
Corporations and Abortion Rights in a Post-Dobbs World

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When the U.S. Supreme Court issued its decision on Dobbs v. Jackson Women’s Health Organization, it eliminated the constitutional right to abortion, overturning nearly fifty years of precedent. Although there were those who celebrated the decision, there were also those who were dismayed and angry about its consequences. As a result, many groups mobilized into action, but the vast majority of corporations were not among them. Unlike other social issues, companies were largely silent on the issue of abortion. Using shareholder proposal data from a ten-year period and reproductive health benefits offered by companies, this Article examines how corporations addressed reproductive health issues before and after Dobbs. This Article reveals that very little was done by corporations from a legal perspective in addressing issues of reproductive rights. It argues that more transparency is needed to understand if corporations are truly operating under a stakeholder theory of governance. Specifically, the additional information could help determine whether corporations are meeting the “S” (or social) component of environmental, social, governance (“ESG”) or if their actions are merely performative to assuage the court of public opinion. In addition, this Article contends that corporations need to be held accountable for statements that they

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make in support of particular social issues through disclosure of their support, or lack thereof, for reproductive health within the ESG context. Otherwise, corporations' statements become meaningless and are no better than political theater.

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INTRODUCTION

On June 24, 2022, the U.S. Supreme Court revoked the constitutional right to abortion in *Dobbs v. Jackson Women's Health Organization*.¹ It upheld the constitutionality of a Mississippi law that prohibited abortions after the fifteenth week of pregnancy and overturned *Roe v. Wade*² and *Planned Parenthood v. Casey*,³ which were decided in 1973 and 1992, respectively. By doing so, the Court overturned nearly half a century of precedent. In their dissent, Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan stated that “[a]fter today, young women will come of age with fewer rights than their mothers and grandmothers.”⁴ Furthermore, “from the very moment of fertilization, a woman has no rights to speak of. A State can force her to bring a pregnancy to term, even at the steepest personal and familial costs.”⁵ In the wake of *Dobbs*, some states immediately moved to ban or restrict abortion.⁶ The stage for new legal battles is also coming to the forefront with attacks on the availability of medication abortions,⁷ restrictions on

¹ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2284 (2022).

² *Roe v. Wade*, 410 U.S. 113, 153 (1973) (holding in a 7-2 decision that a fundamental “right of privacy” is inherent in the Due Process Clause of the Fourteenth Amendment which protects a women’s right to have an abortion).

³ *Planned Parenthood v. Casey*, 505 U.S. 833, 845-46 (1992) (upholding the central holding of *Roe*).

⁴ *Dobbs*, 142 S. Ct. at 2347.

⁵ *Id.* at 2317.

⁶ The Center for Reproductive Rights created a tool that categorizes each state, territory, and the District of Columbia in one of the following five categories: “Expanded Access, Protected, Not Protected, Hostile, and Illegal.” See *After Roe Fell: Abortion Laws by State*, CTR. FOR REPROD. RTS., <https://reproductiverights.org/maps/abortion-laws-by-state/> (last visited June 14, 2023) [<https://perma.cc/H5AP-USTY>]. Many states had already enacted “trigger” laws that came instantly into effect upon the decision in *Dobbs*.

⁷ Alliance Defending Freedom, a Christian advocacy group, filed a lawsuit on November 25, 2022, before a Trump-appointed Texas judge, claiming that the Food and Drug Administration “exceeded its [regulatory] authority [to approve mifepristone].” *All. for Hippocratic Med. v. U.S. Food & Drug Admin.*, No. 22-CV-223, 2023 WL 2825871, at *21 (N.D. Tex. Apr. 7, 2023); Pam Belluck, *Abortion Pills Take the Spotlight as States Impose Abortion Bans*, N.Y. TIMES (June 27, 2022), <https://www.nytimes.com/2022/06/26/health/abortion-medication-pills.html> [<https://perma.cc/RK38-7Z2W>]. Studies have shown mifepristone to be safer to use than Tylenol or Viagra. Cynthia Koons, *Abortion Pill Is Safer Than Tylenol Yet Almost Impossible to Get*, BLOOMBERG L. (Feb. 17, 2022, 1:00 AM), <https://news.bloomberglaw.com/health-law-and-business/abortion-pill-is-safer->

the training of obstetrics and gynecology residents on how to perform abortions,⁸ protocols for miscarriage management, medical treatment when pregnancy is a complicating factor (e.g., cancer), standard of care in informing pregnant patients of tetragenic impacts of diseases or medications and/or of pregnancy complications, selective reduction options in abortion-restrictive states, issues involving application of the Emergency Medical Treatment and Labor Act (“EMTALA”) to pregnancy-related problems that present in the emergency room,⁹ and potential impact on in vitro fertilization and genetic testing, storage,

than-tylenol-and-almost-impossible-to-get [<https://perma.cc/2BWY-KKJ2>]. Mifepristone, together with another drug, misoprostol, “can be used to end a pregnancy within the first 10 weeks.” Allie Reed & Celine Castronuovo, *Abortion Pill Opponents Seize New Chance to Target FDA Approval*, BLOOMBERG L. (Nov. 23, 2022, 2:25 AM), <https://news.bloomberglaw.com/health-law-and-business/abortion-pill-opponents-seize-new-chance-to-target-fda-approval> [<https://perma.cc/YCN3-2D77>]. In 2020, 54% of all U.S. abortions were done using abortion pills. *Id.* “Mifepristone and misoprostol . . . are often more accessible than surgical procedures in states that ban abortion because the FDA allows them to be prescribed via telehealth.” *Id.*

⁸ Jan Hoffman, *OB-GYN Residency Programs Face Tough Choice on Abortion Training*, N.Y. TIMES (Oct. 27, 2022), <https://www.nytimes.com/2022/10/27/health/abortion-training-residency-programs.html> [<https://perma.cc/JS96-LU7N>].

⁹ Memorandum from the Ctrs. for Medicare & Medicaid Servs., *Reinforcement of EMTALA Obligations Specific to Patients Who Are Pregnant or Are Experiencing Pregnancy Loss* (July 11, 2022), <https://www.cms.gov/medicareprovider-enrollment-and-certificationsurveycertificationgeninfopolicy-and-memos-states-and/reinforcement-entala-obligations-specific-patients-who-are-pregnant-or-are-experiencing-pregnancy-o> [<https://perma.cc/U9FP-G9VM>] [hereinafter *Reinforcement of EMTALA Obligations*]. The EMTALA “provides rights to any individual who comes to a hospital emergency department and requests examination or treatment.” *Id.* “Emergency medical conditions involving pregnant patients may include, but are not limited to, ectopic pregnancy, complications of pregnancy loss, or emergent hypertensive disorders, such as preeclampsia with severe features.” *Id.* However, due to the preliminary injunction in *Texas v. Becerra*, 623 F. Supp. 3d 696, 739 (N.D. Tex. 2022), the Health and Human Services Department can no longer enforce the interpretations in the Centers of Medicare & Medicaid Services guidance, which stated that Texas abortion laws were preempted by EMTALA and the interpretation of EMTALA “both as to when an abortion is required and EMTALA’s effect on state laws governing abortion — within the State of Texas or against the members of the American Association of Pro Life Obstetricians and Gynecologists (AAPLOG) and the Christian Medical and Dental Association (CMDA).” *Reinforcement of EMTALA Obligations, supra.*

and disposal of embryos created outside the womb.¹⁰ In response to the post-*Dobbs* world, driven by fear and uncertainty, women stocked up on Plan B pills (the so-called morning-after pills);¹¹ some even opted to bypass clinics or doctors, self-managing their abortions by educating themselves through online resources and obtaining medication on their own.¹²

Although many groups mobilized into action, corporations largely were not among them.¹³ Ninety percent of U.S. companies did not make a statement about abortion after *Dobbs*.¹⁴ The Business Roundtable, “an association . . . of chief executive officers (CEOs) of America’s leading companies,”¹⁵ which in 2019 redefined corporate purpose to include a

¹⁰ Jan Hoffman, *Infertility Patients and Doctors Fear Abortion Bans Could Restrict I.V.F.*, N.Y. TIMES (July 6, 2022), <https://www.nytimes.com/2022/07/05/health/ivf-embryos-roe-dobbs.html> [<https://perma.cc/QN2N-NP95>].

¹¹ Katherine Rosman & Gina Chereus, *Women on Why They’re Stocking Up on the Morning-After Pill*, N.Y. TIMES (June 27, 2022), <https://www.nytimes.com/2022/06/27/style/plan-b-stockpile-roe-abortion.html> [<https://perma.cc/TZ29-ULRN>].

¹² Roni Caryn Rabin, *Some Women “Self-Manage” Abortions as Access Recedes*, N.Y. TIMES (Aug. 7, 2022), <https://www.nytimes.com/2022/08/07/health/abortion-self-managed-medication.html> [<https://perma.cc/VT93-MS29>].

¹³ See, e.g., Anne D’Innocenzio & Haleluya Hadero, *Abortion Ruling Thrusts Companies into Divisive Arena*, AP NEWS (June 25, 2022, 7:18 AM PDT), <https://apnews.com/article/company-stances-abortion-c70835ae2eedc71c36078ccaa81437b7> [<https://perma.cc/L323-3H9W>] (For example, when the Associated Press reached out to “dozens of big businesses . . . many like McDonald’s PepsiCo, Coca-Cola, General Motors, Tyson and Marriott did not respond . . . Walmart — the nation’s largest employer with a good portion of its stores in states that will immediately trigger abortion bans following the . . . ruling — also kept quiet.”).

¹⁴ Emily Peck, *90% of U.S. Companies Silent on Abortion After Dobbs, Survey Finds*, AXIOS (July 20, 2022), <https://www.axios.com/2022/07/20/90-of-us-companies-silent-on-abortion-after-dobbs-survey-finds> [<https://perma.cc/J7SX-32T7>]. This is in contrast to the percentage of companies that have taken a public stance since 2020 on racial equality (61%) and LGBTQ+ rights (44%) which are viewed as mainstream and widely accepted positions. *Id.* The survey notes that most of the pressure on companies to speak out about abortion comes from employees. *Id.*

¹⁵ *About Us*, BUS. ROUNDTABLE, <https://www.businessroundtable.org/about-us> (last visited June 14, 2023) [<https://perma.cc/3U3L-F8DU>].

commitment to stakeholders,¹⁶ said “it ‘does not have a position on the issue.’”¹⁷

Companies face a difficult challenge. Some may choose to remain neutral because they do not want to anger any constituency by taking a side on abortion rights.¹⁸ There are also companies that may choose to take a stance by pledging to advance and promote women in the workplace.¹⁹ Companies may find it difficult to attract college-educated

¹⁶ “While each of our individual companies serves its own corporate purpose, we share a fundamental commitment to all of our stakeholders.” *Business Roundtable Redefines the Purpose of a Corporation to Promote “An Economy That Serves All Americans,”* BUS. ROUNDTABLE (Aug. 19, 2019), <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans> [<https://perma.cc/6HTP-T5UH>].

¹⁷ Anastasia Moloney, *A Year After Roe v. Wade, How Have Firms Reacted?* CONTEXT (June 11, 2023), <https://www.context.news/socioeconomic-inclusion/a-year-after-roe-v-wade-how-have-us-firms-reacted> [<https://perma.cc/PGC8-2JHE>]. One study found that signing the 2019 Business Roundtable statement was “mostly for show” and did not translate into a strong commitment by companies to change how they operated their businesses. Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 98 (2020).

¹⁸ Recently, the Biden Administration proposed tightening the ACA’s contraception mandate to eliminate non-religious moral objections to such coverage. See Kellie Mejdrich, *New ACA Birth Control Exemptions Cover Faith, Not Morality*, LAW360 (Jan. 30, 2023, 7:15 PM EST), <https://www.law360.com/articles/1570704/new-aca-birth-control-exemptions-cover-faith-not-morality> [<https://perma.cc/3EJQ-JKPA>]; see also Mary Ziegler, *Alito’s Alleged 2014 Leak Fits Right into the Anti-Abortion Playbook*, SLATE (Nov. 21, 2022, 10:02 AM), <https://slate.com/news-and-politics/2022/11/alito-supreme-court-leak-abortion-hobby-lobby.html> [<https://perma.cc/5C5Z-C4TF>] (“We can draw a line, it seems, from *Citizens United* through *Hobby Lobby* and all the way to *Roe*’s demise.”). Geographic location undoubtedly has an impact on how vocal a company, owner, or shareholder might be. In addition, even if companies appear to be in support of women’s reproductive health issues, they may be giving political donations to anti-abortion politicians. See Stephanie Kirchgaessner & Lauren Aratani, *These Companies Claim to Support Abortion Rights. They Are Backing Anti-Abortion Republicans*, GUARDIAN (Nov. 6, 2022, 2:00 AM EST), <https://www.theguardian.com/world/2022/nov/06/us-companies-abortion-rights-donation-anti-abortion-republicans> [<https://perma.cc/5QZ3-RK9C>]. These companies include Amazon, AT&T, Citigroup, Comcast, Eli Lilly, and Meta, among others. *Id.*

¹⁹ D’Innocenzio & Hadero, *supra* note 13. There are places where corporations, owners, and shareholders are vocal in their support of abortion restrictions. For instance, Hobby Lobby Stores, Inc. (“Hobby Lobby”), an arts and crafts store based in Oklahoma, sued Kathleen Sebelius, the Secretary of the Department of Health and

workers in states with restrictive abortion laws.²⁰ As one professor at University of Pennsylvania's Wharton School of Business observed, "We're in this moment in time where we're expecting corporate leaders to also be leaders in the political sphere[.] . . . A lot of employees expect to work in companies that not only pay them well, but whose values are aligned with theirs."²¹ Many executives will likely avoid the topic of abortion rights (which is often lumped in with the more general term of "reproductive rights"²² or "reproductive health,") but that choice comes with legal risk which may contribute to their perceived lack of action regarding abortion.²³ "They can either support travel for out-of-state care and risk lawsuits and the ire of local politicians, or they can not include this coverage and risk the ire of employees[.]"²⁴ Ultimately, it

Human Services, because it did not want to provide certain contraceptive coverage required under the Patient Protection and Affordable Care Act ("ACA") to its employees. It was Hobby Lobby's belief that such contraceptives caused abortions and therefore that the mandate that the store's insurance cover contraceptives violated the Free Exercise Clause of the First Amendment and the Religious Freedom Restoration Act of 1993. The case eventually made it to the Supreme Court. *See* *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 736 (2014) (holding that closely held corporations do not need to comply with the contraceptive mandate under the ACA based on their religious beliefs).

²⁰ D'Innocenzio & Hadero, *supra* note 13.

²¹ *Id.*

²² "Reproductive rights include prenatal services, safe childbirth, and access to contraception. They also include access to legal and safe abortion." *Reproductive Rights and Abortion*, HUM. RTS. WATCH, <https://www.hrw.org/topic/womens-rights/reproductive-rights-and-abortion> (last visited June 14, 2023) [<https://perma.cc/W9GK-RTSZ>].

²³ *See* D'Innocenzio & Hadero, *supra* note 13.

²⁴ For example, in a sign of how fraught the issue of abortion is, the law firm of Sidley Austin received a letter from Republican state legislators in Texas that warned that by reimbursing employees for out-of-state abortion costs, the firm was breaking the law. Andrew Maloney, *Sidley and Law Firms Get Warning from Texas Lawmakers on Abortion Pay Policy*, AM. LAW. (July 8, 2022, 6:21 PM), <https://www.law.com/americanlawyer/2022/07/08/sidley-and-law-firms-get-warning-from-texas-lawmakers-on-abortion-pay-policy> [<https://perma.cc/WY7H-Q246>]. The law, known as Senate Bill 8, gives private citizens a cash bounty if they are successful in suing anyone who has assisted a person in getting an illegal abortion. *See* S.B. 8, 87th Leg., Prior Sess. (Tex. 2021). It has been called the "vigilante abortion law" or "bounty hunter law." Emma Bowman, *As States Ban Abortion, the Texas Bounty Law Offers a Way to Survive Legal Challenges*, NPR (July 11, 2022, 5:00 AM EST), <https://www.npr.org/2022/07/11/1107741175/texas-abortion-bounty-law> [<https://perma.cc/Q6FU-L4KJ>]. The legislators further stated that they plan "to

may be that corporate inaction is not driven by politics, but legal uncertainty.

The issue is not a binary one — it is far more complex and nuanced than that. It essentially comes down to “who decides who gets abortion access in a post-*Roe* world.”²⁵ Conservatives argue that corporations want to pay for abortions because it is more cost-effective than paying for prenatal care, delivery, and maternity leave, and that corporations are anti-family.²⁶ One liberal argues that “the justices are making [abortion rights] a corporation’s privilege.”²⁷ Others cynically wonder if corporations could use abortion rights benefits as leverage in the employee context.²⁸ However, this political war of words is a smokescreen for the real issue. Women comprise an ever-larger part of the workforce, making it more important than ever for corporations to understand how the healthcare needs of women differ from men. During the last half of the twentieth century, women’s participation in the labor

introduce legislation to impose ‘additional civil and criminal sanctions on law firms that pay for abortions or abortion travel.’” Maloney, *supra*. The letter also noted that future legislation would mandate the disbarment of lawyers who provided the means for an abortion. This is consistent with laws that threaten to revoke provider state licenses for abortion help or provision. *See generally* Selena Simmons-Duffin, *Doctors Who Would Like to Defy Abortion Laws Say It’s Too Risky*, NPR (Nov. 22, 2022, 5:07 AM EST), <https://www.npr.org/2022/11/22/1138558392/doctors-who-would-like-to-defy-abortion-laws-say-its-too-risky> [<https://perma.cc/2GWG-GMCD>]. It would also “prohibit any employer from paying for elective abortions or reimbursing abortion-related travel; allow private citizens to sue anyone who pays for an elective abortion for a Texas citizen or reimburses the costs of getting one; and empower local district attorneys to prosecute abortion-related crimes beyond their jurisdiction, among other things.” Maloney, *supra*.

²⁵ Katelyn Fossett, *Should Companies Be in Charge of Abortion Access?*, POLITICO (July 1, 2022, 11:00 AM EDT), <https://www.politico.com/newsletters/women-rule/2022/07/01/should-companies-be-in-charge-of-abortion-access-00043747> [<https://perma.cc/6N2Q-2Q57>].

²⁶ *See id.*

²⁷ *Id.*

²⁸ *Id.*

force rose rapidly.²⁹ In 2020, women comprised 56.2 percent of the labor force.³⁰

The way in which women were involved in the labor market also changed significantly over the past few decades due to educational attainment and an increase in full-time and year-round participation in the workforce.³¹ “[F]rom 1970 to 2020, the proportion of women ages 25 to 64 in the labor force who held a college degree more than quadrupled[;]” for men it doubled.³² The labor force participation rate of women also varied based on ethnicity and race, unemployment rate, marital status, occupation and industry, earnings, hours of work, the ages of their children, among other factors.³³

A corporation’s stance on social issues also impacts who consumes their goods. A 2021 nationwide survey of U.S. consumers reported that sixty-four percent of consumers stated that employers should ensure that their employees have access to necessary reproductive health care.³⁴ Furthermore, forty-two percent said if a brand publicly supported

²⁹ U.S. BUREAU OF LAB. STAT., *WOMEN IN THE LABOR FORCE: A DATABOOK* (2022), <https://www.bls.gov/opub/reports/womens-databook/2021/home.htm> [<https://perma.cc/E2EQ-9R8G>]. There was a steep increase from the 1960s through the 1980s, and a slowdown in the 1990s and early 2000s. This decline continued and quickened during the December 2007 to June 2009 recession, “hitting a prepandemic low in 2015 at 56.7 percent.” *Id.* In 2019, it increased to 57.4%, but then dropped the following year due to the COVID-19 pandemic.

³⁰ *Id.* This is “the lowest rate since 1987, and nearly 4 percentage points below the peak of 60.0 percent in 1999.” *Id.*

³¹ *Id.*

³² *Id.* In 1970, women comprised 37.5% of the U.S. workforce. D’Innocenzio & Hadero, *supra* note 13.

³³ See U.S. BUREAU OF LAB. STAT., *supra* note 29. One of the most striking statistics was among mothers: “The labor force participation rate for women with children under 18 years of age was 72.5% in March 2020, much lower than the rate of 93.1% for men with children under 18 years.” *Id.* For women with children between six to 17 years old, women’s participation was 76.4% and men’s was 92.0%. *Id.* For women with children under six years old, it was 67.4% and for women with children under three years old it was 65.6%; for men it was 94.5% and 94.7%, respectively. *Id.*

³⁴ Note that coverage of FDA-approved birth control and female sterilization is required. See 29 C.F.R. § 2590.715-2713A (2023). There are exceptions per the ACA-related regulation and *Hobby Lobby* decision for religiously associated or closely held businesses with contrary religious views. See *supra* note 19 for more information on the *Hobby Lobby* case.

reproductive health care, they would be more likely to purchase from such a brand.³⁵

This Article does not look at abortion rights from a healthcare law or criminal law perspective.³⁶ Instead, it analyzes abortion rights from a corporate lens, specifically showing how the stakeholder theory of governance and ESG animates the participation, or lack thereof, of corporations in the reproductive health realm, which includes abortion rights. Even the language that corporations use must be carefully chosen. In many cases, instead of using the words “abortion rights,” corporations use other terms, such as “medical care,” “medical procedures,” “reproductive healthcare,” or “health care.”³⁷ It is not

³⁵ Memorandum from Greenwald Rsch., What Do Consumers Think About Brands That Take a Stand on Reproductive Health Care? 3 (Sept. 3, 2021), <https://greenwaldresearch.com/wp-content/uploads/2021/09/Tara-Health-Foundation-2021-Consumer-Survey-on-Brands-Defending-Reproductive-Health.pdf> [<https://perma.cc/J387-FMAC>].

