an implicit statement about its support for segregation, there is no requirement that a beverage manufacturer adopt any policy with respect to voting rights, that a manufacturer of razors advocate with respect to toxic masculinity, or that a theme park operator express a view about teaching policies in the public schools. While these companies may be taking political positions for business reasons—to appeal to their customers, employees, or investors—such issues have no intrinsic tie to their operations.

Significantly as well, the political and social causes addressed in these corporate statements do not appear to reflect a corporation's underlying commitment to a particular social or political identity. To be clear, some corporations explicitly identify themselves with specific social or political issues, issues that may or may not bear an intuitive connection to the company's business model but that can be understood as giving the corporation a distinctive political identity. Ben & Jerry's Ice Cream, since its inception, has focused on environmental causes.<sup>75</sup> So too has

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<sup>74</sup> Cf. Xiaoqi Han & Sunny Wanhsiu Tsai, *Beyond Targeted Advertising: Representing Disenfranchised Minorities in 'Inclusive' Advertising*, 1 JOURNAL OF CUL. MKTG. STRAT. 154, 155 (2016), <https://perma.cc/XJZ5-VBUE> ("What makes minority targeted advertising a more risky strategy is the heightened political tension associated with targeting controversial minorities, as illustrated by various boycotts against companies targeting the gay and lesbian community.").

<sup>75</sup> Significantly, even a corporation with an identified political identity may engage in political issues outside the scope of that identity. Ben & Jerry's, for example, took a public stand on Israeli-Palestinian relations, an issue that seems relatively far removed from saving the rainforest. *Ben & Jerry's Will End Sales of Our Ice Cream in the Occupied Palestinian Territory*, BEN & JERRY'S, <https://perma.cc/AK64-FGZW> (last visited Feb. 14, 2024) ("We believe it is inconsistent with our values for Ben & Jerry's ice cream to be sold in the Occupied Palestinian Territory.").

Patagonia, an outdoor clothing company.<sup>76</sup> Black Rifle coffee describes itself as furthering the interests of armed forces veterans.<sup>77</sup> Hobby Lobby embraces a set of religious principles.<sup>78</sup> For such corporations, political statements serve to reinforce their pre-existing identities, and we do not characterize their statements in support of these principles as political posturing.

## B. Understanding the Rise of Political Posturing

Why have corporations begun to engage on topics unrelated to their operations? We identify three related factors: (i) increasing politicization and polarization in society, partly driven by social media; (ii) demand for corporate involvement from consumers, employees, and investors, leveraged by social activists; and (iii) the potential to further the interests of the corporation and its executives by responding to such demand.

Politicization of society is increasing along two dimensions. First, a growing number of issues have become political—from Covid vaccinations to climate change.<sup>79</sup> As a result, a broader number of activities can be understood as having a political dimension. Support of LGBTQ+ causes, for example, is increasingly an issue that divides along conservative/progressive lines. For many years, companies associated themselves with the movement without incident, but now such efforts draw fire. Target’s 2023 decision to sell transgender products identified with Gay Pride month was decried as “woke” despite a long history of LGBTQ+ promotions.<sup>80</sup>

Second, and relatedly, the public divide along firm political lines is growing. Society has less tolerance of mixed political views or nuanced political positions, preferring the ease of characterizing political preferences in accordance with a binary divide and, to an increasing degree, becoming intolerant of opposing political and social views.<sup>81</sup> This means that corporations are increasingly

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<sup>76</sup> Rainey, *supra* note 67.

<sup>77</sup> Black Rifle Coffee Company (Feb. 19, 2024), <https://perma.cc/5PFB-L9CH>.

<sup>78</sup> *Five Things to Know about Hobby Lobby’s Owners*, SEATTLE TIMES (July 2, 2014), <https://www.seattletimes.com/nation-world/5-things-to-know-about-hobby-lobbys-owners> (last visited Sept. 6, 2024).

<sup>79</sup> See, e.g., Toby Bolsena & Risa Palm, *Politicization and COVID-19 Vaccine Resistance in the U.S.*, 188 PROG. MOL. BIOL. TRANSL. SCI. 81 (2022) (describing how politicization has contributed to Covid vaccination hesitancy in the United States).

<sup>80</sup> D’Innocenzio, *supra* note 42.

<sup>81</sup> Iyengar et al., *supra* note 17; James Druckman & Jeremy Levy, *Affective Polarization in the American Public*, NORTHWESTERN INSTITUTE FOR POLICY

defined by a single political stance. They are labeled as either liberal or conservative even if they hold a range of views.

Related to this building polarization is the desire on the part of many to affiliate with those whose political views they share and, at the same time, to shun those with whom they disagree.<sup>82</sup> Politics is now a product feature. For example, 60% of surveyed Americans responded, “that how a brand responds to racial justice protests will influence *whether they buy or boycott the brand* in the future” and a full “69% of Millennial and Gen Z consumers think brands should be actively involved in the BLM movement.”<sup>83</sup>

Similarly, employees want to work for companies that align with their values and want their employers to take positions on important political topics.<sup>84</sup> This is especially important to younger workers, who also tend to have progressive social stances. According to a New York Times survey, 61% of Millennials want their companies to engage on social issues and 49% said they would quit their job if the company values did not match their own.<sup>85</sup> DEI was the most important value expressed among graduating college students, with 72% indicating that it was a top priority.<sup>86</sup> Companies seeking to attract and retain young workers thus have a significant incentive to take progressive policy stances.

Additional pressure may come from investors. Increasingly, people want to invest in companies that align with their values. ESG investing has soared in popularity in recent years although its momentum may have slowed.<sup>87</sup> Companies are also flooded with shareholder proposals pushing them to be more

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RESEARCH 1 (Working Paper May 17, 2021), <https://perma.cc/GT6Y-H8S8> (terming “affective polarization” as “the gap between individuals’ positive feelings toward their own political party and negative feelings toward the opposing party” and providing evidence that it has increased “in the past two decades”).

<sup>82</sup> As Miriam Baer explains, not only has polarization increased, but so has “affective polarization,” the strength of one’s positive feelings toward those with shared political views and negative feelings toward those with opposing views. Miriam H. Baer, *Reframing Compliance for a Polarized World* (Working Paper 2024, at 27–33) (on file with authors).

<sup>83</sup> Geeta Menon & Tina Kiesler, *When a Brand Stands up for Racial Justice, Do People Buy It?* HARV. BUS. REV. (July 31, 2020), <https://perma.cc/AMT8-4WKB>.

<sup>84</sup> Andrew Ward, *Why Companies Should Stay Away From Controversial Social and Political Issues*, THE HILL (May 24, 2022), <https://perma.cc/9DNZ-EB6G>.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> See, e.g., Chip Cutter & Emily Glazer, *The Latest Dirty Word in Corporate America: ESG*, WALL ST. J. (Jan. 9, 2024) (citing decline in corporate references to their ESG initiatives in response to the increasing polarization of ESG).



environmentally and socially responsible.<sup>88</sup> Influential shareholders like BlackRock and Vanguard have often supported these proposals, although again, this support appears to be fading.<sup>89</sup> Political statements signal likeminded political values to these investors.

Activists also view corporate involvement in political discourse as a way to spur social change without government action. Many progressives currently view social regulation as facing insurmountable hurdles in Washington and attribute the failure of government to respond to social problems as indicative of a failure of the political process.<sup>90</sup> In response, they have upped the pressure on corporations to take a stand. Corporations are vulnerable to such pressure, in part, because activists have been able to tap into the demands of corporate stakeholders. Social media facilitates these efforts by allowing for the quick dissemination of marketing campaigns and public stances. Thus, people can know about where companies stand much more easily than when channels for such communications were limited to traditional advertising and media.<sup>91</sup> Social media also enables activists to label a corporation's actions as political and to mobilize stakeholders to support or condemn those actions.

Corporations have self-interested reasons to be sympathetic to activist appeals. The first, and arguably most compelling reason for finding common ground with activists, is that politics opens up a novel and potentially attractive avenue of competition for both customers and employees. Products now can have an entirely new dimension. Without incurring any costs, products can

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<sup>88</sup> See Jill E. Fisch & Adriana Robertson, *Shareholder Proposals and the Debate over Sustainability Disclosure*, in BOARD-SHAREHOLDER DIALOGUE: POLICY DEBATE, LEGAL CONSTRAINTS AND BEST PRACTICES (Cambridge Univ. Press, forthcoming 2024), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4477680](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4477680) (providing empirical evidence on the growth of and support for shareholder proposals seeking greater ESG disclosure); Jeff Schwartz & Jefferson Jensen, *Understanding How the Big 3 Vote on Environmental and Social Proposals*, \_\_ SEATTLE L. REV. \_\_ (forthcoming 2025) (on file with author).

<sup>89</sup> Bob Rubin, *Blackrock and Vanguard Were Once ESG's Biggest Proponents—Now They Seem to Be Reversing Course*, FORTUNE (Sept. 13, 2023), <https://perma.cc/N29L-UDDD> (describing how “BlackRock and Vanguard have a reputation for backing ESG initiatives” but observing reduced support in 2023).

<sup>90</sup> Ward, *supra* note 84 (“Indeed, the 2022 Trust Barometer characterized the country as being in ‘the cycle of distrust’ and suggests that businesses step into the void left ‘by an incapacitated government.’”).

<sup>91</sup> Notably also, in this previous era, corporations could target politically tinged marketing much more easily. For example, they could run such ads in magazines or during shows with audiences likely to be sympathetic.

become political symbols and sources of associative value. Gillette razors are no longer just razors; they are razors manufactured by a company that cares.

Typically, to win over new customers, companies must innovate or lower prices. The former is difficult and the latter unwelcome. Political statements, on the other hand, cost nothing. Instead of the traditional means, companies can gain a competitive edge by selling moral indignation. What can Gillette say about its razors that hasn't already been said? A traditional advertisement melts away instantly, but politics touches a nerve. Social media may play a role here as well. Because social media produces an overwhelming flow of content, it is likely hard for traditional marketing to stand out from the noise. Effective political engagement may be an exception. A symbolic gesture like an advertisement or public statement is also a cheaper way to market to values-conscious consumers than actually engaging in sustainability efforts. Figuring out whether a sprawling international supply chain is free of human rights abuses is costly and difficult. Words are cheap.

Much of the same logic applies to how political posturing can help employers recruit and retain talent. Typically, the way to attract and keep employees is to pay them more, give them better benefits, and create a dynamic culture. Rather than incur all of these costs, companies can espouse values that align with their employees and the ones they wish to recruit without spending a dime.

Corporations may also target their posturing to a political audience, seeking to curry favor with influential politicians. President Biden, for example, was strongly against the Georgia voting restrictions.<sup>92</sup> Corporate public statements can demonstrate ideological alignment that might reduce the risk of unfavorable regulation.<sup>93</sup>

To be sure, a corporation that markets itself through political posturing may spur controversy. But some amount of controversy

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<sup>92</sup> See *Presidential Statement on Election Reform Legislation in Georgia*, 2021 DAILY COMP. PRES. DOC. 260 (Mar. 26, 2021), (characterizing the Georgia voting law as “a blatant attack on the Constitution and good conscience”).

<sup>93</sup> See, e.g., Jeff Schwartz, *Stewardship Theater*, 100 WASH. U. L. REV. 393, 443 (2022) (“[V]oting in a way that aligns with the views of regulators and powerful politicians makes it less likely that the unprecedented power of the large asset managers becomes a regulatory target.”).

is profitable because it increases brand awareness.<sup>94</sup> Controversial ads, practices, and statements are endlessly discussed on social media and cable news. Because of all of this exposure, after some time has passed, customers may remember the name of the brand, but not remember why.

Corporations may also take political positions that align with the interests of their leaders. In the same way that corporations, because of their size and power, magnify the voices of their stakeholders, they may enhance the ability of corporate executives to advance their personal political preferences. Executives may have a political view and use the formidable platform that their company provides to express it. Executives may also wish to signal to others that they hold these views. Who wants to be the only CEO at Davos whose company hasn't stood behind BlackLivesMatter? Executives may also have personal political aspirations. Using their corporate position gives them a platform both for communicating their views and enhancing their public profile.<sup>95</sup> Although such actions arguably constitute self-dealing, the scope of the business judgment rule largely insulates corporate political posturing from legal attack unless a corporation's expenditures are so egregious that they constitute waste.<sup>96</sup>

The herd-like move into political posturing suggests that there are also group dynamics at play. Executives tend to attend the same events, run in the same social circles, and have similar political views, raising the potential that groupthink explains some of the momentum behind political posturing. Moreover, it is difficult to know whether corporate missives on political topics began on the demand side or the supply side, but at least for the last several years, demand and supply appear to be locked in a mutually-reinforcing cycle, where consumers, employees, investors, and activists demand corporate engagement and corporations supply it. Part of this may stem from a prisoners-dilemma-

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<sup>94</sup> See, e.g., Jura Liaukonyte, Anna Tuchman & Xinrong Zhu, *How Much Do Boycotts Affect a Company's Bottom Line?*, KELLOGG INSIGHT (Jan. 1, 2023), <https://perma.cc/S4B5-XZ5K> (“[M]eaning people may be more likely to buy a product not because they’re actively participating in the boycott, but because they’ve heard the brand name a lot recently.”).

<sup>95</sup> See, e.g., Sophie Heading, *CEO: Business (Wo)man or Politician?*, KMPG INSIGHTS (Mar. 2018), <https://perma.cc/LMM4-ECDW> (describing “The ‘revolving door’ between CEOs and top political appointments in developed and developing countries alike”).

<sup>96</sup> See *Simeone v. Walt Disney Co.*, 302 A.3d 956, 968–69 (Del. Ch. 2023).

like dynamic, where, even if corporations do not really want to take a position, they feel compelled because of their competitors.<sup>97</sup>

In the end, each corporation and corporate culture is unique. The decision to wade into political waters likely depends on a mix of personal factors, including the views of the executives and their peers, and competitive factors, including how much pressure is coming from customers, activists, employees, and investors. It is also a strategic decision, where a corporation weighs the risk of significant blowback against the benefits of being somewhat controversial.