³⁶ In addition to the more obvious ties between new abortion restrictions and criminal law, there is a rich literature at the intersection of healthcare law and abortion rights. See, e.g., Aziza Ahmed, *Floating Lungs: Forensic Science in Self-Induced Abortion Prosecutions*, 100 B.U. L. REV. 1111 (2020) (examining the “relationship between scientific expertise, evidence, and lawmaking in the context of self-induced abortion late in pregnancy”); Yvonne Lindgren, *When Patients Are Their Own Doctors: Roe v. Wade in an Era of Self-Managed Care*, 107 CORNELL L. REV. 151, 151-52 (2021) (arguing the Supreme Court’s gatekeeper framing is obsolete in light of medical technology advancement and the need for direct-to-consumer access to abortion care); Patricia J. Zettler, Annamarie Beckmeyer, Beatrice L. Brown & Ameet Sarpatwari, *Mifepristone, Preemption, and Public Health Federalism*, 9 J.L. & BIOSCIENCES, Dec. 2022, at 1-2 (arguing there are compelling legal grounds on which courts should conclude that many state restrictions on drugs are preempted and investigating the implications these preemption challenges in the context of abortion).

³⁷ Áine Cain, Avery Hartmans & Marguerite Ward, *Uber, Nike, Lyft, Disney, JP Morgan and Others Vow to Help Employees Access Abortions After Supreme Court Overturns Roe v. Wade: “We Must Keep Up the Fight,”* BUS. INSIDER (Aug. 24, 2022, 9:37 AM PDT), <https://www.businessinsider.com/businesses-react-supreme-court-overturn-of-roe-v-wade-2022-6> [<https://perma.cc/8PQN-9WYH>] (For example, when *Business Insider* shared corporations’ reactions to the *Dobbs* decision, most corporations avoided any reference to abortion and instead used the terms noted above. Apple CEO Tim Cook stated that Apple would “cover employees who ‘travel out-of-state for medical care if it is unavailable in their home state.’” AT&T said, “The health of our employees and their families is important to our company, and we provide benefits that cover the cost of travel for medical procedures that are not available within 100 miles of their home.” CVS stated, “Ensuring access to safe, legal, high-quality health care is one of our most

inaccurate to use any of these terms as abortion rights do fall under them. One of the reasons corporations discuss abortion at all is because there are many more women in the workforce and most people under the age of sixty-five access their health care through their employers, which are often corporations.³⁸

This Article aims to provide a holistic analysis of the types of levers corporations use in the reproductive health arena. It also illustrates the limits of the stakeholder theory of governance where reproductive health is concerned. This Article is the first to analyze this phenomenon. While corporations may be at the forefront of many social issues, reproductive health is not among them.³⁹ This Article contends that

important priorities[.]” Lyft said, “We believe access to healthcare is essential and transportation should never be a barrier to that access[.]...This decision will hurt millions of women by taking away access to safe, and private reproductive healthcare services.”).

³⁸ See Emma Goldberg & Lora Kelley, *Companies Are More Vocal Than Ever on Social Issues. Not on Abortion.*, N.Y. TIMES (June 24, 2022), <https://www.nytimes.com/2022/06/24/business/abortion-roe-wade-companies.html> [<https://perma.cc/MVR9-F4U5>].

³⁹ This lack of corporate engagement may in part be due to the fact that so few women run corporations. See generally Afra Afsharipour & Darren Rosenblum, *Power and Pay in the C-Suite*, INEQUALITY INQUIRY (Sept. 8, 2021), <https://lawandinequality.org/wp-content/uploads/2021/09/Power-and-Pay-in-the-C-Suite.pdf> [<https://perma.cc/6G7B-23QT>] (arguing that much of corporate governance is tied to who is at the top, using executive compensation as an example of how male domination at the CEO level led to higher compensation). Notably, one of the CEOs to speak out on the issue of reproductive health post-*Dobbs* was a woman, Jane Fraser, CEO of Citigroup. See Alex Millson & Ella Ceron, *How US Companies Are Supporting Workers on Abortion*, BLOOMBERG (May 3, 2022, 1:01 AM PDT), <https://www.bloomberg.com/news/articles/2022-05-03/how-u-s-companies-are-supporting-workers-on-abortion#xj4y7vzkg> [<https://perma.cc/9XJU-XWPL>]. But cf. Nicole Gaudiano, Tanya Dua, Kimberly Leonard, Andrea Michelson, Sindhu Sundar, Rebecca Ungarino & Angela Wang, *AT&T, Walmart, Citi, and Other Megacorporations Bankrolled a Wave of State Abortion Bans*, BUS. INSIDER (June 24, 2022, 9:37 AM PDT), <https://www.businessinsider.com/state-abortion-ban-sponsors-bankrolled-by-att-walmart-citi-corporations-2022-5> [<https://perma.cc/4WCS-TQ29>] (finding that Citigroup “had donated about \$285,000 to state legislators who sponsored trigger laws in four states and to governors who signed them into law in five states”). In addition, scholars such as Professor Afra Afsharipour, have pointed out that the lack of gender diversity in the actors involved in the broader scheme of corporate governance often impacts actions and behaviors. See, e.g., Afra Afsharipour, *Investment Bankers and Inclusive Corporate Leadership*, 46 SEATTLE U. L. REV. 221, 221-222 (2023) (arguing that “the norms and divides of investment banking calibrate corporate cultures and values in the C-suite, thus enabling the continued gender gap in corporate America”).

documenting and disclosing what corporations are doing with respect to reproductive health is crucial for identifying potential ways to decrease gender disparities in corporations. It then addresses the gap in the debate on the stakeholder versus shareholder primacy theories of governance literature by its examination of the issue of reproductive health within the context of those two theories. The literature on reproductive health and its relation to the stakeholder theory of governance is sparse. This Article aims to deepen the understanding of the limitations of the stakeholder theory of governance through the lens of corporate actions or inaction. Although the stakeholder theory of governance is often characterized as more expansive than the shareholder primacy theory due to its numerous constituencies beyond shareholders themselves,⁴⁰ it has its own natural boundaries and limitations. Through an examination of shareholder proposals from 2012 through the first quarter of 2023, and information provided regarding certain companies' values and reproductive health benefits, this Article reveals that while corporations may have prioritized the advancement of women and diversity, equity, and inclusion matters in the workplace, such prioritization has not necessarily extended to reproductive health in any meaningful way. This Article examines existing corporate abortion policy for employees post-*Dobbs* and analyzes the role of the stakeholder in the reproductive health arena as it relates to the abortion rights debate.

Part I provides an overview of the number of abortions in the United States, how public opinion on abortion rights influences corporations' actions, and the economic and societal costs that accompany the lack of access to abortion. In particular, it illustrates how the absence of abortion rights is not only detrimental to women but to corporations as well. Part II analyzes the role corporations have played in advancing or reducing reproductive health rights by using data derived from an examination of shareholder proposals from a ten-year and one quarter period. It also looks at corporate benefits in relation to reproductive health to help complete the picture and provide a more nuanced

⁴⁰ Eduardo Gallardo, *On an Expansive Definition of Shareholder Value in the Boardroom*, THE CLS BLUE SKY BLOG (Oct. 22, 2019), <https://clsbluesky.law.columbia.edu/2019/10/22/on-an-expansive-definition-of-shareholder-value-in-the-boardroom> [<https://perma.cc/N2YU-8NH7>].

understanding of what actions corporations are taking with respect to abortion rights in particular. Part III focuses on the implications of the relative absence of corporate involvement in reproductive health matters. Part III also explores the limitations of the stakeholder theory of governance and what is now becoming an increasingly hybrid form which includes both shareholder primacy and stakeholder theories of governance. Part IV addresses the possible policy outcomes based on this Article's data and examines how corporations can forge a path forward in the hyper-partisan arena of reproductive health, particularly as it applies to abortion rights.

I. ABORTION IN THE U.S. AND ITS IMPACT ON CORPORATIONS

This Part provides a brief overview of abortion statistics to ground later discussions on how this issue impacts women employees. Next, it shares how public opinion may influence corporations' actions regarding abortion. This Part then provides data on the economic and societal costs that accompany a lack of access to abortion to give a sense of how the issue of reproductive health impacts corporations. It also highlights the disproportionate negative impact that restricted abortion rights have on the health and employment outcomes of women of color, which could potentially impact corporations as well. In sum, lack of access to abortion harms women in myriad ways and those impacts will adversely affect corporations in light of the increased number of women in the workplace.

A. *Abortion in the United States*

Abortion access impacts women workers and, by extension, the corporations that employ them. In the decades after *Roe*, many states passed laws regulating abortions. "Some states passed laws to protect abortion access, while others imposed more onerous regulations on abortion providers and sought to prohibit abortion at earlier points in pregnancy."⁴¹ As a result, more than 160 clinics offering abortion

⁴¹ Women and Foreign Policy Program Staff, *Abortion Law: Global Comparisons*, COUNCIL ON FOREIGN RELS. (June 24, 2022, 4:00 PM EST), <https://www.cfr.org/article/abortion-law-global-comparisons> [<https://perma.cc/G6H2-UFMW>].

services closed.⁴² In some states there was only one abortion provider for the entire state.⁴³

There were 930,160 abortions in 2020, an eight percent increase over 2017.⁴⁴ “While abortion increased nationally, there was substantial variation across, and even within, states between 2017 and 2020. A number of developments over that period may have had differential impacts across states.”⁴⁵ For example, the availability of abortion medication and teleabortion became more widely available in 2021.⁴⁶ Of those 930,160 abortions, 81,120 (nine percent) were obtained by individuals traveling out of their state of residence; this phenomenon coincided with a dramatic increase in the number of states that restricted abortion rights between 2011 and 2020.⁴⁷ Long-distance travel is a significant obstacle given the cost because most people in the U.S.

⁴² *Id.*

⁴³ Jonathan Marc Bearak & Rachel K. Jones, *Cross-State Travel for Abortion Care*, LANCET REG’L HEALTH – AMS., June 2022, at 1, 1. In contrast, outside of the U.S., abortion access has increased since 2000.

⁴⁴ Rachel K. Jones, Jesse Philbin, Marielle Kirstein, Elizabeth Nash & Kimberley Lufkin, *Long-Term Decline in US Abortions Reverses, Showing Rising Need for Abortion as Supreme Court Is Poised to Overturn Roe v. Wade*, GUTTMACHER INST. (June 15, 2022), <https://www.guttmacher.org/article/2022/06/long-term-decline-us-abortions-reverses-showing-rising-need-abortion-supreme-court> [<https://perma.cc/N27S-S7JU>]. Abortion rates in 2020 to 2021 may be anomalies because of COVID. See Isabel R. Fulcher, Chiamaka Onwuzurike, Alisa B. Goldberg, Alischer A. Cottrill, Jennifer Fortin & Elizabeth Janiak, *The Impact of the COVID-19 Pandemic on Abortion Care Utilization and Disparities by Age*, 226 AM. J. OBSTETRICS & GYNECOLOGY 819.e1, 819.e1 (2022).

⁴⁵ Jones et al., *supra* note 44. The expansion of Medicaid coverage in abortion care and local and national abortion funds to assist people in paying for abortions may have contributed to the increase in abortions. *Id.* The dramatic decrease in funding for the Title X family planning network’s capacity led to a stark reduction in the number of contraceptive clients and may have led to unintended pregnancies and abortion care. *Id.* Furthermore, the disruption of healthcare systems throughout the United States during the COVID-19 pandemic also may have impacted abortion numbers. *Id.*

⁴⁶ See Belluck, *supra* note 7.

⁴⁷ Isaac Maddow-Zimet & Kathryn Kost, *Even Before Roe Was Overturned, Nearly One in 10 People Obtaining an Abortion Traveled Across State Lines for Care*, GUTTMACHER INST. (July 21, 2022), <https://www.guttmacher.org/article/2022/07/even-roe-was-overturned-nearly-one-10-people-obtaining-abortion-traveled-across> [<https://perma.cc/V6TF-59X6>].

who obtain abortions make less than 200 percent of the federal poverty level.⁴⁸

Not having the ability to have an abortion also has a disproportionate impact on women of color in the workforce in particular.⁴⁹ Consider that a total ban on abortion would lead to a twenty-one percent increase in maternal mortality; when looking at non-Hispanic Black individuals, that number would increase to thirty-three percent.⁵⁰ For Black women, the maternal mortality rate is already three times the rate of white women.⁵¹

B. *How Public Opinion on Abortion Rights Influences Corporate Actions*

Public opinion has a role in determining how corporations should act on particular issues. “[L]eaders need to carefully consider the factors that may influence how their organizations will be judged in the court of public opinion.”⁵² According to the Pew Research Center, “[w]hile public support for legal abortion has fluctuated some in two decades of

⁴⁸ Daniel Grossman, Jamila Perritt & Deborah Grady, *The Impending Crisis of Access to Safe Abortion Care in the US*, 182 JAMA INTERNAL MED. 793, 793 (2022) (citing JENNA JERMAN, RACHEL K. JONES & TSUYOSHI ONDA, GUTTMACHER INST., CHARACTERISTICS OF U.S. ABORTION PATIENTS IN 2014 AND CHANGES SINCE 2008 (2016), <https://www.guttmacher.org/report/characteristics-us-abortion-patients-2014> [<https://perma.cc/4Z4Y-2JFG>]).

⁴⁹ “[T]he people most impacted by a lack of access to abortion and all kinds of other health services, sexual and reproductive health, are Black, Brown, and other women of color, along with low-income people . . .” Ellen McGirt, *The End of Roe v. Wade Is an Economic, Diversity, and Workplace Equity Issue*, FORTUNE (June 28, 2022, 1:15 PM PDT), <https://fortune.com/2022/06/28/end-of-roe-v-wade-is-an-economic-diversity-workplace-equity-issue/> [<https://perma.cc/JP6Z-U2HE>].

⁵⁰ Grossman et al., *supra* note 48, at 793 (citing Amanda Jean Stevenson, *The Pregnancy-Related Mortality Impact of a Total Abortion Ban in the United States: A Research Note on Increased Deaths Due to Remaining Pregnant*, 58 DEMOGRAPHY 2019, 2023 (2021)).

⁵¹ McGirt, *supra* note 49.

⁵² Matthew Amengual, Rita Mota & Alexander Rustler, *Research: Public Opinion Is Not Enough to Hold Companies Accountable*, HARV. BUS. REV. (Sept. 6, 2022), <https://hbr.org/2022/09/research-public-opinion-is-not-enough-to-hold-companies-accountable> [<https://perma.cc/EN5J-PDGU>]. In the context of a study on the impact of public opinion on protecting human rights, “the court of public opinion may not always be an effective mechanism to align decision-making with legal and ethical standards.” *Id.* In a study with hypothetical situations, people’s responses suggested “that people are far more likely to appeal to their own moral compasses or lay definitions of human rights than to any external reference for what constitutes a human rights abuse.” *Id.*

polling, it has remained relatively stable over the past several years.”⁵³ Roughly three-fifths of the public believe that abortion should be legal. Specifically, “61% say abortion should be legal in all or most cases, while 37% say it should be illegal in all or most cases.”⁵⁴ However, there is a gender gap on who supports abortion rights.

On a national scale, Black men and women are most likely to support abortion being legal all or most of the time (67 and 74 percent, respectively). Native American, White and Latina women are all more likely to support accessible abortion than men of their same race; the share of Asian men and women is comparable.⁵⁵

The numbers for White men and women in support of abortion are lower. “49 percent of White people want abortion legal most or all of the time, but [separating] by gender shows that White men are less likely to support abortion rights (44 percent) than [are] White women (54 percent).”⁵⁶ In determining whether to involve themselves on the issue of abortion rights, corporations may need to consider how their stakeholders’ opinions will impact their decision, such as the communities in which they operate. By doing so, corporations need to consider how they will prioritize various stakeholder interests. It is important to note, however, that the majoritarian view will not necessarily dictate (nor should it) the actions of corporations. From a normative viewpoint, it should be one factor of many that is considered in determining what is in the best interest of stakeholders alongside any shareholder primacy theory of governance which focuses on the maximization of profits. This is discussed in greater detail in Part III below.

⁵³ *Public Opinion on Abortion*, PEW RSCH. CTR. (May 17, 2022), <https://www.pewresearch.org/religion/fact-sheet/public-opinion-on-abortion/> [https://perma.cc/S4DE-3V55].

⁵⁴ *Id.*

⁵⁵ Jasmine Mithani, *States Passing Abortion Bans Reflect What Only a Small Minority of Their Constituents Actually Want*, THE 19TH (Oct. 24, 2022, 3:39 AM PDT), <https://19thnews.org/2022/10/state-abortion-laws-what-constituents-want-analysis/?tpcc=nlbroadsheet> [https://perma.cc/GAC6-3ZDS].

⁵⁶ *Id.*

C. *The Economic, Societal, and Other Costs of Abortion*

The lack of abortion access also has economic, societal, and other costs that affect corporations. Before *Dobbs* overturned *Roe*, C. Nicole Mason, President and Chief Executive Officer of The Institute for Women’s Policy Research (“IWPR”), presciently stated “that overturning *Roe* [would] ‘have a detrimental impact on whether or not women will be able to fully re-enter the workforce.’”⁵⁷

Many workers in the U.S. obtain their health insurance through their employers, which is one of the reasons corporations are a critical part of the reproductive health debate.⁵⁸ Notably, under law, “[i]nsurance policies must cover [the] care for essential health services, including medically necessary pregnancy care and abortion when carrying a pregnancy to term would endanger a patient’s life.”⁵⁹ Furthermore, “[a]bortion may be covered in a health plan, but if no providers are available, patients don’t have access. However, people with insurance that does not cover abortion can still get one — but only if it’s available in their states or they can afford to travel and pay out-of-pocket.”⁶⁰ Separately, “[t]here are also a host of unanswered questions about whether states that restrict abortion will have the legal authority to target the coverage in employer plans.”⁶¹ In one survey, “70% of women ages 18-44 would be discouraged from taking a job in a state that restricts access to abortion, as would 59% of men in the same age

⁵⁷ Alexandra Canal, *Roe v. Wade: “Detrimental Impact” on Women Reentering Workforce, Says IWPR*, AOL (June 24, 2022, 12:13 PM), <https://www.aol.com/roe-v-wade-ruling-could-153658945.html> [<https://perma.cc/MZS9-GXYL>].

⁵⁸ “Of the subtypes of health insurance coverage, employer-based insurance was the most common, covering 54.3 percent of the population for some or all of the calendar year[.]” KATHERINE KEISLER-STARKEY & LISA N. BUNCH, U.S. CENSUS BUREAU, *HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2021*, at 2 (2022), <https://www.census.gov/content/dam/Census/library/publications/2022/demo/p60-278.pdf> [<https://perma.cc/QEB5-QY88>].

⁵⁹ Julie Appleby, *Three Things to Know About Health Insurance Coverage for Abortion*, NPR (July 13, 2022, 5:00 AM EST), <https://www.npr.org/sections/health-shots/2022/07/13/1111078951/health-insurance-abortion> [<https://perma.cc/BY6D-6S24>].

⁶⁰ *Id.*

⁶¹ *Id.*

cohort.”⁶² In large part due to the increase in caretaking responsibilities of women because of the pandemic, there are “2 million fewer women in the workforce than two years ago at the start of the pandemic[.]”⁶³ Furthermore, “**86% of women state that controlling if and when to have children has been important to their careers.** Women who cannot access abortion when needed are three times more likely to be unemployed, and four times more likely to have a household income below the federal poverty level.”⁶⁴

Lack of abortion access also impacts the number of women that corporations can employ. State-level abortion restrictions come at a cost: state economies will lose “\$105 billion per year by reducing labor force participation and earnings levels, in addition to increasing turnover and time off from work among women between the ages of 15 to 44 years old.”⁶⁵ Furthermore, IWPR’s analysis found that the elimination of all state-level abortion restrictions would lead to an “additional 505,000 women (aged 15 to 44) . . . [to] enter the labor force and earn about \$3 billion annually.”⁶⁶ Additionally, the elimination of such restrictions would mean that “employed women would gain \$101.8 billion in higher annual earnings with Black and Hispanic women seeing an even larger impact on labor force participation rates[.]”⁶⁷ The national GDP would increase by an estimated “0.5% on average.”⁶⁸ One study noted that Black women typically participate in the labor force at a higher rate than other women. “[I]n 2019, Black women’s labor force participation rate was 60.5% compared with 56.8% for white women. Even in 2020, in the midst of the pandemic, their labor force participation rate was 58.8%, compared to 56.2% for women overall.”⁶⁹

⁶² RHIA VENTURES, HIDDEN VALUE: THE BUSINESS CASE FOR REPRODUCTIVE HEALTH 9 (2022), <https://rhiaventures.org/wp-content/uploads/2022/08/Hidden-Value-The-Business-Case-for-Reproductive-Health-2022.pdf> [<https://perma.cc/UAX5-F2RR>] [hereinafter HIDDEN VALUE].