### III. IMPLICATIONS OF THE RISE OF POLITICAL POSTURING

Recent academic commentary has largely celebrated corporate political posturing.<sup>98</sup> We, however, are more skeptical. This trend raises significant concerns that fall into two categories—concerns that corporate political posturing may be harmful to the corporation and its shareholders, and concerns that it may be harmful for society.

#### A. The Business Risks of Political Posturing

As noted above, the business case for posturing is that engagement in politics is a marketing tool—a way of increasing visibility and generating brand loyalty. Political statements allow corporations to signal likeminded values to customers, employees, politicians, and investors inexpensively.

At the same time, however, the practice carries significant and unpredictable risks. The central risk of corporate engagement is backlash from customers and politicians. America now has a boycott culture. A recent survey showed that 38% of people are currently boycotting a company.<sup>99</sup> If the boycotting customers

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<sup>97</sup> See, e.g., Dylan Walsh, *How Corporate America Can Advance Social Justice and Racial Equity*, MIT IDEAS TO MATTER (May 10, 2021), <https://perma.cc/88CD-EPKK> (“I like to say that everyone is invited to the justice barbecue . . . but folks notice how late you come,” quoting Malia Lazu, a lecturer in the Technological Innovation, Entrepreneurship, and Strategic Management group at MIT Sloan).

<sup>98</sup> See, e.g., Lin, *supra* note 2; Fairfax, *supra* note 24; Fan, *supra* note 15; Daniel Korschun & N. Craig Smith, *Companies Can’t Avoid Politics— and Shouldn’t Try To*, HARV. BUS. REV. (Mar. 7, 2018) <https://perma.cc/73V5-FKCA>.

<sup>99</sup> See, e.g., Julie Sherrier, *38% of Americans Are Currently Boycotting a Company, and Many Cite Political and Coronavirus Pandemic-Related Reasons*, LENDINGTREE (July 20, 2020), <https://perma.cc/7J75-XFJD> (reporting results of survey about customer boycotts). The survey found that the number one reason for such boycotts was disagreement with politics. *Id.* The survey further reported a split reaction among boycotting customers,

outnumber those that the corporation gains by appealing to new customers who share the corporation's views, then the statement is a net loss. As noted above, some controversy is good for business. But too much can be a disaster. Moreover, politics is a high risk branding strategy precisely because it appeals to stakeholders who are particularly sensitive to political signaling and therefore more likely to turn on a company if they are not satisfied with its political position than those who are drawn by a corporation's workplace practices or product quality.

In addition, a corporation's effort to associate with a political position may increase its vulnerability if that position is viewed as disingenuous. Pepsi's saccharine attempt to associate itself with BLM protests was pulled after a day and significantly damaged the brand.<sup>100</sup>

The risks of political posturing are also unpredictable and increasing. The posterchild for consumer backlash is Bud Light. It is unclear that Bud Light made a calculated decision to speak out in favor of transgender rights through its social media promotion with Ms. Mulvaney—the promotion was part of a campaign that featured a broad range of spokespersons and was likely, at least in part, an effort to demonstrate that the product appeals to a variety of consumer types.<sup>101</sup> Moreover, Bud Light has long sought to associate the brand with the LGBTQ+ movement.<sup>102</sup> Nonetheless, the promotion was rapidly characterized as political. The resulting boycott caused sales to fall 17%.<sup>103</sup> Anheuser-Busch Inbev SA's stock price fell by 20%.<sup>104</sup> Months later the stock price and sales have not recovered.<sup>105</sup> Target faced violent blowback not for making a public statement, but merely for offering transgender

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with 19% boycotting because they disagree with a company's support for BlackLivesMatter and 18% because they disagree with a company's failure to support the cause. *Id.*

<sup>100</sup> See, e.g., Rainey, *supra* note 67. ("The ad was so widely criticized that it ran for only a day. But the damage to the PepsiCo brand lasted nearly a year: millennials' willingness to buy a Pepsi plummeted to its lowest level in at least eight years, according to YouGov BrandIndex.").

<sup>101</sup> See, e.g., Brian Flood & Lindsay Kornick, *Bud Light Says Pact With Trans Activist Dylan Mulvaney Helps 'Authentically Connect With Audiences'*, FOX NEWS (Apr. 3, 2023), <https://perma.cc/4MHW-WAZJ> (quoting statement by Anheuser-Busch that it "works with hundreds of influencers across our brands as one of many ways to authentically connect with audiences across various demographics").

<sup>102</sup> Nave, *supra* note 40.

<sup>103</sup> *Id.*

<sup>104</sup> Caitlin O'Kane, *Bill Gates' Foundation Buys Anheuser-Busch Stock Worth \$95 Million After Bud Light Financial Fallout*, CBS News (Sept. 7, 2023), <https://perma.cc/4KG4-3Z59>.

<sup>105</sup> *Id.*

promotional merchandise, despite the fact that it had, along with H&M and Walmart, been running LGBTQ+ promotions for a decade.<sup>106</sup> Companies were seemingly caught off-guard when transgender rights proved to be a political flashpoint in a way that previous LGBTQ+ issues have not. As more and more issues become politically charged, the risk of blowback increases. And businesses are partly to blame. Political posturing invites stakeholders to view everything they do through a political lens.

Another risk is backlash from politicians, which can be even worse. Delta almost lost a \$35 million tax break for opposing the Georgia voting rights bill.<sup>107</sup> Disney faced a two-year legal battle with the state of Florida.<sup>108</sup> BlackRock is struggling to make amends with Texas after blowback stemming at least partly from its CEO's widely publicized embrace of ESG.<sup>109</sup> Corporations depend on government support, or at least acquiescence, in innumerable ways. Corporate political posturing jeopardizes all of this.

The foregoing issues are problematic even in the case of a corporation that takes a political position in the good faith belief that the position will provide a net benefit to corporate value, whether through the greater sale of its products, its ability to attract workers, or by enhancing its reputation with government officials. Because the effects of corporate political posturing are difficult to predict and quantify, however, corporate officials may also take political positions for personal reasons. As noted above, they may do so to further their political ambitions or signal virtue to their peer group. In such cases, there is an added risk that the

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<sup>106</sup> D'Innocenzio, *supra* note 42 ("Target and other retailers including Walmart and H&M have been expanding their LGBTQ+ displays to celebrate Pride month for roughly a decade.").

<sup>107</sup> Madhu Unnikrishnan, *Delta Nearly Loses Tax Benefit in Georgia Over Elections Law Retribution*, AIRLINE WEEKLY (Apr. 1, 2021), <https://perma.cc/CW4H-SE5S> (reporting that Georgia House voted to end a tax exemption on jet fuel sales "after Republicans in the Georgia General Assembly sought to punish the Atlanta-based company for speaking out against the state's controversial new elections law"). The Senate did not take up the legislation, and it did not become law. Robert Hart, *Georgia House Passes Bill Stripping Delta Of A Multimillion Tax Break After It Slammed The State's New Voting Restrictions*, FORBES (Apr. 1, 2021), <https://perma.cc/RW4Y-NEFZ>.

<sup>108</sup> *See Deal Sealed Between Disney and Disney World Governing District with Approval by DeSantis Reps*, CBS NEWS (June 13, 2024), <https://perma.cc/9Z62-7RSN> (reporting that final approval of settlement agreement two years after Disney's public opposition to the don't say gay legislation).

<sup>109</sup> Isla Binnie, *BlackRock's Fink Says He's Stopped Using 'Weaponised' Term ESG*, REUTERS (June 26, 2023), <https://perma.cc/MQ9M-FPT6> (arguing that his "annual letters to investors that addressed ESG issues were never meant to be political statements").

corporation will be harmed. Although it is personally tempting for corporate officials to justify their actions in moral terms, such terms offer an easy excuse for actions that are not reasonable calculated to serve the best interests of the corporation.

Notably, corporations and corporate officials have already faced litigation challenging political engagements as inconsistent with their fiduciary duties.<sup>110</sup> Although such challenges are unlikely to be successful, they highlight the potential damage caused by ill-judged political posturing.

We acknowledge that the costs and benefits of corporate posturing from the perspective of the corporation may be difficult to evaluate and arguably do not differ substantially from those associated with any business decision. The fact that a business decision turns out badly does not make it illegal or illegitimate. Indeed, courts and legislators adopted the business judgment rule with the express intention of shielding corporate officers and directors from liability for those decisions. As a result, even if political posturing was bad for business, we would scarcely be justified in substituting our judgment for those of the officers and directors of these companies. Nevertheless, it is worth highlighting the potential risks that it poses to the corporation. As the litigation noted above illustrates, when these decisions turn out badly, shareholders ultimately suffer.

#### B. Who Speaks for the Corporation?

Corporations could argue that our discussion of the business risks of posturing misconstrues their motives. Political posturers understandably defend their activism as a profit-neutral expression of values rather than as an attempt to burnish their image with stakeholders or society. Indeed, they have to do so or else the posturing falls flat. We view this claim as implausible, but even if we entertain it, it is problematic.

The Supreme Court has recognized that corporations can have and express values and affords First Amendment protection to corporate political speech.<sup>111</sup> As noted previously, some

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<sup>110</sup> Kathryn Joyce, *Ketchup With Those Fries? Sure—as Long as It’s Anti-Woke*, NEW REPUBLIC (Sept. 12, 2023), <https://perma.cc/E5X2-NBAM> (explaining that a right wing advocacy firm is “soliciting aggrieved conservatives for lawsuits against corporations”).

<sup>111</sup> Ironically, the Court’s extension of First Amendment protections to corporations is based, in large part, on protecting the First Amendment rights of the individuals who own and control those corporations. *Burwell v. Hobby Lobby Stores, Inc.* 573 U.S. 682, 706–07 (2014) (“When rights, whether constitutional or statutory, are extended to

corporations, like Patagonia, have values deeply associated with their companies.<sup>112</sup> In these cases, corporate values are uncontroversial. In cases of political posturing, however, corporations are developing such views on the fly. Even if we take corporations at their word, and assume such position-taking is values-driven, it is unclear where corporations are getting these values from or where they should be getting them from. There is undoubtedly a plurality of views within the corporation on such topics and no way for corporations to legitimately prioritize the views of one group over the other. Even the traditional corporate-law perspective that managers should represent shareholder interests fails to address the problem. Shareholders undoubtedly have diverse views on politically charged topics and their decision to invest, particularly when so much investing is mediated through retirement plans and asset managers, cannot generally be understood as an expression of political preferences.<sup>113</sup>

Viewing political posturing as values-driven changes rather than eliminates the problems with it. As argued above, posturing is problematic when viewed through a profits lens because it is fraught with business risks. When viewed through a values-lens, it is problematic because corporations are not expressing, and really cannot express, the range of values of their stakeholders.

### C. The Social Costs of Political Posturing

Some might dismiss these concerns because of the potential for political posturing to bring about positive social change. The societal case for the practice stems in part from the recognition that corporations are powerful, well-funded, and highly visible. When they publicly support a political position, that support is likely to raise awareness, to change minds, and to impact public policy. Their involvement may legitimize a policy position, making it appear more mainstream. Similarly, their participation may elevate issues that may initially appear to be of local

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corporations, the purpose is to protect the rights of . . . the *people* (including shareholders, officers, and employees) who are associated with a corporation in one way or another.”) (emphasis in original).

<sup>112</sup> Vincent Stanley, *How Patagonia Learned to Act on Its Values*, YALE INSIGHTS (Apr. 22, 2021), <https://perma.cc/L9VM-PARH> (analyzing Patagonia’s commitment to sustainability).

<sup>113</sup> See Jill Fisch & Jeff Schwartz, *Corporate Democracy and the Intermediary Voting Dilemma*, 102 TEXAS L. REV. 1, 22 (2023); Leo E. Strine Jr. & Nicholas Walter, *Conservative Collision Course: The Tension between Conservative Corporate Law Theory and Citizens United*, 100 CORNELL L. REV. 335, 340 (2015).



importance or narrow interest. The multi-billion dollar advertising industry is a testament to the power of corporations to influence the public. There are also some instances where corporations may have impacted policy. In vetoing a bill that would have required people to use the bathroom of their sex assigned at birth, South Dakota's governor cited opposition from Citigroup and Wells Fargo.<sup>114</sup> A backlash led by Walmart likely played a role in Arkansas's decision to amend its religious freedom bill.<sup>115</sup>

In addition to impacting policy, corporate political engagement adds to the range of voices participating in national discussions of important social issues. Corporations amplify voices that would otherwise go unheard, such as those of workers, employees, or customers.

Political posturing is also frequently backed up by action. Corporate political statements are often accompanied by changes in practice, as well as donations or expenditures in favor of political and social causes. The largest corporations pledged \$50 billion to support racial equity causes after BLM,<sup>116</sup> and DEI efforts were intensified.<sup>117</sup> After *Dobbs*, dozens of corporations pledged to pay for travel for abortions.<sup>118</sup> In sum, political posturing has the potential to broaden and deepen political discourse, impact policy, and spark substantive changes within firms.

This rosy view no doubt contains some truth, but it overstates the benefits and ignores the substantial associated drawbacks. Political posturing does have the potential to raise awareness and change minds. But it is not clear why we seem to trust companies to take positions that enhance social welfare. Some are likely tempted to give corporations the benefit of the doubt because their views, at least recently, have skewed progressive. But corporate motivations for political posturing are opaque and varied, and there is no reason to assume that they map onto what is best for society. The positions corporations adopt may stem from the self-interest of their executives or from an effort to increase profits despite the imposition of societal costs or externalities. As noted

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<sup>114</sup> James Surowiecki, *Unlikely Alliances*, NEW YORKER (Apr. 18, 2016), <https://perma.cc/9Z63-7E58>.

<sup>115</sup> *Id.*

<sup>116</sup> Jan et al., *supra* note 6.

<sup>117</sup> *Corporate America Promised to Hire A lot More People of Color. It Actually Did.*, BLOOMBERG (Sept. 26, 2023), <https://perma.cc/H53T-USTU> ("The year after Black Lives Matter protests, the S&P 100 added more than 300,000 jobs — 94% went to people of color.").

<sup>118</sup> Goldberg, *supra* note 14.

above, corporate success with advertising demonstrates their power to change minds. This is more a danger than a blessing.