⁶³ Canal, *supra* note 57.

⁶⁴ HIDDEN VALUE, *supra* note 62, at 9.

⁶⁵ Canal, *supra* note 57.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Mathilde Roux, *5 Facts About Black Women in the Labor Force*, U.S. DEP’T OF LAB. BLOG (Aug. 3, 2021), <https://blog.dol.gov/2021/08/03/5-facts-about-black-women-in-the->

If abortion restrictions were eliminated nationwide, one recent study estimates that it “would result in 1.15% growth in labor force participation and 9.12% growth in private sector earnings.”⁷⁰ Income is also higher for women with the full complement of reproductive health services, including abortion.⁷¹ “Women’s ability to manage and plan for having children is directly linked to their ability to participate in the labor force.”⁷²

There are not only physical, emotional, and employment-related concerns with the elimination or restriction of abortion, but there is now criminal risk as well that could impact corporations. Consider that as state laws continue to evolve post-*Dobbs*, people involved with, or who assist in, accessing or providing an abortion — transporting or housing a woman obtaining an abortion, performing the abortion, or providing health benefits that include abortions, for example — may be subject to substantial legal and licensure risk.⁷³

There are also psychological implications involved with the lack of abortion access that could detrimentally impact women workers and, by extension, the corporations that they work for. In the Turnaway Study, “the largest study to examine women’s experiences with abortion and unwanted pregnancy in the United States,” the researchers found that “many of the common claims about the detrimental effects on women’s

labor-force [<https://perma.cc/YQ8K-5LBD>]. See U.S. BUREAU OF LAB. STAT., *supra* note 29, for a more detailed demographic characteristics report on Black women in the labor force.

⁷⁰ HIDDEN VALUE, *supra* note 62, at 9.

⁷¹ “In states with strong abortion protections and coverage, women have higher levels of education, lower levels of poverty, and experience a higher ratio of female-to-male earnings.” *Id.* at 17.

⁷² *Id.*

⁷³ People have been charged with various crimes, including homicide, criminal abortion, aggravated fetal assault, procuring a miscarriage, and improper disposal of fetal remains. THE SIA LEGAL TEAM, *ROE’S UNFINISHED PROMISE: DECRIMINALIZING ABORTION ONCE AND FOR ALL* 13-14, 17, 19 (2018), <https://www.ifwhenhow.org/resources/roes-unfinished-promise/> [<https://perma.cc/6U6V-H7RQ>]; Grossman et al., *supra* note 48, at 793 (noting that “[a]s of 2018, more than 20 people reportedly have been criminally investigated, arrested, or imprisoned in the US for allegedly self-managing their abortion or helping someone else do so”).

health of having an abortion are not supported by evidence.”⁷⁴ It is when women are denied an abortion where negative outcomes happen. Those who are denied the procedure and carry an unwanted pregnancy to term have a four times greater chance of living below the Federal Poverty Guidelines and are more likely to stay in relationships with abusive partners, experience health complications from the end of pregnancy, and suffer from anxiety and loss of self-esteem; this also impacts the children (both just born and the elder siblings).⁷⁵

D. Abortions in the Corporate Context

There is an expectation by stakeholders that corporations should support reproductive health care as it directly impacts who they can recruit and how they diversify the workplace. As part of corporate gender equity efforts, sixty-nine percent of respondents in one study state that “access to reproductive health care, including abortion, should be part of the issues companies address when it comes to gender issues in the workplace.”⁷⁶ Additionally, “[t]wo-thirds (68%) of top talent say it’s important to them that their company takes a stand on social issues. . . . Half of top talent (51%) says they’d consider leaving their current job for an employer with a stronger viewpoint on social issues.”⁷⁷ Furthermore, “top talent nationally say [political] contributions” to candidates or officials who support abortion bans “would make them feel less positively (64%) toward their company vs. more positively (14%).”⁷⁸ One survey found that “[l]arge majorities of

⁷⁴ *The Turnaway Study*, ADVANCING NEW STANDARDS IN REPROD. HEALTH, <https://www.ansirh.org/research/ongoing/turnaway-study> (last visited June 15, 2023) [<https://perma.cc/9VXG-U3HJ>].

⁷⁵ *Id.*

⁷⁶ Memorandum from PerryUndem, What Does “Top Talent” Think About Working in States that Ban Abortion?: Reactions to Abortion Bans Among Workers in Ohio 5 (Jan. 18, 2022), https://perryundem.com/wp-content/uploads/2021/11/PerryUndem_AbortionLawSurveyFindings_Ohio.pdf [<https://perma.cc/67V6-D4H8>] [hereinafter Memorandum from PerryUndem].

⁷⁷ PERRYUNDEM, HOW “TOP TALENT” VIEWS POLITICS AND SOCIAL ISSUES IN THEIR WORKPLACE: FINDINGS FROM A NATIONAL SURVEY 8 (2021), <https://perryundem.com/wp-content/uploads/2022/03/PerryUndem-Tara-Health-Report.pdf> [<https://perma.cc/9MGG-GVBP>].

⁷⁸ Memorandum from PerryUndem, *supra* note 76, at 5.

top talent nationally . . . support abortion access and consider the issue part of gender equity in the workplace; [t]wo-thirds say the Texas ban [S.B. 8] would discourage them from taking a job in Texas[.]”⁷⁹ This survey has particular significance because it illustrates the priority Millennials and Gen Z, among others, place on workplace culture and values.⁸⁰ This in turn can impact who applies for jobs in corporations. In response to a question about whether or not they would apply for a job in a state that passed a ban on abortion similar to S.B. 8, seventy-three percent of women, fifty-three percent of men, sixty-eight percent of Gen Z, sixty-six percent of Millennials, Black employees, and recent graduates, sixty-three percent of Latino/a employees, and sixty-four percent of AAPI employees responded that they would not apply for such a job.⁸¹

Corporations’ bottom lines are also impacted by consumer perception of their support or lack of support of reproductive healthcare. More than fifty percent of consumers want brands to take a stand by withholding contributions to political candidates who are trying to limit reproductive health care.⁸² A high rate of support for reproductive health care, which includes abortion, can be found among consumers with “77% of consumers consider reproductive health care . . . an important issue . . . 91% of Gen Z and 86% of Millennials say it is important.”⁸³ Seven in ten consumers also believe in the importance of brands taking a stance on social issues, with eighty-six percent of them wanting brands to stand up for reproductive health.⁸⁴ A majority of Gen Z and Millennials, “would be more likely to buy from a brand that publicly supported reproductive health care.”⁸⁵

⁷⁹ *Id.* at 1.

⁸⁰ *Id.* at 4.

⁸¹ *Id.*

⁸² Memorandum from Greenwald Rsch., *supra* note 35.

⁸³ *Id.* at 2.

⁸⁴ *Id.* at 1-2.

⁸⁵ *Id.* at 3.

II. HOW COMPANIES ARE ADDRESSING ABORTION RIGHTS

Companies are often at the center of the most pressing social issues of our time, whether related to LGBTQ+ issues, immigration rights, or Black Lives Matter.⁸⁶ However, the issue of reproductive health and abortion rights in particular presents a conundrum for corporations since they find themselves in the unenviable position of being on the wrong side of the debate for some part of their employee, consumer, or community base (including political connections relied upon for support in non-reproductive health issues). This Part will document the role of public companies in the debate about abortion rights and how their stakeholders included those on the right who labeled individuals who received or were otherwise involved in an abortion as “murderers”⁸⁷ and those on the left who argued that it was a woman’s

⁸⁶ Interestingly, the history of corporate purpose seems to suggest that in the early days of business corporations, the purpose of the corporation was usually public. Specifically, “[t]he purposes of early American business corporations — rather than maximization of profit to private shareholders — were often overtly public, involving development of local transportation, finance, and other much-needed economic infrastructure and even the delegation to business corporations of public powers such as eminent domain, at a time when local governments lacked the resources to build such infrastructure.” David B. Guenther, *Of Bodies Politic and Pecuniary: A Brief History of Corporate Purpose*, 9 MICH. BUS. & ENTREPRENEURIAL L. REV. 1, 5 (2019). However, at the start of the 1820s to 1830s, there was an increase in “factory-based manufacturing and other comparatively more capital-intensive industries, [and] the purpose of the business corporation shifted fundamentally from public to private.” *Id.* at 7. This also meant that “states adopted general incorporation statutes that no longer required an action of the state legislature.” *Id.*

⁸⁷ See, e.g., Blake Ellis & Melanie Hicken, *These Male Politicians Are Pushing for Women Who Receive Abortions to Be Punished with Prison Time*, CNN POL. (Sept. 21, 2022, 12:33 AM EDT), <https://www.cnn.com/2022/09/20/politics/abortion-bans-murder-charges-invs/index.html> [<https://perma.cc/FX49-LEGC>] (showing examples of male state lawmakers advocating for charging women who receive abortions for murder); Allan Smith, *In 2019, Doug Mastriano Said Women Who Violated Proposed Abortion Ban Should Be Charged with Murder*, NBC NEWS (Sept. 27, 2022, 9:20 AM PDT), <https://www.nbcnews.com/politics/doug-mastriano-said-2019-women-violated-proposed-abortion-ban-charged-rcna49601> [<https://perma.cc/N4ML-WGKR>] (noting that Doug Mastriano, the Republican nominee for governor in Pennsylvania, proposed law to charge women who violate the abortion ban with murder).

right to choose.⁸⁸ In the United States, for a large portion of the population, employers are the providers of medical care and insurance and abortion is — unlike the other social issues — a medical issue. Therefore, one way or another, employers have to deal with the consequences of whether they choose to (or refrain from) getting involved in the abortion debate.

A. *Corporate Involvement in Abortion Rights*

Prior to *Dobbs*, corporations' involvement in abortion rights was limited to the type of health coverage they gave their employees⁸⁹ and coverage of birth control.⁹⁰ When *Dobbs* came before the U.S. Supreme Court, the customary onslaught of *amicus* briefs followed.⁹¹ However, perhaps unsurprisingly, corporations were not among them; not a single for-profit corporation filed an *amicus* brief in the case.⁹² In contrast, in

⁸⁸ See, e.g., Dan Mangan & Christina Wilkie, *Biden Defends Abortion Rights After Leak of Supreme Court Draft Striking Down Roe v. Wade*, CNBC (May 3, 2022, 6:50 AM EST), <https://www.cnbc.com/2022/05/03/biden-says-a-womans-right-to-choose-is-fundamental-on-heels-of-leaked-supreme-court-draft-striking-down-roe-v-wade.html> [https://perma.cc/FZE2-RA9X] (noting President Biden defending abortion rights by saying, “I believe that a woman’s right to choose is fundamental . . .”).

⁸⁹ Anne Sanchez LaWer, *Impacts of the Dobbs Decision on Employer Benefit Plans*, LITTLER (June 24, 2022), <https://www.littler.com/publication-press/publication-impacts-dobbs-decision-employer-benefit-plans> [https://perma.cc/53P4-LNG7].

⁹⁰ See *supra* note 19 (discussing *Burwell v. Hobby Lobby, Inc.* in more detail). The owners of Hobby Lobby believed that some contraceptive methods caused what they believed to be an abortion, though the scientific consensus does not support this belief. Aaron E. Carroll, *How Hobby Lobby Ruling Could Limit Access to Birth Control*, N.Y. TIMES (June 30, 2014), <https://www.nytimes.com/2014/07/02/upshot/how-hobby-lobby-ruling-could-limit-access-to-birth-control.html> [https://perma.cc/EKQ2-AZG8].

⁹¹ More than 140 *amicus* briefs were filed with the Court by a wide variety of nonprofits, religious organizations, professional associations, legal and medical professionals, politicians, and more. Case Docket, *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392), <https://www.supremecourt.gov/docket/docketfiles/html/public/19-1392.html> (last visited June 20, 2023) [https://perma.cc/P474-DYSC].

⁹² *Id. But cf.* Jonathan Stempel & Brendan Pierson, *Lawsuits Filed over U.S. State Restrictions on Abortion Pills*, REUTERS (Jan. 25, 2023, 9:25 AM PST), <https://www.reuters.com/legal/us-abortion-pill-maker-doctor-challenge-state-curbs-lawsuits-2023-01-25/> [https://perma.cc/KEZ2-HK3X]. In January 2023, GenBioPro Inc., which sells a generic version of mifepristone, the first drug in a two-drug regimen for

the wake of the passage of Executive Order No. 13769, titled “Protecting the Nation from Foreign Terrorist Entry into the United States” which “prevented certain non-citizens from entering the United States and . . . also, for a ninety-day period suspended all citizens of seven Muslim-majority countries from entering the United States,” *amicus* briefs protesting the so-called Muslim Ban were filed by ninety-seven technology companies.⁹³ In *United States v. Windsor*, “[n]early 380 corporations and employer organizations joined together to file an *amicus* brief urging that the Court declare state bans on gay marriage unconstitutional[.]”⁹⁴ The signatories of the *amicus* brief “spanned many different industries.”⁹⁵

Although the draft opinion for *Dobbs* was leaked in May 2022, companies did not take public action immediately after the ruling. “[B]ehind closed doors, those companies . . . mull[ed] a mass of questions, including whether to accommodate part-time workers and provide paid sick leave for any travel.”⁹⁶ Corporate response was “muted” and “[m]ost stayed silent, including some companies that are known for speaking out on social issues such as Black Lives Matter and L.G.B.T.Q. rights.”⁹⁷ As one consultant aptly pointed out, corporations fear a “backlash . . . [as] they know there’s no way to please everyone.”⁹⁸ Even those corporations who did make public statements about the *Dobbs* ruling were circumspect in how they talked about the decision. They chose to speak about how the decision would impact their workers’

medication abortions, filed a lawsuit in West Virginia claiming that the state’s ban on nearly all abortions violates the U.S. Constitution by preventing the interstate sales of mifepristone which was approved by the FDA in 2000. *Id.*

⁹³ Jennifer S. Fan, *Woke Capital: The Role of Corporations in Social Movements*, 9 HARV. BUS. L. REV. 441, 459 (2019).

⁹⁴ *Id.* at 478.

⁹⁵ *Id.*

⁹⁶ Clara Hudson, *Abortion Looms as ESG Issue for Companies After Voiding of Roe*, BLOOMBERG L. (July 8, 2022, 2:00 AM PDT), <https://news.bloomberglaw.com/esg/abortion-looms-as-esg-issue-for-companies-after-voiding-of-roe> [<https://perma.cc/B6KD-4E2S>].

⁹⁷ Goldberg & Kelley, *supra* note 38 (noting that “[s]ome of the corporations that blacked out their Instagram pages in 2020 or featured rainbow flags on their websites for Pride Month have so far been hesitant to comment on abortion”).

⁹⁸ *Id.*

access to health care; in some cases, avoiding using the word abortion altogether.⁹⁹

In the wake of the *Dobbs* decision, companies reacted very differently in comparison to their responses to the decisions in *U.S. v. Windsor* and the Muslim Ban cases. A number of companies were “cautious and deliberative in how they factor[ed] abortion into their long-term ESG plans despite demands for swift action from shareholders, employees, and the public after the Supreme Court overturned *Roe v. Wade*.”¹⁰⁰ While some said nothing at all, other companies issued neutral statements, pointing to existing health benefits.¹⁰¹ One analysis of the top 100 companies from the S&P 500 Index found that fewer than thirty of those companies made any public announcements regarding reproductive benefits post-*Dobbs*. Of the companies that made such announcements, “the communications, consumer discretionary, financial, and technology sectors had the most public announcements [T]he health care sectors . . . saw a few public announcements”¹⁰²

In contrast, there were also those companies that took action, stating that if an employee resided in a state that did not allow abortion, they would cover the cost of an employee traveling to obtain one outside of the state.¹⁰³ The list of companies offering this benefit covered a broad

⁹⁹ *Id.*

¹⁰⁰ Hudson, *supra* note 96.

¹⁰¹ Fossett, *supra* note 25.

¹⁰² Abigail Gampher, *ANALYSIS: Corps Face Stakeholder Benefit Inquiries After Dobbs*, BLOOMBERG L. (Aug. 17, 2022, 2:00 AM PST), <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-corps-face-stakeholder-benefit-inquiries-after-dobbs> [<https://perma.cc/LLV2-N5VQ>] (noting that CVS Health Corp., Cigna Corp., and Gilead Sciences Inc. were among that group).

¹⁰³ Fossett, *supra* note 25. Notably, the military announced it would pay travel costs. Memorandum from the U.S. Sec’y of Def. to Senior Pentagon Leadership, *Ensuring Access to Reproductive Health Care 2* (Oct. 20, 2022), <https://media.defense.gov/2022/Oct/20/2003099747/-1/-1/1/memorandum-ensuring-access-to-reproductive-health-care.pdf> [<https://perma.cc/24N5-QYAN>]; Becky Sullivan, *The Pentagon Will Pay for Service Members to Travel for Abortions*, NPR (Oct. 20, 2022, 4:52 PM EST), <https://www.npr.org/2022/10/20/1130316976/pentagon-abortion-travel> [<https://perma.cc/M63M-38AQ>]. Under the Hyde Amendment it cannot cover most abortions. Lara Seligman, *Pentagon Will Pay for Service Members to Travel for Abortions*, POLITICO (Oct. 20,

swath of industries: Condé Nast, Dick's Sporting Goods, Meta, and the Walt Disney Company, to name a few.¹⁰⁴ The actions did not come without criticisms, however. There was opposition from both the right and left sides of the political spectrum, which "highlights the complexity of who decides who gets abortion access in a post-*Roe* world. The criticism also shows how skepticism of corporate power animates political arguments on either end of this hot-button culture war."¹⁰⁵ On the one hand, those on the right have argued that the reason corporations offer to pay for their employees' abortions is because they believe it is cheaper than paying for time off as a parent.¹⁰⁶ Those on the left, in contrast, while supportive of companies' efforts to ensure employees' access to abortion also point out that "corporations' efforts fell short of government protections and could in fact be a way of further increasing economic inequality between women and men in a post-*Roe* era, by leaving one specific aspect of healthcare . . . subject to the whims of employers."¹⁰⁷ One of the few responses regarding the lack of access to reproductive health care occurred pre-*Dobbs*: 330 business leaders signed onto the "Don't Ban Equality" statement which was drafted "in response to the alarming number of state abortion bans passed in 2019 that restricted access to comprehensive reproductive healthcare, including abortion."¹⁰⁸ However, some likely wondered whether such a statement was merely performative and that corporations were seizing the moment for marketing purposes. Ultimately, businesses coordinated "on contentious issues, checking in with one another so that they [didn't] stick out from the pack . . ."¹⁰⁹

The ways in which corporations addressed healthcare and other employee benefits for LGBTQ+ families provide an interesting corollary to how corporations approach women and reproductive rights. In the

2022, 2:33 PM EDT), <https://www.politico.com/news/2022/10/20/pentagon-will-pay-for-service-members-to-travel-for-abortions-00062782> [<https://perma.cc/7ZWT-4KJ2>].

¹⁰⁴ Fossett, *supra* note 25.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *About, DON'T BAN EQUALITY*, <https://dontbanequality.com/about/> (last visited June 21, 2023) [<https://perma.cc/45W9-ATD6>].

¹⁰⁹ Hudson, *supra* note 96.

early 2000s, “pressure from LGBT employees and, in some cases, policymakers and unions [had] pushed employers to end discriminatory practices against LGBT workers.”¹¹⁰ Using the business case for diversity, stakeholders focused “on equal treatment of LGBT employees. Voluntarily enacted sexual orientation and gender identity nondiscrimination policies, domestic partner benefits, transition-related health care benefits, and other related policies [were] said to be sound business decisions.”¹¹¹ In 1999, fourteen percent of Fortune 500 companies offered domestic partner benefits; by 2009, that number increased to fifty-nine percent.¹¹² Interestingly, while there is evidence that the business case for diversity motivated employers to adopt LGBTQ+-supportive policies, the reality is “that support for the business case for diversity is not straightforward.”¹¹³ In particular, the business case for such policies was not on either sexual orientation or gender identity diversity of an employer’s workforce, but on the impact of policies.¹¹⁴ While there are qualitative assessments of the connection between diversity-respecting policies and outcomes, the quantitative assessment is not as clear.¹¹⁵

¹¹⁰ M.V. LEE BADGETT, LAURA E. DURSO, ANGELIKI KASTANIS & CHRISTY MALLORY, *THE WILLIAMS INST., THE BUSINESS IMPACT OF LGBT-SUPPORTIVE WORKPLACE POLICIES 4* (2013), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Impact-LGBT-Support-Workplace-May-2013.pdf> [<https://perma.cc/EUK7-2E3L>].

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 5. *But cf.* Shalene Gupta, *Most LGBTQ+ Employees Are Not Comfortable Being Out at Work. Companies Are Failing Them*, *FAST COMPANY* (May 30, 2023), https://www.fastcompany.com/90901245/most-lgbtq-employees-are-not-comfortable-being-out-at-work-companies-failing-them?partner=rss&utm_source=feedly&utm_medium=feed&utm_campaign=rss%2Bfastcompany&utm_content=rss&tpcc=NL_Marketing [<https://perma.cc/FVC7-2P5A>]. Although corporations may have had LGBTQ-supportive policies in the past, it does not mean that they necessarily comply with such policies.