And it is no defense to say that political posturing traces back to stakeholder views. Concededly, employees are key drivers of political posturing. But the employees at the tech giants that are so active in the public debates are wealthy, elite, and few. The other key drivers—consumers and investors—draw from the same group. Wealthier consumers buy more goods, services, and stock. It is questionable whether it is in society's best interest that corporations have become megaphones for this already-privileged segment of society. Political posturing might seem to advance democratic values; instead, it resembles plutocracy.<sup>119</sup> By way of example, Disney issued its public statement about the Florida school statute at the behest of its senior creative leaders.<sup>120</sup> At the same time, Disney employs a substantial number of Republican-leaning employees in Florida who may not share that opposition to the statute.<sup>121</sup>

Moreover, arguments for political posturing incorrectly assume that corporations send a clear message. Rather, corporate engagement in politics is ephemeral. In response to controversy, corporations appear ready to flip-flop, disassociating themselves with their prior statements, which dilutes or confuses the impact of those statements. Vanguard joined and then left the Net Zero Asset Managers initiative.<sup>122</sup> Coca Cola came out against Georgia voting restrictions, but before that, it had released an anodyne statement.<sup>123</sup> The Hallmark Channel released an advertisement with a gay couple kissing. After controversy, it withdrew the ad, but then reinstated it the next day.<sup>124</sup> Target pulled some of its pride month merchandise, including its transgender swimwear,

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<sup>119</sup> This is not to say that every instance of posturing privileges elite views. One of the problems with posturing is that corporate motives are opaque. For example, Coca Cola and Delta may have taken strong stances against the Georgia voting bill to support their large and diverse workforces in the state.

<sup>120</sup> Julia Boorstin, *Disney Creative Leaders Express Frustration to CEO Chapek Over 'Don't Say Gay' Bill Response*, CNBC (May 17, 2022), <https://perma.cc/PR76-5P2N>.

<sup>121</sup> Eric Revell, *DeSantis: Disney's Florida Employees Sided with Me in Feud*, FOX BUS. (July 26, 2023), <https://perma.cc/H8CZ-L3VH>.

<sup>122</sup> Ross Kerber & Noor Zainab Hussain, *Vanguard Quits Net Zero Climate Effort, Citing Need for Independence*, REUTERS (Dec. 7, 2022), <https://perma.cc/E5F5-NTZ4>.

<sup>123</sup> David Gelles, *Coca-Cola C.E.O.: Voting Rights Advocate?*, N.Y. TIMES (Apr. 2, 2021), <https://perma.cc/6C28-YFJH>.

<sup>124</sup> Rainey, *supra* note 67.

in light of significant controversy.<sup>125</sup> After Kid Rock posted a video of himself shooting a row of Bud Light cans, controversy erupted, and Bud Light pulled the promotion, placed the marketing director on leave, and issued bland corporate statements.<sup>126</sup>

These flip-flops not only undermine the company's attempt to align itself with the cause, but more importantly, they also cast doubt on the cause itself. As Ms. Mulvaney said, "For a company to hire a trans person and then not publicly stand by them is worse, in my opinion, than not hiring a trans person at all. . . . It gives customers permission to be as transphobic and hateful as they want."<sup>127</sup> Similarly, self-interested corporate leveraging of issues like transgender rights is a form of appropriation. Members of the LGBTQ+ community have long expressed their misgivings about "rainbow capitalism."<sup>128</sup>

The messaging is also muddled because corporations are often hypocritical. They claim that they stand with a particular group but hedge their bets with campaign contributions to opposing politicians.<sup>129</sup> In 2017, for instance, AT&T received a perfect score on the Human Rights Campaign's Corporate Equality Index while "donating more than \$2.5 million to anti-gay politicians that same year."<sup>130</sup> Despite their public statements opposing the Georgia voting law, Coke and Delta both contributed to the

<sup>125</sup> Siddharth Cavale, *Target Removing Some LGBTQ Merchandise Following Customer Backlash*, REUTERS (May 24, 2023), <https://perma.cc/QJ9C-TVGA>.

<sup>126</sup> Jennifer Maloney & Lauren Weber, *How Bud Light Handled an Uproar Over a Promotion With a Transgender Advocate*, WALL ST. J. (May 22, 2023), <https://perma.cc/Q235-GYFR>.

<sup>127</sup> Joseph Pisani, *Transgender Influencer Dylan Mulvaney Criticizes Bud Light Over Lack of Support*, WALL ST. J. (June 23, 2023), <https://perma.cc/2JUH-F8YR>.

<sup>128</sup> See, e.g., *The Real Cost of Rainbow Capitalism*, NATIONAL WOMEN'S LAW CENTER, (June 2, 2023), <https://perma.cc/8QCG-HTMG>.

<sup>129</sup> See, e.g., *Corporate Boycotts Clash With Political Reality*, REUTERS (June 15, 2023), <https://perma.cc/RL2T-5FJT> (reporting that, according to OpenSecrets, "AB InBev's donations to Republican campaigns last year were quadruple what it gave to Democratic ones").

<sup>130</sup> Lily Zheng, *We're Entering the Age of Corporate Social Justice*, HARV. BUS. REV. (June 15, 2020), <https://perma.cc/T5GM-HTZ9>. AT&T also came under fire for its hypocrisy regarding Black Lives Matter. See Kevin McElwee, *The Fortune 100 and Black Lives Matter*, MEDIUM (Jan. 29, 2021), <https://perma.cc/67UB-MWQW> ("AT&T tweeted about racial justice more than any other Fortune 100 company, but until the Capitol mob, they were also one of the largest corporate donors to Rep. Tom Cotton, who encouraged military action against Black Lives Matter protestors and has a 6 percent rating from the NAACP."). Amazon was similarly critiqued. See Zheng, *supra* this note ("Amazon, which recently tweeted a statement expressing solidarity with Black communities, was immediately criticized for its selling of facial-recognition technology to law enforcement agencies and extreme underrepresentation of Black professionals. (Amazon later announced a one-year moratorium on police use of its facial recognition technology.)").

Georgia politicians who authored it.<sup>131</sup> Delta, among many other firms, continued to make political contributions to supporters of the bill after vigorously denouncing it.<sup>132</sup>

Another problem is that political posturing is typically non-substantive.<sup>133</sup> Corporations add a logo to one side of the debate, not arguments, science, or statistics. One illustration is how corporations reacted to the conflict between Israel and Hamas.<sup>134</sup> That corporations have remained largely silent lays bare that their political posturing reflects society's views back to them rather than informing controversial debates.<sup>135</sup>

Traditional political engagement, in contrast, could bring an important perspective. Microsoft, Google, and OpenAI have the potential to make valuable contributions to the debate about regulating artificial intelligence. Such political statements operate along a similar dimension as other political activities, such as congressional testimony, the submission of comment letters in connection with notice-and-comment rulemaking, and the preparation of amicus briefs. The same is true for corporations that speak out on issues related to their social mission. Patagonia, for instance, is well-known for both its focus on sustainability and its advocacy related thereto.<sup>136</sup> This long history makes them a valuable contributor to public discourse. Companies without a tie to the mission on which they opine, however, bring more heat than light.