B. *Reality vs. Myth: What Motivates Corporate Action on the Social Issues of Our Time*

Contrary to popular belief, corporations do not participate in the debate about abortion rights due to some “‘woke CEO[’s]’ ideology.”¹¹⁶ In fact, “[t]he speed of a company’s corporate engagement [is] rarely determined by the ideology of its leaders, but more often by its strategic positioning and considerations. Thus, where a company [stands] depends on where it sits in society. And current responses to the Supreme Court abortion ruling follow similar lines.”¹¹⁷

According to a study that examined the 118 first-mover responses to the *Dobbs* ruling, the firms’ actions (e.g., paying for employee travel to states that allow abortions) were based on strategic positioning.¹¹⁸ They “don’t seem to have been driven by feminist ideology, or their leadership’s beliefs or gender identity.”¹¹⁹ The issue is likely more nuanced and complex than this study suggests, however, because the C-suite is already dominated by men which may impact and exacerbate particular biases.¹²⁰ “[O]nly 15% of these first mover companies are led by women CEOs. More broadly, only 8.8% of Fortune 500 companies are led by women, and so far only 5 of those 44 women-led companies have supported travel benefits for employees seeking abortions.”¹²¹ Tech companies were the most likely to offer such benefits (thirty percent), with the industries related to finance, professional services, and apparel following at seventeen percent, twelve percent, and ten percent, respectively.¹²² Physical and political geography are an even greater factor in whether a corporation plans to be active on abortion rights.¹²³ As an example, only nine of the 118 first-mover companies are

¹¹⁶ 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://fortune.com/2022/06/30/companies-supporting-abortion-rights-roe-v-wade-first-movers/> [https://perma.cc/26EG-B7VG].

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Afsharipour & Rosenblum, *supra* note 39, at 1.

¹²¹ Sonnenfeld et al., *supra* note 116.

¹²² *Id.*

¹²³ *Id.*

headquartered in states where Republicans control both the state legislature and governor's office — so called “red states.”

The situation is made more complex by the fact that corporations, like most voters, are not single-issue. As an example, companies may announce their support of abortion rights but yet donate to anti-abortion lawmakers or candidates for office who happen to have economic policies that they agree with.¹²⁴ This is described in more detail in the section on shareholder proposals below. Some may even donate to both political parties.¹²⁵ As an example, Match Group, a dating matching company, donated to both the Republican Attorneys General Association and the Democratic Attorneys General Association; they recently suspended such donations.¹²⁶ Many corporations continue to make political donations to those who support them irrespective of their abortion stances.¹²⁷ Pharmaceutical giant, Eli Lilly, “continued to financially support Republican candidates and politicians who support bans on abortion across the country, including many who celebrated the reversal of *Roe v. Wade*.”¹²⁸ Other corporations who did the same include Amazon, AT&T, Comcast, Citigroup, and Meta.¹²⁹

On the one hand, corporations want to appear to be supportive of women by funding reproductive health-related matters so that they can retain them as employees, especially since women comprise a large part of the workforce.¹³⁰ Yet, on the other hand, they are focused on the

¹²⁴ Hudson, *supra* note 96.

¹²⁵ Companies that donate to both political parties often claim that the support is “tied to narrow issues of specific interest to their industries.” Andrew Ross Sorkin, Jason Karaian, Michael J. de la Merced, Lauren Hirsch & Ephrat Livni, *Money Walks: Corporate America Is Rethinking Its Political Donations*, N.Y. TIMES (July 1, 2021), <https://www.nytimes.com/2021/01/11/business/dealbook/corporate-political-donations.html> [https://perma.cc/V642-ZJ83].

¹²⁶ Lauren Hodges, *Corporate America Reckons with Its Role in Reproductive Rights*, NPR (July 25, 2022, 5:00 AM EST), <https://www.npr.org/2022/07/25/1112599476/abortion-roe-companies-pay-travel-law-ban> [https://perma.cc/YZ27-P7GK].

¹²⁷ See Kirchgassner & Aratani, *supra* note 18.

¹²⁸ *Id.*

¹²⁹ *Id.* Most did not respond to a request to comment when asked about the donations. See *id.*

¹³⁰ See Hodges, *supra* note 126. From a shareholder primacy standpoint, there are also economic reasons for wanting to keep women in the workforce. *Supra* Part I.C. Additionally, it is more costly to hire and train new employees as opposed to retaining

implications of particular decisions on their brand.¹³¹ These inconsistencies are further explored in the section on shareholder proposals below.

C. *The Use of Shareholder Proposals*

Pursuant to Rule 14a-8,¹³² shareholders can submit proposals to the company for consideration by shareholders in the company's proxy statement.¹³³ These proposals (along with any supporting statement) are

current employees because “[i]t can take up to six months or more for a company to break even on its investment in a new hire.” See Annie Mueller, *The Cost of Hiring a New Employee: Consider Recruitment, Training, Benefits, and More*, INVESTOPEDIA, <https://investopedia.com/financial-edge/0711/the-cost-of-hiring-a-new-employee.aspx> (last updated Apr. 8, 2022) [<https://perma.cc/QR9F-5H9R>].

¹³¹ See Hodges, *supra* note 126.

¹³² See 17 C.F.R. § 240.14a-8 (2023). “Under state corporate law, a shareholder may bring an appropriate matter to a full vote of the shareholders at the corporation’s annual meeting. Since 1942, federal securities regulation has enhanced this mechanism by requiring a company to include an eligible shareholder’s proposal in its proxy statement, which is sent to all of the company’s shareholders in advance of the annual shareholder meeting.” Sarah C. Haan, *Shareholder Proposal Settlements and the Private Ordering of Public Elections*, 126 YALE L.J. 262, 272 (2016).

¹³³ One business scholar did an empirical study analyzing 3,040 SEC no-action letters from January 2008 through August 2019 and determined “that legal characteristics, pressures on the staff, and proposal attributes have a statistically significant association with the SEC’s decision.” Gregory Burke, *SEC Rule 14a-8 Shareholder Proposals: No-Action Requests, Determinants, and the Role of SEC Staff*, 42 J. ACCT. & PUB. POL’Y, Jan.–Feb. 2023, at 1, 1. Furthermore, individual SEC staff members deciding whether to grant the no-action relief also play an important role in this process. See *id.* There is robust legal literature analyzing Rule 14a-8. See, e.g., J. Robert Brown, Jr., *The Politicization of Corporate Governance: Bureaucratic Discretion, the SEC, and Shareholder Ratification of Auditors*, 2 HARV. BUS. L. REV. 501, 503–506 (2012) (examining the phenomenon of political influence in the context of shareholder proposals); Sung Ho Choi, *It’s Getting Hot in Here: The SEC’s Regulation of Climate Change Shareholder Proposals Under the Ordinary Business Exception*, 17 DUKE ENV’T L. & POL’Y F. 165, 166–167 (2006) (examining the use of shareholder proposals to address climate change and criticizing the lack of sufficient shareholder participation caused by the current shareholder proposal process); Alan R. Palmiter, *The Shareholder Proposal Rule: A Failed Experiment in Merit Regulation*, 45 ALA. L. REV. 879, 879–886 (1994) (examining the mechanism of the shareholder proposal rule and criticizing the SEC’s attempt to define the “proper subjects” of shareholder-management dialogue).

limited to 500 words.¹³⁴ “The structure of the shareholder proposal rule includes a mechanism by which the proponent and the issuer present arguments for and against the proposal.”¹³⁵ Then, “[t]hrough the voting process, fellow shareholders communicate their evaluation of the strengths of these arguments. These evaluations may be further informed by third-party advisors such as proxy advisors.”¹³⁶ Notably, the shareholder proposal process “shifts the cost of communicating the proposal from the shareholder proponent to the company, and formalizes the processes of shareholder voice.”¹³⁷ Shareholder proposals are divided into the categories of corporate governance and social and environmental in academic literature.¹³⁸ “Importantly, most shareholder proposals — and virtually all social and economic proposals — are precatory, which means that they are recommendations and are not binding on management.”¹³⁹ However, “[e]ven precatory proposals . . . increasingly lead to board action when they command the support of a majority of the shareholders.”¹⁴⁰ Ultimately, in light of the nonbinding nature of most shareholder proposals, it is the board of directors, subject to fiduciary constraints, who decide whether to implement the

¹³⁴ 17 C.F.R. § 240.14a-8.

¹³⁵ Jill E. Fisch, *Purpose Proposals*, 1 U. CHI. BUS. L. REV. 113, 117 (2022).

¹³⁶ *Id.* at 117-18.

¹³⁷ Haan, *supra* note 132, at 272.

¹³⁸ “According to this approach, corporate governance proposals address the governance of the firm, including matters such as proxy access, shareholder voting, and poison pills. Social and environmental proposals, in contrast, seek to reform corporate social and environmental policies on a range of topics that involve third-party interests, including consumer product safety, environmental impacts, labor and employment issues, and corporate political spending.” Haan, *supra* note 132, at 272. Note that it wasn’t until the 1970s that social and environmental proposals were allowed. *See id.* at 273 (providing the history of when shareholders were allowed to bring social and environmental proposals under Rule 14a-8).

¹³⁹ *Id.* at 273. “Proposals primarily have focused on informational solutions to social and environmental problems, demanding that firms engage in information gathering, analysis, and public disclosure rather than compelling or prohibiting particular activities.” *Id.* at 272-73.

¹⁴⁰ Fisch, *supra* note 135, at 122. “The impact of shareholder proposals has been enhanced by the policy of leading proxy advisor Institutional Shareholder Services (ISS) to recommend that shareholders vote against the members of a board that fails to take action in response to a proposal that has received majority support.” *Id.* at 122-23.

proposal.¹⁴¹ Under the purview of the SEC, “[t]his process has become a cornerstone of shareholder engagement on important matters.”¹⁴²

Social and environmental shareholder proposals, also referred to as ESG proposals and E&S proposals below, continue to proliferate. Professor Jill Fisch has coined these proposals as “purpose proposals” which “reflect a new dynamic in the debate over stakeholder governance by enabling shareholders to communicate their views about corporate purpose to their fellow shareholders and managements.”¹⁴³ These purpose proposals take several forms which include “seeking disclosure about the corporation’s existing commitments, restructuring the corporation to increase its focus on stakeholder capitalism, and advocating that the corporation amend its charter to convert to a public benefit corporation (PBC).”¹⁴⁴ Governance proposals have decreased while ESG or purpose proposals have continued to rise. “While . . . governance proposals [received by Russell 3000 companies] decreased by approximately 15% in 2022, environmental and social (E&S)-related proposals continued their upward trend, with a record 471 E&S proposals submitted in 2022, a 15% increase over 2021.”¹⁴⁵ In fact, “[t]he number of E&S proposals continues to represent a majority of all shareholder proposals received by Russell 3000 companies, comprising 58% of proposals in 2022 compared to 51% in 2021.”¹⁴⁶ Notably, despite the year-over-year increase in the number of ESG proposals put to a vote, the number of approved ESG proposals decreased (thirty-eight in

¹⁴¹ Fisch, *supra* note 135, at 118.

¹⁴² SEC Staff Legal Bulletin No. 14L (Nov. 3, 2021), <https://www.sec.gov/corpfin/staff-legal-bulletin-14l-shareholder-proposals> [<https://perma.cc/NBY8-WWMM>] [hereinafter SEC Staff Legal Bulletin No. 14L].

¹⁴³ Fisch, *supra* note 135, at 113. Rule 14a-8 “offers a vehicle both for developing shareholder support for a reframed corporate purpose and demonstrating that support to the board of directors.” *Id.* at 116. Furthermore, “[t]he modest ownership stake and relatively low-cost procedural requirements for introducing a shareholder proposal allow investors to place new issues before their fellow shareholders, managers, and corporate boards.” *Id.*

¹⁴⁴ *Id.* at 116.

¹⁴⁵ Daniel Litowitz & Lara Aryani, *Trends in E&S Proposals in the 2022 Proxy Season*, HARV. L. SCH. F. ON CORP. GOV. (Nov. 28, 2022), <https://corpgov.law.harvard.edu/2022/11/28/trends-in-es-proposals-in-the-2022-proxy-season/> [<https://perma.cc/KD2S-5PV9>].

¹⁴⁶ *Id.*

2021 versus thirty-two in 2022).¹⁴⁷ In part, this decrease may be attributed “to the fact that a significant number of proposals, particularly those relating to climate change, prescribed specific actions to be taken by the company, in contrast with the historically more successful types of proposals — E&S and otherwise — that contained more general recommendations or enhanced disclosure.”¹⁴⁸ Another interesting trend that is worth noting is that anti-ESG proposals are on the rise.¹⁴⁹ In terms of who is submitting shareholder proposals, it appears to be confined to a select group. One study noted that corporate gadflies (retail investors with small stakes) dominated the shareholder proposal process for forty years and that most shareholder proposals continue to originate from a small number of individual shareholders.¹⁵⁰ The criticisms regarding shareholder proposals are that they are too numerous, sponsored by corporate gadflies, and do not increase economic value.¹⁵¹ Furthermore, the fact that institutional shareholders comprise “the overwhelming majority of votes at shareholder meetings”¹⁵² also presents issues as they “have no economic interest in the stock they are voting . . . [and] there is a risk that the institutional votes that drive outcomes may not accurately reflect the interests of

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* During the 2022 proxy season, the use of exempt solicitations by proponents of shareholder proposals continued in record numbers. *Shareholder Proposal Developments During the 2022 Proxy Season*, GIBSON DUNN (July 11, 2022), <https://www.gibsondunn.com/shareholder-proposal-developments-during-the-2022-proxy-season/> [<https://perma.cc/D2UM-Z6CD>]. In fact, such filings reached a record high “increasing 34% over last year and 70% since 2020.” *Id.*

¹⁴⁹ Litowitz & Aryani, *supra* note 145 (“Most of the anti-E&S proposals were expressly opposed to existing or proposed E&S initiatives at the subject company.”). They have generally “received an average of less than 3% support in 2022, and as such, are not eligible to be resubmitted in 2023 as they failed to meet the SEC 5% threshold requirements for resubmission.” *Id.*

¹⁵⁰ See generally Kobi Kastiel & Yaron Nili, *The Giant Shadow of Corporate Gadflies*, 94 S. CAL. L. REV. 569, 589-91 (2021) (noting that “of all the 2,042 shareholder proposals submitted between 1987 and 1994, 22% were submitted by the Gilbert brothers and 15% by Evelyn Davis” and “41% of the shareholder proposals among the S&P 1500 in 2018 were submitted by a mere five individuals”).

¹⁵¹ Fisch, *supra* note 135, at 117.

¹⁵² *Id.* at 118.

those with real economic stakes.”¹⁵³ At the same time, they also “offer[] a relatively low-cost and low-stakes procedure for introducing governance innovation” because shareholder proposals allow debate between proponents of the shareholder proposals and the issuer to occur; shareholders can then vote to determine the outcome.¹⁵⁴

Once shareholder proposals are sent to the company’s principal executive office, the company determines whether it meets the procedural requirements of Rule 14a-8 and the shareholder proponent is given the chance to fix certain defects.¹⁵⁵ Bases for exclusion of proposals are listed under Rule 14a-8.¹⁵⁶ “Companies often request assurance that the [S]taff will not recommend enforcement action if they omit a proposal based on one of these exclusions (‘no-action relief’).”¹⁵⁷ Notably, companies consider “previous Staff no-action decisions into their assessments of shareholder proposals and their arguments for excluding them” despite the fact that the “process is not a formal judicial or administrative one.”¹⁵⁸ On November 3, 2021, the Division of Corporate Finance of the SEC released Staff Legal Bulletin No. 14L (CF) which rescinded the Division’s prior positions in Staff Legal Bulletins 14I, 14J, and 14K with respect to the economic relevance

¹⁵³ *Id.*

¹⁵⁴ *See id.*; *see, e.g.*, Jeff Schwartz, “Public” Mutual Funds, in *THE CAMBRIDGE HANDBOOK ON INVESTOR PROTECTION* 40, 57-58 (Arthur B. Laby ed., 2022) (stating that asset managers may have self-interested motives that differ from the way their beneficiaries would vote when supporting proposals of a social nature).

¹⁵⁵ *See* 17 C.F.R. § 240.14a-8(e)(2) (2023). Interestingly, a subset of anti-ESG proposals are “taking advantage of the SEC’s procedural rules regarding the exclusion of future shareholder proposals on similar topics, but do so in a manner different from the intended effect of these rules.” Litowitz & Aryani, *supra* note 145. Essentially, in an anti-ESG proposal, the resolution is identical to an ESG proposal but the supporting statements that accompany the resolution are anti-ESG. “Thus, anti-E&S activists can put forward a proposal substantially similar to an E&S proposal and cause a future E&S proposal attempting to address the same action to be barred from future shareholder meetings as a result of the SEC’s rules against duplicative shareholder proposals.” *Id.*

¹⁵⁶ *See* 17 C.F.R. § 240.14a-8.

¹⁵⁷ SEC Staff Legal Bulletin No. 14L, *supra* note 142.

¹⁵⁸ Marc S. Gerber & Ryan J. Adams, *SEC Increases the Unpredictability of the Shareholder Proposal No-Action Process*, HARV. L. SCH. F. ON CORP. GOV. (July 20, 2022), <https://corpgov.law.harvard.edu/2022/07/20/sec-increases-the-unpredictability-of-the-shareholder-proposal-no-action-process/> [<https://perma.cc/CAN3-DLG6>].

exception¹⁵⁹ and ordinary business exception.¹⁶⁰ By doing so, it became more challenging for companies to exclude shareholder proposals through no-action requests, especially those proposals relating to environmental and social matters.¹⁶¹ The Staff characterized the exception for certain proposals that raise significant social policy issues as “essential for preserving shareholders’ right to bring important issues before other shareholders by means of the company’s proxy statement, while also recognizing the board’s authority over most day-to-day business matters.”¹⁶² Furthermore, with respect to the ordinary business exception, it stated that it would “focus on the social policy significance of the issue that is the subject of the shareholder proposal” rather than “determining the nexus between a policy issue and the company.”¹⁶³ Also, consistent with the Staff’s “pre-SLB No. 14I approach and *Lovenheim [v. Iroquois Brands, Ltd.]*, proposals that raise issues of broad social or ethical concern related to the company’s business may not be excluded, even if the relevant business falls below the economic thresholds of Rule 14a-8(i)(5).”¹⁶⁴

The limits on exceptions paved the way for proposals related to social issues, such as reproductive rights, to move forward. Shareholder proposals referencing reproductive health came in two forms in recent years: political spending misalignment proposals and risk mitigation

¹⁵⁹ See 17 C.F.R. § 240.14a-8(i)(5).

¹⁶⁰ See *id.* § 240.14a-8(i)(7).

¹⁶¹ Era Anagnosti, Maia Gez & Scott Levi, *SEC’s New Approach to No-Action Requests for Shareholder ESG Proposals*, HARV. L. SCH. F. ON CORP. GOV. (Dec. 4, 2021), <https://corpgov.law.harvard.edu/2021/12/04/secs-new-approach-to-no-action-requests-for-shareholder-esg-proposals/> [https://perma.cc/TB23-VRRN]. With respect to the ordinary business exception, the staff stated, “[g]oing forward, the staff will realign its approach for determining whether a proposal relates to ‘ordinary business’ with the standard the Commission initially articulated in 1976, which provided an exception for certain proposals that raise significant social policy issues, and which the Commission subsequently reaffirmed in the 1998 Release.” SEC Staff Legal Bulletin No. 14L, *supra* note 142.

¹⁶² SEC Staff Legal Bulletin No. 14L, *supra* note 142.

¹⁶³ *Id.* (“In making this determination, the [S]taff will consider whether the proposal raises issues with a broad societal impact, such that they transcend the ordinary business of the company.”).

¹⁶⁴ *Id.* (“In light of this approach, the [S]taff will no longer expect a board analysis for its consideration of a no-action request under Rule 14a-8(i)(5).”).

proposals; a sampling of them follows and a full chart categorizing the proposals is included in Appendix I. With respect to shareholder proposals focused on reproductive health, they are unsurprisingly similar to other purpose proposals in that they are precatory and focused on transparency and the disclosure of information. In the future, one would expect a rise in anti-reproductive health shareholder proposals and perhaps a few that are more action-oriented to test the boundaries of shareholder appetite for such proposals.

In the last ten years, there have been twenty-one shareholder proposals related to reproductive rights. This finding is based on a search of all U.S. companies listed in the Russell 3000 (comprised of the largest 3,000 companies based on market cap) that submitted a Form N-PX¹⁶⁵ to the Securities and Exchange Commission (“SEC”) between January 1, 2012 and December 31, 2022. Of the 9,415 shareholder proposals submitted during that time period, twenty-one had either the words “reproductive” or “abortion rights” appearing in the title of the resolution or in the body of the proposal.¹⁶⁶

The temporal distribution of these shareholder proposals is presented below in graph format. As You Sow, a nonprofit organization that focuses on shareholder advocacy,¹⁶⁷ filed some of the proposals. Its “mission is to promote environmental and social corporate responsibility through shareholder advocacy, coalition building, and innovative legal strategies.”¹⁶⁸ In addition to the shareholder proposals that made it to a vote, which are reflected in the graph below, some shareholder proposals were withdrawn prior to voting. For Church & Dwight Company, Inc., a consumer packaging goods company,¹⁶⁹ As You Sow proposed that the company issue a report on risks caused by state

¹⁶⁵ *Form N-PX*, U.S. SEC. & EXCH. COMM’N, <https://www.sec.gov/files/formn-px.pdf> (last visited June 20, 2023) [<https://perma.cc/R9Z4-7XFM>].