A related concern is that the corporate political posturing consists of empty messages that attempt to cover up or distract

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<sup>131</sup> Dahlia Lithwick, *Corporations Bet on Both Parties, and Our Democracy Suffers*, SLATE (Apr. 13, 2021), <https://perma.cc/8VZT-839R>.

<sup>132</sup> See, e.g., Donald Shaw, *Delta Donates to Sponsors of Georgia Voting Bill After Calling it 'Unacceptable'*, SLUDGE (Feb. 10, 2022), <https://perma.cc/WY3L-8957>.

<sup>133</sup> There are exceptions. See, e.g., Gelles, *supra* note 49 ("Brad Smith, the president of Microsoft, wrote a long blog post about the Georgia law, detailing what he saw as the legislation's failings and suggesting that corporate America try to get it changed.").

<sup>134</sup> See, e.g., Daren Fonda, *First Outrage, Then Silence: Inside Corporate America's Dilemmas Over the Israel-Hamas War*, BARRONS (Nov. 16, 2023), <https://www.barrons.com/articles/israel-hamas-war-corporate-america-starbucks-disney-4c2a7ec9> (last visited Sept. 8, 2024) (describing corporate response to the conflict as "silence").

<sup>135</sup> The Israel-Hamas conflict has also pulled universities into political posturing. Douglas Belkin & Lindsay Ellis, *Blaming Israel for Hamas Attacks Sparks Backlash Across U.S., Exposing Deep Rifts*, WALL ST. J. (Oct. 11, 2023), <https://perma.cc/5U6M-9R3S>. The significant controversy surrounding university public statements illustrates that they too struggle to engage productively in public debates and should likewise stay out. See *id.*; Casey & Ginsburg, *supra* note 28 and accompanying text.

<sup>136</sup> Gelles, *supra* note 67; Rainey, *supra* note 67.

from objectionable business practices. For instance, AT&T and Verizon take progressive policy positions, but have left thousands of miles of toxic lead pipes despite their knowledge of the health risks.<sup>137</sup> Although Starbucks has publicly embraced progressive policies, it has a record of aggressively and perhaps illegally interfering with employee efforts to unionize.<sup>138</sup> Goldman Sachs and Bank of America pledged their support for Black Lives Matter while settling lawsuits alleging discriminatory employment policies.<sup>139</sup> Similarly, posturing may crowd out regulatory initiatives. For example, corporate statements touting their sustainability efforts<sup>140</sup> may decrease public demand for regulation.<sup>141</sup> True sustainability efforts, like reducing carbon emissions and ferreting out potential human rights abuses in complex supply chains, are hard. Political statements are easy to make and may dampen calls for real reform.

Moreover, although corporations often take actions to back up their statements, these are often absent, mistargeted, or short-lived. An in-depth *Washington Post* analysis shows that only a small portion of the \$50 billion that corporations pledged toward racial justice causes went toward policing, the issue that galvanized BlackLivesMatter.<sup>142</sup> Similarly, several years after the DEI push, individuals employed through DEI initiatives are being laid

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<sup>137</sup> Susan Pulliam, Shalini Ramachandran, John West, Coulter Jones & Thomas Gryta, *America is Wrapped in Miles of Toxic Lead Cables*, WALL ST. J. (July 9, 2023), <https://www.wsj.com/articles/lead-cables-telecoms-att-toxic-5b34408b> (last visited Sept. 6, 2024).

<sup>138</sup> Steven Greenhouse, *Will Starbucks' Union-busting Stifle a Union Rebirth in the US?*, THE GUARDIAN (Aug. 28, 2023), <https://perma.cc/26M7-L6CN>.

<sup>139</sup> Tracy Jan, Jena McGregor, Renae Merle & Nitasha Tiku, *As Big Corporations Say 'Black Lives Matter,' Their Track Records Raise Skepticism*, WASH. POST (June 13, 2020), <https://perma.cc/E94U-J53D>.

<sup>140</sup> See Center for Political Accountability, *CONFLICTED CONSEQUENCES 17* (2020) (discussing corporate hypocrisy regarding climate change).

<sup>141</sup> There is some evidence that suggests the public may be unmoved, however. See Hajin Kim, Joshua Macey & Kristen Underhill, *Does ESG Crowd Out Support For Government Regulation?*, University of Chicago Coase-Sandor Institute for Law & Economics Research Paper No. 983 (2023), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4521781](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4521781).

<sup>142</sup> Jan et al., *supra* note 6 (“Despite their strong statements after George Floyd’s murder, companies hesitated to pour vast sums into the core issue that sparked last summer’s racial justice demonstrations. Compared to their support for economic mobility, they pledged much lower amounts to groups focused on criminal justice and police reform, including those connected to Black Lives Matter, the most visible movement addressing police brutality.”).

off at high rates.<sup>143</sup> Even the pledge to fund travel for abortion is not as solid as it first appears. Companies face legal challenges both in structuring such payments and with respect to their potential liability exposure.<sup>144</sup> The corporate commitments have yet to be tested, but the efforts may turn out to be mostly marketing.<sup>145</sup>

Apart from these concerns, corporate political engagement imposes the social cost of increasing the polarization of American society. Measures of polarization increase year after year.<sup>146</sup> People no longer marry those with different political views or live in neighborhoods where people disagree. With corporations entering the culture wars, people soon may not even shop in the same places<sup>147</sup> or buy the same products as those with different political views. Where people shop and what brands they wear have become political symbols. People who do not agree with Starbucks, which endorses progressive political views, can drink Black Rifle Coffee, which opposes them.<sup>148</sup> And coffee is just the start: “The Daily Wire, a right-leaning media company, is dreaming even bigger with a line of ‘anti-woke’ shaving gear, chocolate bars and eventually, they say, children’s programming.”<sup>149</sup>

Further still, the politicization of corporations threatens to divide the workplace as employees self-sort into Republican or Democratic companies. This all has a tribal feel that further entrenches ideological echo chambers and creates another cleavage in American society. Rather than common grounds, brands and workplaces become divisive markers of political ideology. This divisiveness is oppressive for those who do not want every decision

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<sup>143</sup> See Kiara Alfonseca & Max Zahn, *How Corporate America is Slashing DEI Workers Amid Backlash to Diversity Programs*, ABC NEWS (July 7, 2023), <https://perma.cc/9XN8-GHRL>.

<sup>144</sup> Daniel Wiessner, *Legal Clashes Await U.S. Companies Covering Workers’ Abortion Costs*, REUTERS (June 27, 2022), <https://www.reuters.com/world/us/legal-clashes-await-us-companies-covering-workers-abortion-costs-2022-06-26/> (last visited Sept. 8, 2024).

<sup>145</sup> Melissa Jeltsen, *The Problem With Companies Promising to Pay for Abortion Travel*, ATLANTIC (Aug. 18, 2022), <https://perma.cc/H4CH-8KJS>.

<sup>146</sup> Levi Boxell, Matthew Gentzkow & Jesse M. Shapiro, *Cross-Country Trends in Affective Polarization* (NBER Working Paper Series No. 26669, 2021), <https://perma.cc/D3R5-RKRW>.

<sup>147</sup> Marcus Painter, *Corporate Political Statements: Evidence from Geolocation Data*, Presentation (Political Economy of Finance Conference, Chicago Booth, Sept. 11, 2022), <https://perma.cc/P4XE-PWZT>.

<sup>148</sup> *Conservative Americans are Building a Parallel Economy*, ECONOMIST (June 1, 2023), <https://perma.cc/AMA5-NBSS>.

<sup>149</sup> Dokoupil & Finn, *supra* note 36.

weighed down by political considerations. The politicization of consumption and employment creates an underappreciated limitation on individual rights of association and autonomy that arises when a person's relationship with a corporation is understood as conveying an alignment with a particular set of values.

Finally, despite some notable counterexamples,<sup>150</sup> political posturing typically favors progressive causes.<sup>151</sup> As more and more companies pile on, those who disagree—who reflect close to half the population—may feel increasingly isolated and without products or employers that match their views. Disenchantment with “woke” corporate behavior contributes to backlash and support for populist figures.

#### IV. CAN CORPORATIONS GET UNSTUCK?

Can anything be done to end corporate political posturing? The trend is largely a market-driven process, which would abate if the market shifted. Indeed, as noted above, there may be signs that corporations are pulling back from political posturing.<sup>152</sup> The key takeaway from this article is that any such retreat should not be limited to a particular timeframe or issue. Activists, investors, customers, and employees should stop pushing corporations to get involved, and corporations and executives should resist rather than acquiesce.

The first step in changing the current dynamic is to challenge the narrative about political posturing. Contrary to conventional wisdom, this article has provided a host of reasons why the practice is likely determinantal. The risks to the corporation are already becoming apparent. Previous corporate boycotts had done little to affect profits,<sup>153</sup> but the unprecedented blowback against Bud Light should be giving corporations pause.

Addressing two market failures would likely further reduce the appeal of political posturing. The first is the collective action problem that pulls corporations toward political engagement even if they would prefer to sit out. The second is a lack of information

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<sup>150</sup> See *supra* notes 65–67.

<sup>151</sup> Courtney Vinopal, *US Companies Embrace Progressive Causes but C-Suites Still Lean Heavily Republican*, OBSERVER (June 29, 2022), <https://perma.cc/6QE4-V29B>. This is the case despite the fact that most C-suite executives are Republican. *Id.*

<sup>152</sup> Similarly, the Israel-Hamas conflict has caused many of those who wholeheartedly supported corporate (and university) involvement in politics to rethink the costs and benefits of political posturing.

<sup>153</sup> Liaukonyte et al., *supra* note 94.

about corporate efforts that support or contradict their public positions. Our proposals aim to ameliorate these problems.

Our primary proposal is voluntary disarmament. We encourage corporations to refrain from naked political engagement and to commit to such restraint on an ongoing basis. They could refrain from efforts to make a product more attractive by appearing woke or anti-woke. They could resist the temptation to recruit employees on the value of a politically uniform workplace.

To resist the pull to compete on the basis of political posturing, we suggest that corporations make a collective public pledge, akin to the Business Roundtable Statement on Corporate Purpose, to refrain from engaging in political posturing. Such an “Anti-Political Posturing Pledge” would offer easy accountability and, at the same time, enable corporations to resist the political arms race with the knowledge that their competitors would not be able to take advantage of their choice to remain neutral. We propose a pledge along the following lines:

We believe that our role as leaders of corporate America is to serve our stakeholders by providing quality goods and services in an ethical and sustainable manner. Because we do not believe that taking stands on political issues furthers these goals, neither the corporation nor its executives will do so, nor will we engage in politically explicit marketing and promotional activities.

To ensure that such pledges reflect corporate policy, we suggest that corporations adopt the Anti-Political Posturing Pledge through a resolution approved by the board of directors.<sup>154</sup>

To be sure, some companies will resist the pledge, and some may abandon it if pressure to take a stance is severe. But it is plausible that such a commitment would be attractive to many corporations that want a way out. Aside from taking the pressure off stance-taking, it would offer corporations a way to appeal to people who would prefer them to return to political neutrality and would value their pledge to do so.<sup>155</sup> There is evidence that this group is substantial. A survey of 1,000 American adults found

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<sup>154</sup> Similarly, while a collective pledge would offer more cover for political abstention, corporations could adopt internal policies not to engage in politics. See Casey & Ginsburg, *supra* note 28.

<sup>155</sup> Omer Yair & Raanan Sulitzeanu-Kenan, *When Do We Care about Political Neutrality? The Hypocritical Nature of Reaction to Political Bias*, PLOS ONE 1, 17 (2018) (“[P]olitically biased messages and acts are generally considered wrong and inappropriate.”).



that “the mass public on the whole does not wish to see companies involved on social or economic policy.”<sup>156</sup>

Our second proposal entails corporations providing greater transparency about their commitments to the political positions they espouse, the process by which they have adopted their political statements, or both. Corporations that back BlackLivesMatter could disclose their diversity practices. Corporations that promise funding for abortion-related travel could disclose the actual dollars spent in support of that travel. Corporations might further disclose the extent to which their voluntary spending, such as through charitable or political contributions, is consistent with their political statements. All of these disclosures would reveal potential hypocrisy.

Corporations could also disclose the process behind their political posturing. They could disclose whether the decision involved the board of directors, a senior executive, or the marketing team. They could reveal whether the position was one advocated by employees, customers, or shareholders. They could disclose any empirical basis for believing that the statement is consistent with either corporate or societal interests.

Corporations could make these disclosures voluntarily. Shareholders could also pressure them to do so. In the past several years, shareholders have introduced hundreds of proposals seeking disclosure of ESG-related information.<sup>157</sup> Shareholder proposals also commonly seek disclosure of corporate lobbying activity and political donations, and a growing number of such proposals are receiving majority support.<sup>158</sup> Notably, in 2023, shareholders introduced an increasing number of proposals that asked corporations to disclose “the alignment or congruency of a company’s political contributions or lobbying expenditures with the company’s publicly stated values.”<sup>159</sup>

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<sup>156</sup> Eitan Hersh & Sarang Shah, *Who Wants Stakeholder Capitalism? Public and Elite Perceptions of the Role of Business in Politics* 3 (Working Paper Aug. 2, 2023), [https://www.eitanhersh.com/uploads/7/9/7/5/7975685/hersh\\_shah\\_stakeholder\\_capitalism\\_082223.pdf](https://www.eitanhersh.com/uploads/7/9/7/5/7975685/hersh_shah_stakeholder_capitalism_082223.pdf).

<sup>157</sup> Fisch & Robertson, *supra* note 88, at 3.

<sup>158</sup> Hong et al., *supra* note 29; Robert Kelner, Matthew Franker, Zachary G. Parks & Mellissa Campbell Duru, *Covington Discusses Corporate Political-Disclosure Shareholder Proposals*, CLS BLUE SKY Blog (Feb. 27, 2023), <https://perma.cc/2VYB-T58S> (“In recent years, shareholders have submitted hundreds of proposals aimed at encouraging companies to voluntarily disclose more information on their websites with regard to their corporate political spending and processes.”).

<sup>159</sup> Gibson Dunn, *Shareholder Proposal Developments During the 2023 Proxy Season*, 22 (July 25, 2023), <https://perma.cc/YY84-SKEB>.