¹⁶⁶ Note that the ACA’s access provisions and preventive care requirements, including birth control coverage, went into effect in 2014 which may have had an impact on the numbers. *See generally* 29 C.F.R. § 2590.715-2713A (2023) (providing that an eligible organization may revoke its use of the accommodation process).

¹⁶⁷ *See About Us*, AS YOU SOW, <https://www.asyousow.org/about-us> (last visited June 20, 2023) [<https://perma.cc/U9C2-Y8G3>].

¹⁶⁸ *Id.*

¹⁶⁹ *Overview*, CHURCH & DWIGHT CO., INC., <https://churchdwright.com/company/> (last visited June 20, 2023) [<https://perma.cc/BY6P-MKXY>].

policies affecting reproductive rights to align with its stated corporate values as part of its shareholder proposal; the resolution was ultimately withdrawn.¹⁷⁰ As You Sow also proposed a “Report on Risks of Policies affecting Reproductive Rights” for Macy’s, Inc., a retail clothing store; this proposal was also withdrawn.¹⁷¹ The Edward W. Hazen Foundation, a private foundation “committed to supporting organizing and leadership of young people and communities of color in dismantling structural inequity based on race and class[.]”¹⁷² and the Lutra Living Trust, submitted a shareholder proposal regarding “Report of Risks of Policies affecting Reproductive Rights” that was ultimately withdrawn when an agreement was reached with the company.¹⁷³

The graph below summarizes the distribution of shareholder proposals on reproductive health from 2012 to March 31, 2023.¹⁷⁴

¹⁷⁰ See Church & Dwight, Shareholder Resolution Filed by As You Sow on Corporate Alignment of Stated Values with Public Policy Involvement; Includes Reproductive Health, (Nov. 20, 2020), <https://www.asyousow.org/resolutions/2020/11/20/church-dwight-corporate-alignment-of-stated-values-with-public-policy> [<https://perma.cc/MM65-B9AX>].

¹⁷¹ Macy’s, Inc., Shareholder Resolution Filed by As You Sow for a Report on Political Spending Related to Company Values and Policies (Dec. 11, 2019), <https://www.asyousow.org/resolutions/2019/12/11/macys-report-on-political-spending-related-to-company-values-and-policies> [<https://perma.cc/Z2BV-J273>].

¹⁷² EDWARD W. HAZEN FOUNDATION, <https://hazenfoundation.org/> (last visited June 20, 2023) [<https://perma.cc/5VZ3-LG3Y>].

¹⁷³ See Letter from Laurie F. Humphrey, Deputy Gen. Couns., Progressive Corp., to Off. of Chief Couns., Div. of Corp. Fin., U.S. Sec. & Exch. Comm’n, Withdrawal of No-Action Request Dated January 21, 2020 Regarding Shareholder Proposal to The Progressive Corporation by As You Sow (Mar. 13, 2020), <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2020/asyousowlutrahazenprogressive032020-14a8.pdf> [<https://perma.cc/XRT9-P8PL>].

¹⁷⁴ Graph data was obtained from a keyword search in Westlaw’s EDGAR Filings & Disclosure database for companies headquartered in the U.S. The search term used was: abortion OR (reproductive /3 (rights OR services OR health)). The search results were manually filtered to only include shareholder proposals that actually discussed issues related to abortion or reproductive rights for vote. The search revealed a noticeable increase of company Schedule 14A filings with shareholder proposals addressing abortion and reproductive rights in 2022. Nine shareholder proposals were filed by corporations in the first quarter of 2023. Most proposals requested political congruency reports meaning that they wanted corporations to explain why they gave to anti-abortion candidates if they purported to be supportive of women. Interestingly, one proposal wanted the company to discuss the dangers of supporting abortion.



More details on the specific proposals in this ten-year and one-quarter date range can be found in Appendix I.

Notably, in the earlier shareholder proposals from 2012–2018, the tone and request differed significantly from the more recent ones, perhaps reflecting the different societal expectations that shareholders had of corporations in the past. To date, the shareholder proposals related to reproductive health have met with little success so far. Lowe’s shareholder proposal had thirty-two percent of the vote, and Walmart Inc. (“Walmart”) received thirteen percent support.¹⁷⁵ In the case of Macy’s and Progressive, the shareholder proposal was withdrawn before it could be voted on.¹⁷⁶ This type of muted response to shareholder proposals involving social issues is not atypical, however, at the initial stages.

1. Earlier Shareholder Proposals

Earlier shareholder proposals in the ten-year and one quarter dataset in Appendix I differed from the ones in more recent years and characterized abortion as a controversial issue that corporations should avoid supporting. As an example, The Home Depot’s 2012 shareholder proposal stated,

¹⁷⁵ Hudson, *supra* note 96.

¹⁷⁶ *Id.*

We should consider how some charities are perceived to be supporting potentially volatile issues like abortion, same sex marriage, or illegal immigration. Support of controversial charities can result in boycotts and/or publicity which negatively impact sales and earnings. The first responsibility of our company is to make money for the shareholders, not give it away to someone's favorite charity.¹⁷⁷

The shareholder proposal then suggested that the solution was for The Home Depot “to list the recipients of corporate charitable contributions or merchandise vouchers of \$6,000 or more on the company website.”¹⁷⁸

In 2012 and 2013, Merck shareholder proposals characterized Planned Parenthood, a recipient of Merck's charitable dollars, as “involved in clearly more controversial issues” and requested “that the independent members of the Board of Directors institute a comprehensive review of Merck's charitable contributions and political contributions and issue a report addressing the interrelation of both and how will they serve overall corporate policy.”¹⁷⁹

In 2017, a shareholder proposal for General Electric described Planned Parenthood, a recipient of General Electric's charitable dollars, as “the controversial abortion provider”¹⁸⁰ and asked that the company provide an annual report on its website which would disclose

the company's standards for choosing recipients of company assets in the form of charitable contributions; the business rationale and purpose for each of the charitable contributions, if any; personnel participating in the decision to contribute; the benefits to society at-large produced by company contributions;

¹⁷⁷ The Home Depot, Inc., 2012 Proxy Statement (Form DEF 14A) 30 (Apr. 2, 2012), <https://www.sec.gov/Archives/edgar/data/354950/000119312512146086/d277811ddef14a.htm>.

¹⁷⁸ *Id.*

¹⁷⁹ Merck & Co., 2012 Proxy Statement (Form DEF 14A) 69 (Apr. 12, 2012), <https://d1lge852tjjqow.cloudfront.net/CIK-0000310158/1196f557-845b-47a6-aa5b-bb88d5c6633a.pdf> [<https://perma.cc/7SC3-XCU5>]; Merck & Co., 2013 Proxy Statement (Form DEF 14A) 67 (Apr. 15, 2013), <https://d1lge852tjjqow.cloudfront.net/CIK-0000310158/870c7e7e-cf2d-4478-9f48-6ecbaab8b266.pdf> [<https://perma.cc/2YZU-D8VM>].

¹⁸⁰ Gen. Electric Co., 2017 Proxy Statement (Form DEF 14A) 69 (Apr. 26, 2017), <https://d18rnop25nwr6d.cloudfront.net/CIK-0000040545/f341c06d-2a18-43f8-8874-1e83e2fe55a7.pdf> [<https://perma.cc/SRX5-2LRS>].

and a follow-up report confirming the contribution was used for the purpose stated.¹⁸¹

Finally, in 2017 and 2018, Pacific Gas & Electric received a shareholder proposal, citing Planned Parenthood as one of the charities which the company gave to and “requested that the board of directors discontinue the charitable giving program unless a majority of [Pacific Gas & Electric Company] customers positively affirm it through a public vote.”¹⁸²

2. Political Spending Misalignment Proposals

As You Sow submitted a shareholder proposal with AbbVie Inc. titled, “Alignment of Stated Corporate Values with Political and Electioneering Expenditures,” which noted that “in the 2016–2020 election cycles, AbbVie and its employee PACs donated at least \$1,068,050 to politicians and political organizations working to weaken women’s access to reproductive health care.”¹⁸³ It further stated, “To minimize possible missteps and risk to the firm’s reputation and brand, AbbVie should establish clear policies and reporting on corporate electioneering and political spending that contrast with its stated healthcare, social and environmental objectives.”¹⁸⁴ The shareholder proposal also requested that AbbVie provide a report which would analyze how its preceding year’s political, lobbying, and electioneering expenditures were congruent or not with its company values and policies; if they were found to be incongruent then the company would need to state whether it would “lead to a change in future expenditures or contributions.”¹⁸⁵ It would “also contain an analysis of risks to our

¹⁸¹ *Id.*

¹⁸² PG&E Corp., 2017 Proxy Statement (Form DEF 14A) 75 (May 30, 2017), https://s1.q4cdn.com/880135780/files/doc_financials/2017/annual/2017-Proxy-Statement-Final.pdf [<https://perma.cc/D59U-V3SF>]; PG&E Corp., 2018 Proxy Statement (Form DEF 14A) 78 (May 22, 2018), <https://d18rnop25nwr6d.cloudfront.net/CIK-0001004980/c356e4b3-b2b1-447b-b05d-05579a3aea32.pdf> [<https://perma.cc/U9N7-XB8W>].

¹⁸³ AbbVie Inc., Shareholder Resolution Filed by As You Sow on the Alignment of Stated Corporate Values with Political and Electioneering Expenditures (Dec. 1, 2021), <https://www.asyousow.org/resolutions/2021/11/22-abbvie-alignment-of-stated-corporate-values-with-political-and-electioneering-expenditure> [<https://perma.cc/M6UG-4GSX>].

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

company's brand, reputation, or shareholder value of expenditures in conflict with publicly stated company values."¹⁸⁶ Similar shareholder proposals were also filed during the 2022 proxy season (with the exact same title) with Amgen Inc.¹⁸⁷ and AT&T Inc.¹⁸⁸

Clean Yield Asset Management works with progressive investors to create "custom portfolios that reflect their values and seek to create a just and environmentally sustainable economy."¹⁸⁹ It submitted a shareholder proposal for Cigna titled, "Political Contributions Misalignment."¹⁹⁰ It stated, "Cigna promotes gender equity in the workplace, and more than three-quarters of its workforce is female. Yet in the 2016-2020 election cycles, Cigna and its employee PACs have donated at least \$3.4 million to politicians and political organizations working to weaken women's access to reproductive health care."¹⁹¹ It specifically pointed out the Texas bill, "which creates potential liability for organizations that insure in-state abortions after approximately 6 weeks of pregnancy. Large majorities of college-educated workers say the ability to control when and if to become a parent has been important

¹⁸⁶ *Id.*

¹⁸⁷ "Amgen and its employee Political Action Committees ("PACs") donated at least \$1,425,400 to politicians and political organizations working to weaken women's access to reproductive health care." Amgen Inc., Shareholder Resolution Filed by As You Sow on the Alignment of Stated Corporate Values with Political and Electioneering Expenditures (Dec. 14, 2021), <https://www.asyousow.org/resolutions/2021/12/6-amgen-alignment-of-stated-corporate-values-with-political-and-electioneering-expenditures> [<https://perma.cc/B6UW-DXCM>].

¹⁸⁸ "AT&T states . . . [it] [h]as a 'history of commitment to gender equality,' yet Proponent estimates that in the 2016-2018 election cycles, AT&T and its employee PACs made political donations totaling at least \$16.4 million to politicians and political organizations working to weaken women's access to reproductive health care." AT&T Inc., Shareholder Resolution Filed by As You Sow on the Alignment of Stated Corporate Values with Political and Electioneering Expenditures (Nov. 10, 2021), <https://www.asyousow.org/resolutions/2021/11/10-att-alignment-of-stated-corporate-values-with-political-and-electioneering-expenditures> [<https://perma.cc/5GVC-SW3U>].

¹⁸⁹ CLEAN YIELD ASSET MGMT., <https://www.cleanyield.com> (last visited June 26, 2023) [<https://perma.cc/8WWU-AFHT>].

¹⁹⁰ Cigna, Shareholder Proposal Filed by Clean Yield Asset Mgmt. on Political Contributions Misalignment (Jan. 2022), <https://rhiaventures.org/wp-content/uploads/2022/01/Cigna-2022-Proposal-.pdf> [<https://perma.cc/R67Z-FPCC>].

¹⁹¹ *Id.*

to their career path.”¹⁹² Again, an annual report was suggested to make the public (and presumably the company’s stakeholders) more aware of Cigna’s incongruity between its stated company values and its political expenditures.¹⁹³

Clean Yield Asset Management also submitted a shareholder proposal for Fed Ex Corp.’s 2022 proxy ballot titled, “Shareholder Advisory Vote on Electioneering Contributions.”¹⁹⁴ It stated, “FedEx has supported gender diversity by sponsoring a women’s employee resource group and providing maternity leave, financial assistance with adoptions and providing a work-life balance program.”¹⁹⁵ It went on to note FedEx and FedExPAC’s over \$4 million in political donations in the 2016–2020 election cycles “to politicians and political organizations working to weaken access to reproductive health care, undermining the ability of employees to manage their fertility.”¹⁹⁶ A report to explain the discrepancy between company values and political donations was requested.¹⁹⁷

Dr. Ruth Shaber, acting on behalf of the Tara Health Foundation,¹⁹⁸ Employees’ Retirement System of Rhode Island, and Trillium Asset Management¹⁹⁹ submitted a shareholder proposal for The Home Depot 2022 Proxy Ballot titled, “Political Spending Misalignment.”²⁰⁰ Like the

¹⁹² *Id.*

¹⁹³ *See id.*

¹⁹⁴ FedEx, Shareholder Proposal Filed by Clean Yield Asset Mgmt. on Shareholder Advisory Vote on Electioneering Contributions (Jan. 2022), <https://rhiaventures.org/wp-content/uploads/2022/01/Fedex-2022-Resolution-Unfootnoted.pdf> [<https://perma.cc/9FYM-23EF>].

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *See id.*

¹⁹⁸ *About Our Team*, TARA HEALTH FOUND., <https://tarahealthfoundation.org/our-team> (last visited Aug. 12, 2023) [<https://perma.cc/7EAV-PXAF>]. “[D]evelop[s] philanthropic capital through venture capital, grantmaking, debt, and public equities to drive social and financial returns.” TARA HEALTH FOUND., <https://tarahealthfoundation.org/> (last visited June 20, 2023) [<https://perma.cc/44ML-DARJ>].

¹⁹⁹ Trillium Asset Management is described as “[d]edicated to sustainable and responsible investing.” *About Us*, TRILLIUM ASSET MGMT., <https://www.trilliuminvest.com/> (last visited June 20, 2023) [<https://perma.cc/VW4M-58WD>].

²⁰⁰ The Home Depot, Shareholder Proposal Filed by Dr. Ruth Shaber Acting on Behalf of the Tara Health Found. on Political Spending Misalignment (Jan. 2022),

other proposals, this one begins with the company's commitment to women and contrasts this commitment with the nearly \$7.5 million in political donations by the company's employee PAC "to politicians and political organizations working to weaken access to abortion."²⁰¹ It ends with a request for an annual report.²⁰² The Tara Health Foundation also submitted a similar shareholder proposal for the Pfizer Inc. 2022 proxy ballot regarding political contributions misalignment.²⁰³ The proposal noted that Pfizer's "political contributions are made to support the election of candidates, political parties and committees that support public policies important to the industry, such as innovation and access to medicines."²⁰⁴ Although the company is involved in manufacturing contraceptives as well as "a drug commonly prescribed as an abortifacient . . . [it] has been a top contributor to a 527 organization that funds state legislators' efforts to implement extreme anti-abortion measures."²⁰⁵ Donations totaling at least \$8.4 million were made by Pfizer and its employee PACs in the 2016–2020 election cycles "to politicians and political organizations working to weaken women's access to reproductive health care."²⁰⁶

The Educational Foundation of America²⁰⁷ submitted a shareholder proposal for the 2022 proxy ballot of JPMorgan Chase & Company titled, "Political Spending Misalignment."²⁰⁸ In the proposal, it stated that "JPMorgan's Women on the Move initiative provides a platform for

<https://rhiaventures.org/wp-content/uploads/2022/01/HD-2022-Resolution-.pdf> [https://perma.cc/7Q8W-38BR].

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ Pfizer, Shareholder Proposal Filed by Tara Health Found. on Political Contributions Misalignment (Jan. 2022), <https://rhiaventures.org/wp-content/uploads/2022/01/PFE-2022-Resolution-.pdf> [https://perma.cc/JN7D-XQGQ].

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ The Educational Foundation of America is a family foundation which describes itself as "Advancing Progressive Change Through Support For Creative Initiatives Working Toward Sustainability, Justice, And Equity." THE EDUC. FOUND. OF AM., <https://www.theefa.org/> (last visited June 20, 2023) [https://perma.cc/ZXG5-4DHG].

²⁰⁸ JPMorgan & Chase, Shareholder Proposal Filed by the Educ. Found. of Am. on Political Spending Misalignment (Jan. 2022), <https://rhiaventures.org/wp-content/uploads/2022/01/JPM-2022-Resolution.pdf> [https://perma.cc/GCJ5-J4LU].

networking and career development at all levels of the company and is expanding credit and opportunity to female clients and customers as well. Management is working to expand supportive policies to working parents and their families.”²⁰⁹ However, it “contributed at least \$2.8 million to anti-choice candidates and political committees from the corporate treasury and company-sponsored political action committees” in the 2016–2020 election cycles.²¹⁰ The proposal asked for the publication of an annual report analyzing the incongruencies between stated values and political expenditures.²¹¹ It submitted a similar shareholder proposal accompanied by the Jessie Smith Noyes Foundation for UnitedHealth Group (“UHG”) titled “Political Contributions Misalignment.”²¹² “Although UHG offers insurance coverage for abortion to its clients, based on publicly available records, the proponents estimate that in the 2016–20 election cycles, the company and its employee PAC have donated at least \$8.5 million to politicians and political organizations working to weaken women’s access to abortion.”²¹³ The proposal noted that this amount included \$120,000 in the 2020 election cycle to the sponsors of the Texas S.B. 8 as well as over \$230,000 to the sponsors of similar bills restricting abortion bills in fourteen other states.²¹⁴ It requested the publication of an annual report analyzing these inconsistencies between stated company values and political expenditures.²¹⁵

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *See id.*

²¹² UnitedHealth Grp., Shareholder Proposal Filed by the Educ. Found. of Am. on Political Contributions Misalignment (2022), <https://rhiaventures.org/wp-content/uploads/2022/01/UHG-2022-Proposal.pdf> [<https://perma.cc/A64Y-7LZD>] [hereinafter UnitedHealth Grp. Shareholder Proposal]; *Shareholder Proposals Challenge Companies on Support for Politicians Opposing Abortion Access, Progress on Climate, Voting Rights*, PR NEWSWIRE (Jan. 14, 2022, 12:49 EST), <https://www.prnewswire.com/news-releases/shareholder-proposals-challenge-companies-on-support-for-politicians-opposing-abortion-access-progress-on-climate-voting-rights-301461367.html> [<https://perma.cc/FD6C-QGJE>].

²¹³ UnitedHealth Grp. Shareholder Proposal, *supra* note 212.

²¹⁴ *Id.*

²¹⁵ *See id.* The proposal also noted, “This proposal aligns with the standards and procedures set forth in the Center for Political Accountability’s Model Code of Conduct.” *Id.*

3. Risk Mitigation Proposals

This next Subpart delves into risk mitigation proposals. These proposals were filed with companies with operations in almost all or all fifty states. They enumerated the challenges of abortion access and discussed the implications of increased challenges should *Roe v. Wade* be overturned and asked for the public issuance of a board report prior to December 31, 2022, detailing strategies besides litigation and legal compliance to mitigate the risks that would accompany restricted access to reproductive healthcare.

The Educational Foundation of America filed a shareholder proposal for Lowe's Companies, Inc. ("Lowe's") 2022 shareholder meeting.²¹⁶ It discussed the challenges at the federal and state levels in the U.S. to access abortion. Lowe's has operations in all fifty states, but specifically pointed out North Carolina's passage of "a pre-*Roe* law that, if revived, would outlaw all abortions within the state. Should that occur, Lowe's may find it difficult to recruit employees to North Carolina, or to the 20+ states now considered likely to outlaw abortion if *Roe* is overturned."²¹⁷ It requested that the Lowe's board issue a public report similar to the one outlined above prior to December 31, 2022.²¹⁸

Trillium Asset Management, along with Zevin Asset Management,²¹⁹ filed a resolution for TJX Companies, Inc.'s ("TJX") 2022 shareholder meeting.²²⁰ Like Lowe's, it operates in all fifty states.²²¹ The resolution stated, "In 2021, 40% of TJX's stores in the U.S. and Puerto Rico were in states that could immediately prohibit abortion entirely under this

²¹⁶ Lowe's Companies, Inc., Shareholder Proposal Filed by the Educ. Found. of Am. for the 2022 Shareholder Meeting (Jan. 2022), <https://rhiaventures.org/wp-content/uploads/2022/01/Lowes-2022-Proposal.pdf> [<https://perma.cc/J8CQ-UBT9>].