In addition, the SEC could act to increase transparency. The agency could adopt rules explicitly requiring that corporations disclose the extent to which their business practices and their charitable and political contributions align with their public statements and marketing on political matters.<sup>160</sup> The SEC could also adopt a lighter touch approach by taking the position, in interpretive guidance, that a corporation that makes a public political statement must disclose any material political expenditures that conflict with the position articulated, and that the failure to do so makes the political statement a misleading half-truth.<sup>161</sup> If the SEC identifies clear instances of corporate hypocrisy, it could bring enforcement actions under Rule 10b-5.<sup>162</sup>

The motivation behind requiring corporations to reveal their hypocrisy is three-fold. First, it would cause corporations to think twice before making public statements. Polls show that people are willing to punish corporations that do not stand by their public commitments.<sup>163</sup> Corporations would hold back for fear of such retribution. Second, the subset of companies that continue to make such statements would be more authentic about their stances and more likely to be the ones that make a positive contribution to public debates. Finally, and this is more speculative, it may make activists less inclined to push for corporate

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<sup>160</sup> Commentators have argued that the SEC should require disclosure of all corporate political contributions. See, e.g., Lucian A. Bebchuk & Robert J. Jackson, Jr., *Shining Light on Corporate Political Spending*, 101 GEO. L.J. 923, 966 (2013) (“put[ting] forward the case for mandatory SEC rules requiring public companies to disclose political spending to shareholders”). In recent years, however, Congress has prohibited the SEC from adopting such rules. See, e.g., Cydney Posner, *What’s Happening With Corporate Political Spending Disclosure?*, COOLEY PUBCO (Apr. 5, 2022), <https://perma.cc/9H7S-3PSM> (describing provision in Congress’s 1.5 trillion budget bill providing that the SEC may not use funds from the bill “to finalize, issue, or implement any rule, regulation, or order regarding the disclosure of political contributions”). It is unclear whether this prohibition would extend to a narrow rule that required disclosure of misaligned donations.

<sup>161</sup> See generally Donald C. Langevoort, *Half-Truths: Protecting Mistaken Inferences By Investors and Others*, 52 STAN. L. REV. 87, 113 (1999) (explaining that the half-truth doctrine is designed to protect investors from information from which they would draw a natural but mistaken inference).

<sup>162</sup> 17 C.F.R. § 240.10b–5 (2024).

<sup>163</sup> See, e.g., Haniyah Philogene, *As Corporations Double Down On Social Justice, Americans Say They Still Have A Long Way To Go*, FORBES (July 14, 2021), <https://perma.cc/C5N9-LG4J> (reporting a study from social media software company Sprout Social finding that “29% of consumers say they’d boycott brands that fail to follow through on their commitments, and 42% say they’d take their business elsewhere”); see also Walsh, *supra* note 97 (“Companies need to realize that statements aren’t cutting it. They’re going to have to do more to satisfy consumers’ expectations.”).

endorsements. If they saw the actual substantive impact corporate statements have, they might redirect their efforts.

An alternative approach would be to subject political posturing to distinctive treatment under corporate law. The law could require enhanced governance procedures, such as board or special committee approval before a corporation could make political statements. In an influential 2010 article, Professors Bebchuk and Jackson argue that independent directors and shareholders should be a required part of corporate decision-making with respect to political speech.<sup>164</sup> They argue that the potential for conflicts of interests, higher risks, and the expressive nature of political speech justify an additional layer of obligations.<sup>165</sup> Their main goal is to better align political speech with the best interests of shareholders.<sup>166</sup> Alternatively, courts could require corporations to adopt internal procedures for overseeing decisions to engage in political speech, with the failure to do so rendering directors potentially liable under *Caremark*.<sup>167</sup>

We do not believe that such procedures are or should be legally required. While corporate political statements may be bad business decisions, they are nonetheless business decisions amenable to the ordinary corporate decision-making process and liability scheme. Absent a showing of waste or an egregious conflict of interest, they should be protected by the business judgment rule. This view is consistent with the recent Delaware Chancery Court decision in *Simeone v. Walt Disney*, in which the court rejected a shareholder's business records request, reasoning that Disney's decision to oppose Florida's Parental Rights Act was an ordinary business decision.<sup>168</sup> Moreover, the boundaries of political posturing are insufficiently clear for such actions to be subject to distinctive legal treatment.

To be sure, corporations could voluntarily adopt internal policies requiring special oversight for political actions. Such policies could potentially be valuable for several reasons. First, formal

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<sup>164</sup> Bebchuk & Jackson, *supra* note 25.

<sup>165</sup> *Id.* at 89–97.

<sup>166</sup> *Id.* at 117.

<sup>167</sup> *In re Caremark Int'l*, 698 A.2d 959 (Del. Ch. 1996). *See, e.g.*, Roy Shapira, *Mission Critical ESG and The Scope of Director Oversight Duties*, 2022 COLUM. BUS. L. REV. 732, 785–86 (“One could therefore argue that political spending practices and managers’ public stances on social issues have become a major source of reputational risk for companies and may therefore become a potential source of Caremark liability for directors.”).

<sup>168</sup> *See Simeone v. Walt Disney Co.*, 302 A.3d 956, 969 (Del. Ch. 2023) (“The plaintiff is not describing potential wrongdoing. He is critiquing a business decision.”).

oversight would reduce the risk that political engagement is the result of self-dealing by a corporate officer. Second, oversight would likely enable the corporation to weigh more accurately the potential costs and benefits of political involvement from an economic perspective, resulting in fewer bad decisions. Third, because a formal board decision takes time, it would provide automatic protection against corporate officials being pressured to jump on a political bandwagon.

Note, however, that corporate governance is an inherently limited tool. While additional checks and balances may reduce agency costs and therefore better align political posturing with shareholder interests, what is most problematic about the practice is the significant societal costs. Corporate governance is not well-suited to police such costs. Although our proposals would better align political posturing with shareholder value, they would also target the market forces that fuel the practice, thereby serving the interests of both shareholders and society.

## V. CONCLUSION

The conventional view that corporate political posturing is welcome misapprehends the nature of corporations. They are complex social, commercial, and financial institutions with shifting and competing incentives that reflect a balance among the interests of leadership, shareholders, customers, and employees.<sup>169</sup> Because corporations are market actors rather than political actors, we should not presume that they make political statements to promote public welfare, nor should we look to them as saviors from dysfunctional public governance. The statements themselves are more likely to polarize than enlighten public debate. Supporting actions, if any, are often tepid and temporary. Moreover, such statements threaten to backfire on the activists who push for them and the corporations that succumb to that pressure.

How can corporations get unstuck? We suggest a collective anti-political posturing pledge and heightened transparency. If corporations jointly agree to stay out of politics, it will be much easier for any single corporation to do so. Additionally, if corporations are forced to make clear the extent to which their actions

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<sup>169</sup> See, e.g., Jan et al., *supra* note 6 (quoting Yale Professor Phillip Atiba Goff as explaining that “Corporations are not set up to wield their power for the greater good as much as we give them credit for, a lot of times”).

reflect their espoused views, they will be much less likely to take controversial positions in the first place.