²¹⁷ *Id.*

²¹⁸ *See id.*

²¹⁹ "Zevin Asset Management is a boutique investment manager with a global focus that integrates sustainability into professional investment management for our clients -- individuals, families, religious institutions, and non-profits." ZEVIN ASSET MGMT., <https://www.zevin.com/> (last visited June 20, 2023) [<https://perma.cc/US3Z-4TYQ>].

²²⁰ TJX Companies, Inc., Resolution Filed by Trillium Asset Mgmt. for the 2022 Shareholder Meeting (Jan. 2022), <https://rhiaventures.org/wp-content/uploads/2022/01/TJX-2022-Proposal.pdf> [<https://perma.cc/RV8A-JTTM>].

²²¹ *Id.*

scenario.”²²² It requested that the TJX board issue a public report prior to December 31, 2022.²²³

Clean Yield Asset Management filed a resolution for Walmart’s 2022 shareholder meeting.²²⁴ Walmart has operations in all fifty states.²²⁵ “As of October 2021, 60% of Walmart’s 5,342 stores in the U.S. were in states that could immediately prohibit abortion entirely under this scenario.”²²⁶ It requested that the Walmart board issue a public report prior to December 31, 2022.²²⁷

The role of shareholder proposals in reproductive health post-*Dobbs* will continue to evolve. Since the SEC appears to be amenable to such proposals, shareholders will likely test the boundaries of the proposals that they ask for. In the 2022 proxy season, their approach seemed to focus on transparency — they wanted companies to issue reports about the inconsistencies between their stated company values and their political donations. Shareholder proposals in the first quarter of 2023 also seemed similar with the exception of one proposal that was not supportive of reproductive health.²²⁸ In this way, reproductive health-related shareholder proposals did not differ from other ESG-related proposals in that they were precatory in nature. The use of this tactic aligns with both stakeholder governance and shareholder primacy as discussed in more depth in Part IV.A below.

III. WHAT CORPORATE INVOLVEMENT OR LACK OF INVOLVEMENT IN REPRODUCTIVE HEALTH ILLUSTRATES ABOUT THE STAKEHOLDER THEORY OF GOVERNANCE

This Part focuses on the implications of the involvement, or lack thereof, by corporations in reproductive rights matters while

²²² *Id.*

²²³ *See id.*

²²⁴ Walmart, Inc., Resolution Filed by Clean Yield Asset Mgmt. for the 2022 Shareholder Meeting (Jan. 2022), <https://rhiaventures.org/wp-content/uploads/2022/01/WMT-2022-Resolution.pdf> [<https://perma.cc/5DT9-WLGG>] [hereinafter Walmart, Inc. Resolution].

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *See infra* Appendix I.

simultaneously assessing the limitations of the stakeholder theory of governance. In order to frame this discussion, this Part first provides a brief overview of the stakeholder theory of governance. Next, it explains the extent to which corporations have engaged in discussions around reproductive rights. This Part then poses the question of whether we are headed toward a future where shareholder primacy and stakeholder governance are not mutually exclusive.

A. *Defining Stakeholder Governance*

Support for stakeholder governance in legal scholarship has grown over time.²²⁹ However, scholars have different ideas about what constitutes stakeholder governance.²³⁰ As an example, Lucian Bebchuk and Roberto Tallarita categorize stakeholder governance as “instrumental stakeholderism” or “pluralistic stakeholderism”; the former involves maximizing long-term shareholder value by prioritizing the interests of stakeholders and the latter is when the impact on stakeholders is of primary significance irrespective of how it affects shareholder value.²³¹ One popular viewpoint is that the growing support for stakeholder governance over the past decade is driven by “the increasing concerns about the effects that companies and the corporate economy have on stakeholders, as well as the interest in and demand for, reforms to address them.”²³² In addition, some scholars have observed that leaders of corporations “use stakeholderism ‘strategically’

²²⁹ See Simon Deakin, *The Corporation as Commons: Rethinking Property Rights, Governance and Sustainability in the Business Enterprise*, 37 *QUEEN’S L.J.* 339, 379 (2012); Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 *N.Y.U. L. REV.* 733, 868 (2005); Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 *HARV. L. REV.* 1197, 1295-96 (1999); see, e.g., LYNN STOUT, *THE SHAREHOLDER VALUE MYTH* 13 (2012) (arguing against “shareholder value maximization”); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 *VA. L. REV.* 247 (1999) (characterizing directors as “mediating hierarchs” who should balance the interests of shareholders, employees, creditors, and other stakeholders); E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 *HARV. L. REV.* 1145 (1932) (arguing corporations should be accountable to both the society in which they operated and their shareholders).

²³⁰ See *supra* note 229 and accompanying text.

²³¹ Bebchuk & Tallarita, *supra* note 17, at 108-09, 114.

²³² *Id.* at 108.

to insulate corporate leaders from shareholder oversight and to impede or delay stakeholder-protecting reforms that would constrain companies' choices."²³³ Ultimately, although corporations may act on certain matters at the behest of shareholders, they do not necessarily take action because it is the right thing to do. Sometimes they do so to appease one or more stakeholder constituencies. In the case of reproductive health, for example, most corporations have found it to be prudent and, perhaps, politically expedient to generally remain silent.

In evaluating the merits of the stakeholder theory of governance, there is also the question of how corporations prioritize different stakeholder interests under this governance framework.²³⁴ Stakeholders in this case generally include customers, employees, and suppliers and may even include the community at large.²³⁵ According to Bebchuk and Tallarita, "[t]his reliance on the role of discretion is significant because the task that stakeholderism assigns to corporate leaders is Herculean."²³⁶ Jill Fisch observes, "[i]f . . . stakeholder governance is intended to authorize or even require the sacrifice of shareholder value, it raises questions both about the extent to which corporate law can or should permit that sacrifice as well as the process by which such decisions should be made."²³⁷

B. *Corporate Involvement or Non-Involvement in Reproductive Rights*

Pre-*Dobbs*, abortion-related coverage was through employer health plans. Post-*Dobbs*, if corporations offered abortion-related coverage,

²³³ *Id.*

²³⁴ See, e.g., Fisch, *supra* note 135, at 121 (noting that some scholars, like former Delaware Supreme Court Justice Leo Strine, want to prioritize employee interests).

²³⁵ Stakeholders groups are also identified in state constituency statute. See Bebchuk & Tallarita, *supra* note 17, at 117 tbl.1. The stakeholders noted above are either listed in all constituency statutes (employees and customers) or mostly all (suppliers); some constituency statutes even have a catch-all phrase that allows directors to include other stakeholders at their discretion. *Id.* at 117-18.

²³⁶ *Id.* at 115. "[P]luralistic stakeholderism relies on directors to make the hard choices necessary to define the groups of stakeholders whose interests should be taken into account and then to weigh and balance these interests, which are often difficult to measure, in the vast number of situations in which trade-offs arise." *Id.*

²³⁷ Fisch, *supra* note 135, at 121.

they would do so in different ways: employer health plans,²³⁸ coverage which included part-time staff,²³⁹ or expanded travel benefits.²⁴⁰ Appendix II provides an overview of the reproductive health benefits offered by various companies. However, the different types of coverage were accompanied by varying degrees of legal risk.

1. Legal Risks

Larger companies tend to be self-insured (i.e. self-funded).²⁴¹ In a 2019 study by the Henry J. Kaiser Family Foundation, “[s]ixty-one percent of covered workers [were] in a plan that [was] completely or partially self-funded.”²⁴² This means that the company pays their workers’ claims and typically hires an insurer to manage the health plan.²⁴³ These plans are subject to federal regulation which does not ban

²³⁸ See *infra* Appendix II: Reproductive Health Benefits by Company (containing a chart providing an overview of the reproductive health benefits offered by different companies).

²³⁹ See, e.g., *infra* Appendix II: Reproductive Health Benefits by Company (entries on Patagonia and Levi Strauss). Note that under the Affordable Care Act, large employers (50+ employees) must provide health insurance coverage to employees who work at least 30 hours per week. See 26 U.S.C. § 4980H.

²⁴⁰ See *infra* Appendix II: Reproductive Health Benefits by Company (containing a chart providing an overview of the reproductive health benefits offered by different companies).

²⁴¹ “As expected, covered workers in large firms are significantly more likely to be in a self-funded plan than covered workers in small firms (80% vs. 17%). The percentage of covered workers in self-funded plans generally increases as the number of workers in a firm increases.” KAISER FAM. FOUND., EMPLOYER HEALTH BENEFITS: 2019 ANNUAL SURVEY 170 (2019), <https://files.kff.org/attachment/Report-Employer-Health-Benefits-Annual-Survey-2019> [<https://perma.cc/U3A2-5A3V>].

²⁴² *Id.*

²⁴³ “A self-insured health plan is a type of group health insurance in which the employer collects premiums and is responsible for paying claims when employees need care. These plans can be self-administered, or the business may work with an insurance provider to get stop-loss coverage and administrative support.” Lindsay Frankel, *Best Health Insurance Companies for Small Businesses*, INVESTOPEDIA, <https://www.investopedia.com/best-health-insurance-for-small-business-owners-4846573> (last updated Apr. 30, 2023) [<https://perma.cc/U43M-4TKQ>]. There is some criticism that self-insured employers cannot contain the cost of health care because “[i]nsurance carriers simply pass provider prices on to employers, and thus employers lack ‘skin in the game’ to impose genuine pricing pressure on providers.” Gloria Sachdev, Chapin White & Ge Bai,

abortion care; in contrast, “many smaller and mid-size firms have fully-insured plans, which are subject to state oversight and would have a harder time providing abortion benefits or travel reimbursement in states where the procedure is banned.”²⁴⁴ Additionally, in states which limit or prohibit abortion-related services, insurance companies may limit coverage for such services for employees in those states even if the employee can travel to a different state which allows them.²⁴⁵

In the case of travel reimbursement policies, the Employee Retirement Income Security Act of 1974 (“ERISA”) may provide a viable defense from a civil liability perspective because it prevents states from implementing requirements that “relate to” employer-sponsored health plans.²⁴⁶ However, ERISA cannot limit states from enforcing criminal laws if those states have laws which “impose criminal penalties on abortion providers, pregnant people, and/or individuals or entities that ‘aid and abet’ abortions.”²⁴⁷

Self-Insured Employers Are Using Price Transparency to Improve Contracting with Health Care Providers: The Indiana Experience, HEALTH AFFS. BLOG (Oct. 7, 2019), <https://www.healthaffairs.org/doi/10.1377/forefront.20191003.778513/full/> [<https://perma.cc/E6F4-H5WQ>].

²⁴⁴ Tami Luhby, *If You Use Your Company’s Abortion Travel Benefits, Will Your Boss Find Out?*, CNN BUS. (July 6, 2022, 12:09 PM EDT), <https://www.cnn.com/2022/07/06/success/companies-abortion-travel-policy/index.html> [<https://perma.cc/SW53-X9AY>].

²⁴⁵ Lisa Michelle Kohring & Weston J. Mumme, *Employment Implications Arising from Dobbs v. Jackson Women’s Health Organization*, HOLLAND & KNIGHT (June 29, 2022), <https://www.hklaw.com/en/insights/publications/2022/06/employment-implications-arising-from-dobbs-v-jackson> [<https://perma.cc/MT39-3YLZ>]. It is unclear how the standard/default plan would be structured in those places; however, if it is per state law, that default would end up impacting self-insureds that do not actively seek to modify it. See Louise Norris, *What Is Self-Insured Health Insurance*, VERY WELL HEALTH, <https://www.verywellhealth.com/what-is-self-insured-health-insurance-and-how-is-it-regulated-4688567> (last updated Mar. 19, 2023) [<https://perma.cc/U6VS-RUAW>].

²⁴⁶ See Schwabe, Williamson & Wyatt PC, *Employer-Provided Travel Benefits in Response to Dobbs and State Prohibitions on Abortion*, JD SUPRA (July 22, 2022), <https://www.jdsupra.com/legalnews/employer-provided-travel-benefits-in-3184422/> [<https://perma.cc/99CC-GD8E>].

²⁴⁷ Catherine T. Barbieri & Pamela A. Thein, *The Supreme Court’s Dobbs Ruling Creates a Variety of Significant Legal Issues*, FOX ROTHSCHILD LLP (July 1, 2022), <https://www.foxrothschild.com/publications/the-supreme-courts-dobbs-ruling-creates-a-variety-of-significant-legal-issues> [<https://perma.cc/A4PE-EXJU>].

Some states, such as Texas, have targeted firms or companies that reimburse for abortion-related services for employees or who otherwise help with abortion access.²⁴⁸ Republican lawmakers from Texas and Oklahoma sent a letter to Lyft Chief Executive Officer, Logan Green, stating that the states would “take swift and decisive action” if the company instituted its policy of paying the travel costs of women who reside in Texas or Oklahoma and leave their state to obtain an abortion.²⁴⁹ One of the actions enumerated included the introduction of legislation which would prohibit corporations from doing business in Texas if they paid for elective abortions.²⁵⁰ Another was subjecting any director or officer of a publicly traded corporation that uses corporate resources to pay for elective abortions or reimburses abortion-related expenses using corporate resources to criminal liability.²⁵¹ Those companies that are heavily regulated by the state and depend on state licenses to operate may also be subject to criminal liability; they could even have their licenses revoked if they provide abortion-related benefits and state legislators choose to make examples out of them.²⁵²

There is also the issue of the limitations of privacy protections under the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) post-*Dobbs*. The Department of Health and Human Services published guidance in June 2022 which stated that the HIPAA Privacy Rules supports access to reproductive health care services “by giving individuals confidence that their protected health information (PHI), including information relating to abortion and other sexual and reproductive health care, will be kept private.”²⁵³ It further states, “The

²⁴⁸ See Maloney, *supra* note 24.

²⁴⁹ Reuters, *Legal Clashes Await U.S. Companies Covering Workers’ Abortion Costs*, NBC NEWS (June 27, 2022, 12:41 PM PDT), <https://www.nbcnews.com/business/business-news/companies-offering-abortion-related-travel-expenses-legal-exposure-rcna35559> [<https://perma.cc/6CF8-HQ57>].

²⁵⁰ *Id.*

²⁵¹ See Barbieri & Thein, *supra* note 247.

²⁵² See Amanda Ottaway & Kellie Mejdric, *What Employers Should Do Now That Roe Has Fallen*, LAW360 (June 24, 2022, 8:39 PM EDT), <https://www.law360.com/articles/1505902/what-employers-should-do-now-that-roe-has-fallen> [<https://perma.cc/PC5E-3GCV>] (quoting DLA Piper partner Erin M. Sweeney).

²⁵³ *HIPAA Privacy Rule and Disclosures of Information Relating to Reproductive Health Care*, U.S. DEP’T OF HEALTH & HUM. SERVS., <https://www.hhs.gov/hipaa/for->

Privacy Rule permissions for disclosing PHI without an individual's authorization for purposes not related to health care, such as disclosures to law enforcement officials, are narrowly tailored to protect the individual's privacy and support their access to health services."²⁵⁴ However, the guidance then states,

The Privacy Rule permits but does not require a covered entity, consistent with applicable law and standards of ethical conduct, to disclose PHI if the covered entity, in good faith, believes the use or disclosure is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public, and the disclosure is to a person or persons who are reasonably able to prevent or lessen the threat.²⁵⁵

There is also the possibility that customers of tech companies may be prosecuted for having an abortion if law enforcement agencies are able to obtain digital data from Apple, Google, and the like in the event there is a criminal investigation. "That's raised concerns from privacy advocates about enforcers of abortion laws tapping into period apps, phone location data and other sensitive online health information."²⁵⁶

C. *Toward a Hybrid Future?*

The stakeholder capitalism theory of governance and the shareholder primacy viewpoint are not mutually exclusive. As one pundit observed, "Yes, shareholder capitalism has delivered economic growth with many important benefits, but it's also left a path of environmental and social destruction for future generations to grapple with."²⁵⁷ As a society, we are now at a crucial juncture where stakeholder capitalism is playing an

professionals/privacy/guidance/phi-reproductive-health/index.html (last updated June 29, 2022) [<https://perma.cc/N2DX-WAVA>].

²⁵⁴ *Id.*

²⁵⁵ *Id.* Note that corporations are not covered entities unless they are healthcare providers. See *Covered Entities and Business Associates*, U.S. DEP'T OF HEALTH & HUM. SERVS., <https://www.hhs.gov/hipaa/for-professionals/covered-entities/index.html> (last updated June 16, 2017) [<https://perma.cc/5V79-37E8>] (emphasis in original).

²⁵⁶ D'Innocenzio & Hadero, *supra* note 13.

²⁵⁷ Doug Sundheim & Kate Starr, *Making Stakeholder Capitalism a Reality*, HARV. BUS. REV. (Jan. 22, 2020), <https://hbr.org/2020/01/making-stakeholder-capitalism-a-reality> [<https://perma.cc/YVV7-TX8H>].

increasingly prominent role to mitigate some of the negative impact wrought by the sole pursuit of profit under the shareholder primacy theory. Admittedly, there are cynics who believe that stakeholder capitalism is “a PR stunt. Window dressing designed to placate protesters and pretty-up corporate images.”²⁵⁸ To have a truly functional stakeholder-oriented system requires a rethinking of how companies approach particular ESG issues.

In August 2019, multinational chief executive officers of the influential Business Roundtable revised their “Statement on the Purpose of a Corporation” stating, “[W]e share a fundamental commitment to all of our stakeholders Each of our stakeholders is essential. We commit to deliver value to all of them, for the future success of our companies, our communities and our country.”²⁵⁹ In December 2019, The World Economic Forum updated its Davos Manifesto “The Universal Purpose of a Company in the Fourth Industrial Revolution” expressing, “The purpose of a company is to engage all its stakeholders in shared and sustained value creation. In creating such value, a company serves not only its shareholders, but all its stakeholders — employees, customers, suppliers, local communities and society at large.”²⁶⁰ In order to meet the lofty ideal of each stakeholder being essential and the need for sustained value creation, women — who make up more than half of the workforce — cannot be left out of the equation. By failing to account for the reproductive health needs of women, who make up nearly 58.7% of the civilian labor force,²⁶¹ it results in slowing or stopping women’s economic progress in the workforce in their chosen profession and also has a detrimental impact on the economic health of the United States.²⁶² So there are both public-

²⁵⁸ *Id.*

²⁵⁹ *Our Commitment*, BUS. ROUNDTABLE, <https://opportunity.businessroundtable.org/ourcommitment/> (last visited June 20, 2023) [<https://perma.cc/X28W-G3NH>].

²⁶⁰ Klaus Schwab, *Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution*, WORLD ECON. F. (Dec. 2, 2019), <https://www.weforum.org/agenda/2019/12/davos-manifesto-2020-the-universal-purpose-of-a-company-in-the-fourth-industrial-revolution/> [<https://perma.cc/3R56-X845>].

²⁶¹ *QuickFacts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/LFE046221> (last visited Nov. 4, 2023) [<https://perma.cc/44BA-8XGZ>].

²⁶² See *infra* Part IV.C for a discussion on the negative economic impact of fewer women in the workforce.

oriented and economic reasons for supporting reproductive health, particularly abortions. Ultimately, the stakeholder capitalism theory of governance is in part limited or expanded by a particular group of stakeholders, such as employees and consumers; however, whomever the stakeholders are identified as, they will always include women. In the case of abortion, a particular group of stakeholders — employees — demanded that their employers support abortion rights. While corporate norms vary from company to company, employees may also inform the alternatives that corporations can consider. In addition, public opinion in the abortion debate can also influence what corporations decide to do regarding their reproductive health policies. Lastly, ESG reporting plays a role in helping to inform the public about what companies are doing in the arena of reproductive health.

IV. POLICY IMPLICATIONS

This last Part addresses the possible policy outcomes based on the data and analysis provided in this Article and offers a path forward for corporations that hopefully minimizes the politics that inevitably attaches itself to any abortion rights-related conversation.

A. *Continued Use of Shareholder Proposals*

Shareholder proposals offer one avenue of getting corporations to prioritize reproductive health issues for ESG reasons and to meet possible stakeholder demands. More recent shareholder proposals primarily requested that companies issue public reports on the incongruencies between their stated company values (typically pointing to its prioritization of advancing more women in the workplace) and which politicians or organizations the companies themselves or their PACs gave to politically. If they were found to be incongruent, the shareholders requested that an explanation for such inconsistencies be given along with what actions companies would undertake to address them. By requesting these types of public reports, shareholders representing particular stakeholder values attempted to hold companies accountable for their political donations if they appeared to contradict what the companies said they valued. In addition, such reports facilitate more transparency and a debate about such donations through the

mechanism of shareholder proposals. Put differently, by using shareholder proposals, certain stakeholders may compel companies to think more carefully about supporting anti-abortion groups or candidates while simultaneously holding themselves out to be champions of women. Furthermore, having an increasing number of these types of shareholder proposals puts companies on notice that the “social” component in ESG includes reproductive health. Put simply, even if the shareholder proposal does not receive a majority vote, at a minimum, it signals to corporations what certain shareholders value.

In the future, shareholders will likely try to push forward more aggressive and less precatory proposals. Based on the data on reproductive health-related shareholder proposals provided above, it appears that these types of proposals will continue to trend upwards. However, if shareholders choose to take this path of being prescriptive rather than precatory, they may face headwinds because recent studies seem to indicate that shareholders are less comfortable with the prescriptive option.²⁶³

Another issue to consider in the context of shareholder proposals is whether institutional investors who vote on behalf of the mutual-fund shareholders and pension-plan participants “are acting in a manner consistent with the interests of their beneficiaries.”²⁶⁴ Jill Fisch and Jeff Schwartz argue for “informed intermediation” by institutional investors to allow “fund managers discretion in how to incorporate the views they collect into their stewardship practices. As in a representative democracy, their job would be to use their experience and expertise to translate aggregate individual preferences — which might be incomplete, inconsistent, or uninformed — into appropriate and well-considered votes.”²⁶⁵

²⁶³ See *supra* Part II.C for a discussion of shareholder proposals.

²⁶⁴ Jill E. Fisch & Jeff Schwartz, *Corporate Democracy and the Intermediary Voting Dilemma* 4 (Eur. Corp. Governance Inst., Working Paper No. 685, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4360428 [<https://perma.cc/KBE6-5LY3>].

²⁶⁵ *Id.* at 8. Fisch and Schwartz consider and reject other approaches related to intermediary voting, including greater regulation, increasing fund disclosure obligations, and pass-through voting. See *id.* at 28-40.

B. *ESG Reporting for Reproductive Health*

As ESG issues come under greater scrutiny for companies, reproductive health will be among the social issues that stakeholders will be looking at. According to Rhia Ventures, “[i]n the 2020–2022 proxy seasons, investors filed 28 shareholder proposals, some of which were withdrawn following constructive dialogues with companies. Participants in dialogues and proposal filings include an array of pension funds, asset managers and owners, foundations, and religious investors.”²⁶⁶ Corporations should expect more dialogue with investors and an increased number of shareholder proposals addressing reproductive health.²⁶⁷

The absence of quality metrics on ESG’s “social” component has long been a source of frustration for ESG investors. There are a few organizations which offer metrics related to reproductive health, such as the Bloomberg Gender Equality Index and the Equileap Global Gender Equality Index.²⁶⁸ However, more needs to be done.²⁶⁹ Currently, the public relies upon nonprofits and databases created by organizations outside the corporations to understand how different corporations are approaching reproductive rights. While companies often leverage each other’s policies and practices, no uniform method of disclosure exists. One company that offers such resources is Rhia Ventures, a venture capital firm, whose “mission is to create a vibrant US market for sexual, reproductive, and maternal health that produces equitable outcomes for all.”²⁷⁰ The firm produced a report on the business case for reproductive health.²⁷¹

²⁶⁶ HIDDEN VALUE, *supra* note 62, at 28. Note that it was difficult to ascertain how Rhia Ventures searched for the 28 proposals so we could not vouch for its accuracy in an independently conducted search.

²⁶⁷ *See id.* at 29.

²⁶⁸ *Id.*

²⁶⁹ *See generally* George S. Georgiev, *The Human Capital Management Movement in U.S. Corporate Law*, 95 TUL. L. REV. 639 (2021) (explaining how worker-centric “human capital management” has become increasingly prominent and shifted attitudes in boardrooms across the country).

²⁷⁰ *About*, RHIA VENTURES, <https://rhiaventures.org/about/> (last visited Aug. 17, 2023) [<https://perma.cc/ZPR8-FBAA>].

²⁷¹ HIDDEN VALUE, *supra* note 62, at 8–10 (summarizing the case for reproductive health benefits).

Ultimately, the social component of ESG will not be helpful unless there is a uniform system of ESG reporting widely used by companies of a certain size, such as Fortune 500 companies. There is a plethora of reporting mechanisms that are available to help companies evaluate their performance based on the ESG issues that would likely impact their industry. However, companies do not have the bandwidth to use all of the different reporting mechanisms available nor would it be helpful to use all of them. Therefore, companies should prioritize using just a few types of reports. For example, there are two reporting mechanisms that an increasing number of companies utilize: SASB's Materiality Map²⁷² or Materiality Finder.²⁷³ Without the SEC creating a more comprehensive and uniform reporting structure for public companies regarding the impact on ESG of women in the workplace, we are left with an imperfect system where different companies may be using different types of reporting mechanisms. As a result, it becomes the case of comparing apples to oranges versus apples to apples. In order to get more reliable data, key companies in certain industries would need to agree to use the same type of reporting mechanisms so that it would be easier to do a comparison among companies related to ESG issues.

In addition to having a more uniform application of reporting mechanisms, shareholders also need to see the value of stakeholder capitalism in order for stakeholder governance to succeed.²⁷⁴ George Serafeim, a Harvard Business School Professor, did a study on “how

²⁷² “The Materiality Map visually reveals how 26 general sustainability issues manifest across 77 industries.” *Exploring Materiality*, SASB STANDARDS, <https://www.sasb.org/standards/materiality-map/> (last visited June 20, 2023) [<https://perma.cc/UF2G-2VX8>]. Note that “[e]ffective August 1, 2022, the Value Reporting Foundation — home to the SASB Standards — consolidated into the IFRS Foundation, which established the first International Sustainability Standards Board (ISSB). SASB Standards are now under the oversight of the ISSB.” *About Us*, SASB STANDARDS, <https://www.sasb.org/about/> (last visited June 20, 2023) [<https://perma.cc/PBY7-RJHE>].

²⁷³ *Materiality Finder*, SASB STANDARDS, <https://www.sasb.org/standards/materiality-finder/> (last visited June 20, 2023) [<https://perma.cc/P848-6MTZ>].

²⁷⁴ Sundheim & Starr, *supra* note 257 (noting that the chief financial officer needs the support of others in the C-suite, such as COO, CMO, CIO, and CEO, to “articulate how working on ESG issues affects financial performance.”).

public sentiment influences the market pricing of firms' sustainability activities and thereby the future stock returns of portfolios that integrate [ESG] data" using big data and machine learning.²⁷⁵ From the evidence he gathered, Professor Serafeim found that public sentiment did influence investor views and it had a corresponding impact on the "price paid for corporate sustainability and the investment returns of portfolios that consider ESG data."²⁷⁶ Consider that in the context of reproductive health and, more specifically, abortion rights, if public sentiment was largely in favor of broad medical coverage for reproductive health purposes, then it may translate into more women getting coverage for abortion rights for purposes of fulfilling the "S" or "social" component of ESG.

One commentator noted, "Business does not exist in a vacuum. Even before . . . the Covid-19 pandemic, a growing number of business leaders were shifting away from Milton Friedman's assertion that the sole purpose of business is to maximize shareholder returns and embracing the idea that business should serve *all* stakeholders"²⁷⁷ In other words, the case of women and how their health needs are met in companies, illustrates whether the definition of stakeholders truly encompasses everyone or only benefits a specific subset of the population, such as white males.²⁷⁸ Put differently, the question of who is intended to fit under the definition of stakeholder becomes an important one. Time and time again, we have witnessed economic situations that have routinely excluded women and minorities.

²⁷⁵ George Serafeim, *Public Sentiment and the Price of Corporate Sustainability* 2 (Harv. Bus. Sch., Working Paper No. 19-044, 2018), <https://hbswk.hbs.edu/item/public-sentiment-and-the-price-of-corporate-sustainability> [<https://perma.cc/B987-MLWZ>].

²⁷⁶ *Id.* at 1.

²⁷⁷ Hubert Joly, *How to Lead in the Stakeholder Era*, HARV. BUS. REV. (May 13, 2021), <https://hbr.org/2021/05/how-to-lead-in-the-stakeholder-era> [<https://perma.cc/8TN3-ZPH4>] (emphasis in original).

²⁷⁸ Although it is outside of the scope of this Article, a major related issue is transgender healthcare and support for getting it in restrictive states. See, e.g., Anna Kirkland, Shauhin Talesh & Angela K. Perone, *Transition Coverage and Clarity in Self-Insured Corporate Health Insurance Benefit Plans*, 6 TRANSGENDER HEALTH 207 (2021) (examining transgender health care coverage offered by the biggest corporate employers in the United States in 2019 and revealing higher levels of total exclusions in contracts. For example, facial confirmation surgery procedures are commonly excluded, and 25% of the companies in the study offered at least one contract with a categorical exclusion.).

Therefore, companies need to focus on the purpose of their business and who comprises the demographic that they are serving.²⁷⁹ In the debate between the merits and downsides of shareholder primacy versus stakeholder governance, it becomes clear “that business and society cannot thrive if employees, customers, and communities are not healthy; if our planet is on fire; and if our society is fractured.”²⁸⁰ The health of the community component of stakeholder governance is especially relevant with regard to the reproductive health rights of women. Ultimately, the question becomes whether companies will champion the reproductive health rights of women or stay mum on the subject; there is no in-between ground like there may be for other social issues. “What we need today is a refoundation of business and capitalism so that we can build a more sustainable future. It is time for business leaders to embrace a declaration of interdependence that prioritizes the common good and recognizes the humanity of all stakeholders.”²⁸¹ This would include women in the workforce, particularly with respect to women of color, who have disproportionately faced barriers in the workplace and poor health outcomes due to existing biases.²⁸²

C. Supporting Women in the Workforce Means Championing Reproductive Health

In addition to strategically using shareholder proposals and standardizing ESG proposals with respect to reproductive health issues, corporations also need to understand that the support of women’s advancement in their careers is likely tied to meeting their reproductive health needs, which includes abortion access. As an initial matter, employers need to ensure that employees are aware of what their benefits cover; studies have shown that many of them do not know. One study noted, “**69% of women with health insurance currently do not**

²⁷⁹ See Joly, *supra* note 277.

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² See Ruqaiyah Yearby, *The Impact of Structural Racism in Employment and Wages on Minority Women’s Health*, AM. BAR ASS’N, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-state-of-healthcare-in-the-united-states/minority-womens-health/ (last visited June 20, 2023) [<https://perma.cc/S7FS-DA8B>].

know whether their coverage includes abortion.²⁸³ It is important that companies are transparent about how their employees' reproductive health needs are being met. This is especially true of the younger generation of employees, such as Gen Z.²⁸⁴ Contraception and abortion "are used by nearly all women: 99% of women have used contraception, 24% of women have had an abortion by age 45, and 74% of women can imagine a situation in which they or someone covered by their insurance would need an abortion."²⁸⁵

There is "[a] well-documented 'broken rung' in the career ladder [that] prevents women — especially women of color — from advancing from frontline roles. In 2020, for every 100 men promoted from a frontline to a manager role, only 85 women received the same promotion."²⁸⁶ For women of color it is even lower — "only 71 Latina women and 58 Black women [are] promoted One underexplored contributor is likely to be women's access to reproductive health care services."²⁸⁷ For example, one study notes that the lack of abortion access can impact women's ability to stay in the workforce. "[W]omen who cannot access abortion are three times more likely to leave the workforce than women who were able to access abortion when needed. The Institute for Women's Policy Research estimates that state-level abortion restrictions annually keep more than 500,000 women aged 15 to 44 out of the workforce."²⁸⁸ There are major economic disadvantages to not being able to keep employees. One study estimated that replacing

²⁸³ HIDDEN VALUE, *supra* note 62, at 10 (emphasis in original). Even if they knew, the coverage may have changed depending on where they resided.

²⁸⁴ See *supra* Part I.D.

²⁸⁵ HIDDEN VALUE, *supra* note 62, at 11. On the other hand, as with drug and addiction coverage, this type of coverage might not be one that most people care about unless they have a current need or strong family history; they do not expect to use it. Unlike broad networks, low co-pays, gym memberships, and the like, abortion coverage may not be a selling point which is why they were not advertised widely.

²⁸⁶ *Id.* at 20.

²⁸⁷ *Id.*

²⁸⁸ Walmart, Inc. Resolution, *supra* note 224 (citing statistics from the IWPR report, *IWPR Launches New Tool in the Fight Against Reproductive Health Restrictions*, INST. WOMEN'S POL'Y RSCH, <https://iwpr.org/iwpr-launches-new-tool-in-the-fight-against-reproductive-health-restrictions-2/> (last visited Nov. 4, 2023) [<https://perma.cc/9K4G-KR59>]).

a departing employee is equivalent to “roughly 33% of that employee’s annual salary. For an employee earning the annual median salary in the U.S. of \$45,000, that would result in a \$15,000 replacement cost, including recruiting, training, and productivity loss.”²⁸⁹ In sum, there are economic justifications for supporting women’s reproductive health.

CONCLUSION

Corporations continue to hold a unique place of influence and power in American society. Their stakeholders, particularly their employees, often expect corporations to speak out on important social issues, such as reproductive health. However, the issue of abortion rights has proven itself to be a difficult one for corporations to navigate. While there are some corporations that are vocal about their anti-abortion stance due to their religious beliefs, such as Hobby Lobby, many choose to remain silent. Although studies have predicted the adverse economic and social impact of a ban on abortion or having the right to an abortion severely curtailed, corporations are typically reluctant to voice an opinion on the issue. And, even when corporations support abortion rights, they may still support anti-abortion politicians as they are not single-issue driven. On the one hand, they profess to support gender equity. But, on the other hand, they are hesitant to wade into the debate about abortion rights and may also choose not to provide health care coverage for abortions even where they might legally do so. Scholarly discourse on the stakeholder theory of governance and its connection to reproductive health has been largely absent. For particularly fraught social issues where there are strong opinions on either side, the limits of the stakeholder theory of governance become more apparent. In theory everyone can agree that all employees should have health coverage from their employers, but what exactly this coverage entails and how involved employers should be on the matter of abortion rights are different matters. In terms of social issues, corporations have historically focused on racial equity or LGBTQ+ rights, but not reproductive rights. While there have been strides on select social issues, disclosure about what

²⁸⁹ HIDDEN VALUE, *supra* note 62, at 20 (analyzing promotion data and the differences between men and women’s advancement).

corporations are doing regarding reproductive health continues to be non-existent according to the data that is currently publicly available. This Article captures data in a snapshot in a remarkable time period both before and after *Roe v. Wade* was overturned, but data is dynamic and will evolve as corporations release new metrics and more metanalysis is conducted on such metrics. This Article illustrates that corporations may be the last line of defense against states who want to outlaw or severely limit abortions—whether or not they should be is a separate question. Stakeholder governance, which could potentially give corporations more flexibility to act, is limited in this instance due to the political and moral issues at play.

APPENDIX I: SHAREHOLDER PROPOSALS²⁹⁰

Company	Year	Shareholder Proposal
AbbVie	2022	“AbbVie has stated ‘We are committed to equity, equality, diversity and inclusion (“EED&I”). It’s fundamental to who we are and it’s just how we ‘do good business’ . . . However, in the 2016 - 2020 election cycles, AbbVie and its employee PACs donated at least \$1,068,050 to politicians and political organizations working to weaken women’s access to reproductive health care . . . Shareholders request that AbbVie annually analyze and report, at reasonable expense, the congruence of its political, lobbying, and electioneering expenditures during the preceding year against its publicly stated company values and policies, listing and explaining instances of incongruent expenditures, and stating whether the identified incongruencies have or will lead to a change in future expenditures or contributions.”
AbbVie	2023	“AbbVie has stated, ‘We are committed to equity, equality, diversity and inclusion (“EED&I”). It’s fundamental to who we are and it’s just how we ‘do good business’ . . . AbbVie and its employee PACs donated at least \$1,604,250 to

²⁹⁰ Chart data was obtained from a Westlaw search with the search term (abortion OR (reproductive /3 (rights OR services OR health))) of SEC DEF 14A filings by companies headquartered in the U.S. from 2011 to March 2023. The search results were manually filtered to only include shareholder proposals that actually discuss abortion or reproductive rights for vote. This data can be used to compare language from the 14A filings before and after *Roe v. Wade* was overturned. Chart data is on file with the author.

Company	Year	Shareholder Proposal
		<p>politicians and political organizations working to weaken women’s access to reproductive health care. Reductions in access to reproductive health care may also put at risk future sales for AbbVie subsidiaries Allergan and Odyssey Pharma, which both manufacture birth control . . . Shareholders request that AbbVie annually analyze and report, at reasonable expense, the congruence of its political, lobbying, and electioneering expenditures during the preceding year against its publicly stated company values and policies, listing and explaining instances of incongruent expenditures, and stating whether the identified incongruencies have or will lead to a change in future expenditures or contributions.”</p>
Anthem (now Elevance Health)	2022	<p>“It has . . . been reported that our corporation or its PAC financially supported Texas state legislators who voted for Senate Bill 8, the so-called “heart rate bill” prohibiting all abortions in the state if medical professionals could detect a fetal heartbeat, something that can occur after just six weeks when most women do not know they are pregnant; and . . . such political contributions to Texas lawmakers has caused serious reputational harm to our company, but more importantly, it may, in fact, cause great physical and emotional harm to women and other stakeholders . . . The shareholders request that the board of directors adopt a policy prohibiting the use of corporate or PAC funds for direct or indirect contributions to candidates.”</p>
AT&T	2022	<p>“AT&T states it has a ‘history of commitment to gender equality,’ yet Proponent estimates that in the 2016-2018 election cycles, AT&T and its employee PACs made political donations totaling at least \$16.4 million to politicians and political organizations working to weaken women’s access to reproductive health care . . . Shareholders request that AT&T publish a report, at reasonable expense, analyzing the congruence of the Company’s political and electioneering expenditures during the preceding year against publicly stated company values and policies, listing and explaining any instances of incongruent expenditures, and stating whether the Company has made, or plans to make, changes in contributions or communications to candidates as a result of identified incongruencies.”</p>

Company	Year	Shareholder Proposal
Cigna	2022	<p>“Cigna promotes gender equity in the workplace, and more than three-quarters of its workforce is female. Yet in the 2016-2020 election cycles, Cigna and its employee PACs have donated at least \$3.4 million to politicians and political organizations working to weaken women’s access to reproductive health care. These include lawmakers who sponsored Texas SB8, which creates potential liability for organizations that insure in-state abortions after approximately 6 weeks of pregnancy . . . Shareholders request that Cigna publish an annual report, at reasonable expense, analyzing the congruence of political, lobbying, and electioneering expenditures during the preceding year against publicly stated company values and policies, listing and explaining any instances of incongruent expenditures, and stating whether the identified incongruencies have led to a change in future expenditures or contributions.”</p>
Cigna	2023	<p>“Cigna promotes gender equity in the workplace, and more than three-quarters of its workforce is female. Yet in the 2020-2022 election cycles, Cigna and its employee PACs donated at least \$2.6 million to politicians and political organizations working to weaken women’s access to reproductive health care, including 16 direct donations during the 2022 election cycle to Texas legislators who voted in favor of Texas SB 8 (2021), which made it illegal to insure abortion in the state . . . Shareholders request that Cigna publish an annual report, at reasonable expense, analyzing the congruence of political, lobbying, and electioneering expenditures during the preceding year against publicly stated company values and policies, listing and explaining any instances of incongruent expenditures, and stating whether the identified incongruencies have led to a change in future expenditures or contributions.”</p>
Costco	2022	<p>“Costco Wholesale Corporation (“Costco”) has operations in 45 states, Puerto Rico, and D.C., subject to this patchwork of laws. With Roe v. Wade overturned, Costco employees will face greater challenges accessing abortion care. The proponent estimates that 45 percent of Costco’s stores in the U.S. are in states or territories that either have or will quickly ban or severely restrict access to abortion care . . . [W]omen who cannot access abortion are three times more likely to leave the workforce than women who</p>

Company	Year	Shareholder Proposal
		<p>were able to access abortion when needed . . . Shareholders request that Costco’s Board of Directors issue a public report within 6 months of the 2023 annual meeting date, omitting confidential and privileged information and at reasonable expense, detailing any known or potential risks and costs to the company caused by enacted or proposed state policies severely restricting reproductive rights, and detailing any strategies beyond litigation and legal compliance that the company may deploy to minimize or mitigate these risks.”</p>
FedEx	2022	<p>“FedEx has supported gender diversity by sponsoring a women’s employee resource group and providing maternity leave, financial assistance with adoptions and providing a work-life balance program. Yet based on public data, the proponent estimates that in the 2016-2020 election cycles, FedEx and FedExPAC have made political donations totaling over \$4 million to politicians and political organizations working to weaken access to reproductive health care, undermining the ability of employees to manage their fertility . . . Shareholders request that FedEx publish an annual report, at reasonable expense, disclosing whether incongruencies between political and electioneering expenditures and company values were identified during the preceding year, and disclosing or summarizing any actions taken regarding pausing or terminating support for organizations or politicians, and the types of incongruent policy advocacy triggering those decisions.”</p>
General Electric	2017	<p>“The company has donated to Planned Parenthood. Numerous states have moved to defund the controversial abortion provider as has the United States Congress. While [some] groups support Planned Parenthood and unfettered access to abortion, millions of Americans oppose the group’s activities . . . The proponent requests that the company provide an annual report, omitting proprietary information and at reasonable cost, disclosing: the company’s standards for choosing recipients of company assets in the form of charitable contributions; the business rationale and purpose for each of the charitable contributions, if any; personnel participating in the decision to contribute; the benefits to society at-large</p>

Company	Year	Shareholder Proposal
		produced by company contributions; and a follow-up report confirming the contribution was used for the purpose stated. The report should be published on the company's website."
The Home Depot	2012	"Current disclosure is insufficient to allow the Company's Board and shareholders to evaluate the proper usage of corporate assets by outside organizations and how those assets should be allocated, especially regarding controversial issues. We should consider how some charities are perceived to be supporting potentially volatile issues like abortion, same sex marriage, or illegal immigration. Support of controversial charities can result in boycotts and/or publicity which negatively impact sales and earnings. The first responsibility of our company is to make money for the shareholders, not give it away to someone's favorite charity . . . [S]hareholders request the Company to list the recipients of corporate charitable contributions or merchandise vouchers of \$6,000 or more on the company website."
The Home Depot	2020	"Home Depot has evidenced a strong commitment to gender diversity through its support of a women's employee resource group, a 'Women in Leadership' curriculum, and other actions, including the provision of strong reproductive health and maternity benefits. Yet based on public data, the proponent estimates that in the last two election cycles, Home Depot and The Home Depot Political Action Committee (PAC) has made political donations totaling \$4.9 million to politicians and political organizations working to weaken access to abortion . . . [Shareholders request that] The Home Depot publish, at least annually, a report prepared at reasonable expense analyzing the congruency of political and electioneering expenditures during the preceding year against publicly stated company values and policies."
The Home Depot	2021	"The Home Depot has evidenced a strong commitment to gender diversity through its support of a women's employee resource group, a 'Women in Leadership' curriculum, and other actions, including the provision of strong reproductive health and maternity benefits. Yet based on public data, the proponent estimates that in the

Company	Year	Shareholder Proposal
		last three election cycles, The Home Depot and its employee PAC has made political donations totaling \$6.5 million to politicians and political organizations working to weaken access to abortion . . . [Shareholders request that] The Home Depot publish, at least annually, a report, at reasonable expense, analyzing the congruency of political and electioneering expenditures during the preceding year against publicly stated company values and policies.”
The Home Depot	2022	“The Home Depot has evidenced a strong commitment to gender diversity through its support of a women’s employee resource group, a ‘Women in Leadership’ curriculum, and other actions, including the provision of strong reproductive health and maternity benefits. Yet based on public data, the proponent estimates that in the 2016-2020 election cycles, The Home Depot and its employee PAC made political donations nearing \$7.5 million to politicians and political organizations working to weaken access to abortion . . . Shareholders request that The Home Depot publish, at least annually, a report, at reasonable expense, analyzing the congruence of political and electioneering expenditures during the preceding year against publicly stated company values and policies and disclosing or summarizing any actions taken regarding pausing or terminating support for organizations or politicians, and the types of incongruent policy advocacy triggering those decisions.”
JP Morgan	2021	“JPMorgan has... [i]n the 2016–2020 election cycles, contributed at least \$2.8 million to anti-choice candidates and political committees from the corporate treasury and company-sponsored political action committees, according to an analysis conducted by the Sustainable Investments Institute . . . Shareholders request that JP Morgan publish an annual report, at reasonable expense, disclosing whether incongruencies between political and electioneering expenditures and company values were identified during the preceding year, and disclosing or summarizing any actions taken regarding pausing or terminating support for organizations or politicians, and the types of incongruent policy advocacy triggering those decisions.”
Lowe’s	2022	“Lowe’s Companies, Inc. (“Lowe’s) has operations in all 50

Company	Year	Shareholder Proposal
		states, subject to this patchwork of [restrictive abortion] laws. Should Roe v. Wade be weakened or overturned as is widely anticipated, many Lowe’s employees will face challenges accessing abortion care and other sexual and reproductive health care. Employers as well as employees bear the cost of restricted access to health reproductive health care . . . Shareholders request that Lowe’s issue a public report prior to December 31, 2022, omitting confidential and privileged information and at a reasonable expense, detailing any known and any potential risks and costs to the Company caused by enacted or proposed state policies severely restricting reproductive health care, and detailing any strategies beyond litigation and legal compliance that the Company may deploy to minimize or mitigate these risks.”
Merck	2012	“Whereas, our company has given charitable donations to seemingly noncontroversial groups like Meals On Wheels, Save the Children, and the Boy Scouts of America. It has also given money to Planned Parenthood, the largest abortion performing organization in the country, gay and lesbian organizations trying to change the marriage laws of our country, and was a sponsor of the American Society of Reproductive Medicine, which supports, inter alia, human embryo destruction. These later recipients are involved in clearly more controversial issues, some of which are also major political issues of our day . . . [S]hareholders request that the independent members of the Board of Directors institute a comprehensive review of Merck’s charitable contributions and political contributions and issue a report addressing the interrelation of both and how will they serve overall corporate policy.”
Merck	2013	“Whereas, our company has given charitable donations to seemingly noncontroversial groups like Meals On Wheels, Save the Children, and the Boy Scouts of America. It has also given money to Planned Parenthood, the largest abortion performing organization in the country, gay and lesbian organizations trying to change the marriage laws of our country, and was a sponsor of the American Society of Reproductive Medicine, which supports, inter alia, human embryo destruction. These later recipients are involved in clearly more controversial issues, some of which are also

Company	Year	Shareholder Proposal
		major political issues of our day . . . [S]hareholders request that the independent members of the Board of Directors institute a comprehensive review of Merck’s charitable contributions and political contributions and issue a report addressing the interrelation of both and how will they serve overall corporate policy.”
Pacific Gas & Electric	2017	“[M]any of our customers are of moderate or low income levels and struggle greatly to pay their bills . . . PG&E distributes over twenty million dollars a year to a long list of charities . . . [including] Planned Parenthood, which does over 300,000 abortions a year, or the Human Rights Campaign, which often characterizes people who oppose same-sex marriage as haters and bigots. This might include millions of our customers . . . [I]t is requested the board of directors discontinue the charitable giving program unless a majority of our customers positively affirm it through a public vote.”
Pacific Gas & Electric	2018	“[M]any of our customers are of moderate or low income levels and struggle greatly to pay their bills . . . PG&E distributes over twenty million dollars a year to a long list of charities . . . [including] Planned Parenthood, which does over 300,000 abortions a year, or the Human Rights Campaign, which often characterizes people who oppose same-sex marriage as haters and bigots. This might include millions of our customers . . . [I]t is requested the board of directors discontinue the charitable giving program unless a majority of our customers positively affirm it through a public vote.”
Pfizer	2021	“Pfizer manufactures contraceptives and a drug commonly prescribed as an abortifacient. Yet Pfizer has been a top contributor to a 527 organization that funds state legislators’ efforts to implement extreme anti-abortion measures. The proponent estimates that in the 2016-2020 election cycles, Pfizer and its employee PACs have donated at least \$8.4 million to politicians and political organizations working to weaken women’s access to reproductive health care . . . Shareholders request that Pfizer publish an annual report, at reasonable expense, analyzing the congruency of political, lobbying, and electioneering expenditures during the preceding year

Company	Year	Shareholder Proposal
		against publicly stated company values and policies, listing and explaining any instances of incongruent expenditures, and stating whether the identified incongruencies have led to a change in future expenditures or contributions.”
Pfizer	2023	“Pfizer manufactures contraceptives and a drug commonly prescribed for medication abortion. Yet the proponent estimates that since the beginning of the 2020 election cycle, Pfizer and its employee PACs have donated at least \$5 million to politicians and political organizations working to weaken women’s access to reproductive health care” Shareholders request that “Pfizer publish an annual report, at reasonable expense, analyzing the congruency of political, lobbying, and electioneering expenditures during the preceding year against publicly stated company values and policies, including Pfizer’s stated goal to “end discrimination against women, ensure equal opportunities for leadership and access to reproductive health.” Such a report should list and explain any instances of incongruent expenditures, and state whether the identified incongruencies have led to a change in future expenditures or contributions.”
TJX	2022	TJX Companies, Inc. (“TJX”) has operations in all fifty states, subject to this patchwork of [restrictive abortion] laws. Should Roe v. Wade be weakened or overturned, as is widely anticipated, TJX employees will face challenges accessing abortion care. In 2021, 40% of TJX’s stores in the U.S. and Puerto Rico were in states that could immediately prohibit abortion entirely under this scenario Shareholders request that TJX issue a public report prior to December 31, 2022, omitting confidential and privileged information and at a reasonable expense, detailing any known and any potential risks and costs to the company caused by enacted or proposed state policies severely restricting reproductive rights, and detailing any strategies beyond litigation and legal compliance that the company may deploy to minimize or mitigate these risks.”
UnitedHealth Group	2022	“Although UHG offers insurance coverage for abortion to its clients, based on publicly available records, the proponents estimate that in the 2016-20 election cycles, the company and its employee PAC have donated at least \$8.5

Company	Year	Shareholder Proposal
		<p>million to politicians and political organizations working to weaken women’s access to abortion. This includes \$120,000 in the 2020 election cycle to the sponsors of Texas SB 8 – which creates potential liability for organizations that insure in-state abortions after approximately six weeks of pregnancy - and more than \$230,000 to the sponsors of restrictive abortion bills in 14 other states . . . Shareholders request that UHG publish an annual report, at reasonable expense, analyzing the congruency of political, lobbying, and electioneering expenditures during the preceding year against publicly stated company values and policies, listing and explaining any instances of incongruent expenditures, and stating whether the identified incongruencies have led to a change in future expenditures or contributions.”</p>
Walmart	2022	<p>“Walmart Inc. (“Walmart”) has operations in all fifty states, subject to this patchwork of [restrictive abortion] laws. Should Roe v. Wade be weakened or overturned, as is widely anticipated, Walmart employees will face challenges accessing abortion care. As of October 2021, 60% of Walmart’s 5,342 stores in the U.S. were in states that could immediately prohibit abortion entirely under this scenario . . . Shareholders request that Walmart Board of Directors issue a public report prior to December 31, 2022, omitting confidential and privileged information and at a reasonable expense, detailing any known and any potential risks and costs to the Company caused by enacted or proposed state policies severely restricting access to reproductive health care, and detailing any strategies beyond litigation and legal compliance that the Company may deploy to minimize or mitigate these risks.”</p>
Verizon	2023	<p>“We believe Verizon has reputational risk as it has repeatedly been called out for political contributions which appear to be inconsistent with its corporate values. In 2022, Verizon recognized Women’s History Month by highlighting how “Verizon ‘focus[es] on breaking down bias and stereotypes while continuing progress on women’s equality and gender equality.”” But between 2016 and May 2022, Verizon reportedly contributed \$901,150 to anti-abortion political committee . . .” Shareholders “request that the board of directors adopt a policy prohibiting political and electioneering expenditures.”</p>

Company	Year	Shareholder Proposal
PepsiCo	2023	<p>“Access to reproductive rights is being challenged at the state and federal levels across the U.S. Currently, a patchwork of laws regulates access to abortion and broader reproductive rights . . . This patchwork of laws adds complexity for PepsiCo, which employed about 26,000 women throughout the U.S. at year-end 2021. Many PepsiCo employees will now face additional challenges accessing reproductive healthcare for themselves or their family members. Employers, as well as employees, bear the cost of restricted access to reproductive health care . . . Shareholders request that the PepsiCo Board of Directors issue a public report prior to December 31, 2023, omitting confidential and privileged information and at a reasonable expense, describing any known and potential risks and costs to the company caused by enacted or proposed state policies severely restricting reproductive rights, and detailing any strategies beyond litigation and legal compliance that the company may deploy to minimize or mitigate these risks.”</p>
United Parcel Service	2023	<p>“United Parcel Service, Inc. (“UPS”) employs nearly 93,000 female employees and has significant operations in states where reproductive rights are severely limited. These employees face challenges accessing reproductive healthcare, including abortion services, for themselves or family members.</p> <p>Employers, as well as employees, bear the cost of restricted access to reproductive health care . . . Shareholders request that the UPS Board of Directors issue a public report prior to December 31, 2023, omitting confidential information and at reasonable expense, detailing any known and potential risks or costs to the company caused by enacted or proposed state policies severely restricting reproductive rights, and detailing any strategies beyond litigation and legal compliance that the company may deploy to minimize or mitigate these risks.”</p>
American Express	2023	<p>“Following the revocation of the constitutional right to an abortion in June 2022, policymakers and legislators have become alarmed by the use of personal digital data for the enforcement of state laws that ban or limit abortion access. Congress is considering bills that would increase privacy protections for personal reproductive health information.</p>

Company	Year	Shareholder Proposal
		<p>California now requires out-of-state law enforcement seeking personal data from California corporations to attest that the investigation does not involve any crime related to an abortion that is lawful under California law . . . Shareholders request that our Board issue a public report detailing any known and potential risks and costs to the Company of fulfilling information requests regarding American Express customers for the enforcement of state laws criminalizing abortion access, and setting forth any strategies beyond legal compliance that the Company may deploy to minimize or mitigate these risks.”</p>
Coca-Cola	2023	<p>“While the Coca-Cola Company (“Coke”) has stated “[t]here is overwhelming evidence that achieving equality and empowerment for women has broad ripple effects that are good for society,” in the 2020-22 election cycles, the Proponent estimates that Coke has given more than \$1.8 million to politicians and political organizations seeking to limit women’s reproductive rights . . . Coke and its independent bottling partners operate in states where reproductive rights have been limited. Employees of Coke and its partners now face challenges accessing reproductive healthcare, including abortion services, for themselves or family members. Employers, as well as employees, bear the cost of restricted access to reproductive health care . . . Shareholders request that Coca-Cola’s Board of Directors issue a public report prior to December 31, 2023, omitting confidential information and at reasonable expense, detailing any known and potential risks or costs to the company caused by enacted or proposed state policies severely restricting reproductive rights, and detailing any strategies beyond litigation and legal compliance that the company may deploy to minimize or mitigate these risks.”</p>
Disney	2023	<p>“The political expenditures of The Walt Disney Company (“Disney”) appear to be misaligned with the company’s publicly stated values and vision across important issue areas. Disney has stated, ‘We embrace a world of belonging through our continuing efforts to promote Diversity, Equity & Inclusion in our workforce and beyond. We believe that greater representation and diversity of thought and experience make us a stronger, more capable, and creative company’ . . . Disney sponsors numerous efforts to</p>

Company	Year	Shareholder Proposal
		<p>promote women’s advancement inside the company, yet in the 2020 and 2022 election cycles, Disney and its employee PAC have made political donations totaling at least \$1.6 million to politicians and political organizations working to weaken women’s access to reproductive health care in the U.S. In Florida between 2017 and March 2022, 86% of Disney’s political contributions went to anti-choice politicians prior to the passage of a 10-week abortion ban . . . Shareholders request that Disney annually analyze and report, at reasonable expense, the congruence of its political and electioneering expenditures during the preceding year against its publicly stated company values and policies, listing and explaining instances of incongruent expenditures, and stating whether the identified incongruencies have or will lead to a change in future expenditures or contributions.”</p>

APPENDIX II: REPRODUCTIVE HEALTH BENEFITS BY COMPANY²⁹¹

Company Name	Public or Private	Travel Support	\$1,000 - \$10,000 Benefit For Out of State Care (listed)	Unclear/ Unspecified Benefit Amount For Out of State Care	Must Be Enrolled in Company's Health Plan
Accenture	public	x		x	x
Adidas	public	x	x		x
Adobe	public	x		x	
Airbnb	public	x		x	
Alaska Airlines	public	x		x	
Alloy Inc.	private	x	x		
Alphabet Google	public	x		x	
Amalgamated Bank	public	x		x	
Amalgamated Financial Group	public	x		x	
Amazon	public	x	x		
American Airlines	public	x			
American Express Co	public	x		x	
Apollo Global Management Inc.	public	x		x	
Apple	public	x		x	x
AT&T	public	x		x	
Bain & Company	private	x		x	x
Bank of America	public	x		x	x

²⁹¹ The Yale School of Management, via their Chief Executive Leadership Institute, is tracking “Companies with Extended Women’s Health Benefits.” This data was reviewed and quantified into overview groupings of benefits to show the different benefits that Corporations are providing to their employees. This data was last updated August of 2022. While this information is changing in real time, this time frame was selected to capture company trends in the subsequent months following the Supreme Court of the United States overturning *Roe v. Wade*. *Companies with Extended Women’s Health Benefits*, YALE SCH. OF MGMT.: CHIEF EXEC. LEADERSHIP INST., <https://yaleceli.wixsite.com/website> (last visited June 20, 2023) [<https://perma.cc/8NHR-ZF8K>].

Company Name	Public or Private	Travel Support	\$1,000 - \$10,000 Benefit For Out of State Care (listed)	Unclear/ Unspecified Benefit Amount For Out of State Care	Must Be Enrolled in Company's Health Plan
Bank of Nova Scotia	public	x		x	
BCG	private	x		x	
Biogen	public	x		x	
BlackRock	public	x		x	x
Blackstone	public	x		x	
Block	public	x		x	
Bloomberg	private	x		x	
Box	public	x		x	
British Petroleum	public	x		x	
Bumble	public	x		x	
Buzzfeed	public	x		x	
Canadian Imperial Bank of Commerce	public	x		x	
Carlyle Group	public	x		x	
Chobani Inc.	private	x		x	x
Citigroup	public	x		x	x
Civitech	private	x		x	
Comcast	public	x		x	x
Condé Nast	private	x		x	
CVS Health Corp.	public	x		x	
Danone North America	public	x		x	
Dell	public	x		x	
Deloitte	private	x		x	
Deutsche Bank AG	public	x		x	
Dick's Sporting Goods	public	x	x		
Discord	private	x		x	
Disney	public	x		x	
DoorDash	public	x		x	
Douglas Elliman	public	x		x	
e.l.f.	public	x		x	

Company Name	Public or Private	Travel Support	\$1,000 - \$10,000 Benefit For Out of State Care (listed)	Unclear/ Unspecified Benefit Amount For Out of State Care	Must Be Enrolled in Company's Health Plan
Cosmetics Group					
Equinox	private	x		x	
Estee Lauder Cos.	public	x		x	x
Expedia	public	x		x	
Favor Inc.	private	x	x		
Ford Motor	public	x			
Gap	public	x		x	x
General Motors	public	x		x	
Goldman Sachs	public	x		x	
Grubhub	public	x	x		
Gucci	public	x		x	
H&M	public	x		x	
Havas SA	public	x			
Hawaiian Airlines	public	x		x	
Hewlett Packard Inc.	public	x		x	x
Him & Hers Health Inc.	public	x	x		
HP Enterprise	public	x		x	x
Hubspot	public	x		x	
IBM	public	x		x	
Impossible Foods	private	x		x	
Indeed Inc.	private	x		x	x
Intel Corp.	public	x		x	
Interpublic Group	public	x		x	
Intuit	public	x		x	
Jefferies	public	x		x	
Johnson & Johnson	public	x		x	
JP Morgan Chase & Co.	public	x		x	
KPMG US	private	x		x	

Company Name	Public or Private	Travel Support	\$1,000 - \$10,000 Benefit For Out of State Care (listed)	Unclear/ Unspecified Benefit Amount For Out of State Care	Must Be Enrolled in Company's Health Plan
Kroger Co.	public	x	x		
Levi Strauss & Co.	public	x		x	
Live Nation	public	x		x	
LVMH	public	x		x	
Lyft Inc.	public	x		x	x
Macy's Inc.	public	x		x	x
Mastercard Inc.	public	x		x	
Match	public	x		x	
McDermott Will & Emery Law Firm	private	x		x	x
McKinsey	private	x	x		
Meta Platforms Inc.	public	x		x	
Microsoft Corp.	public	x		x	
MMI Agency	private	x		x	
Morgan Lewis & Bockius Law Firm	private	x		x	x
Morgan Stanley	public	x		x	
Morrison & Foerster Law Firm	private	x		x	
Neiman Marcus Group	public	x		x	
Netflix	public	x		x	x
Nike Inc.	public	x		x	
Nordstrom	public	x		x	
OKCupid	public	x		x	
Omnicom Group	public	x		x	x
Open Sea	private	x		x	
Paramount	public	x		x	
Patagonia	private	x		x	
Paul, Weiss	private	x		x	

Company Name	Public or Private	Travel Support	\$1,000 - \$10,000 Benefit For Out of State Care (listed)	Unclear/ Unspecified Benefit Amount For Out of State Care	Must Be Enrolled in Company's Health Plan
Paypal Holdings Inc.	public	x		x	
Power Home Remodeling	private	x	x		
Proctor and Gamble	public	x		x	
Publicis Groupe	public	x		x	
PwC	private	x		x	
Ralph Lauren	public	x		x	
Reddit	private	x		x	
Rivian Automotive Inc.	public	x		x	
Ropes & Gray Law Firm	private	x		x	
Salesforce	public	x			
Sephora	subsidiary of public company	x		x	
Sony	public	x	x		
Starbucks Corp.	public	x		x	
Target Corp.	public	x		x	
Tesla	public	x		x	
The Body Shop	public	x		x	
The Knot Worldwide	private	x		x	
The New York Times	public	x		x	
TikTok	private	x		x	
Tory Burch	private	x		x	x
TPG Inc.	public	x		x	
Uber Technologies Inc.	public	x		x	x
Ulta Beauty Inc.	public	x		x	
Under Armour	public	x		x	x

Company Name	Public or Private	Travel Support	\$1,000 - \$10,000 Benefit For Out of State Care (listed)	Unclear/ Unspecified Benefit Amount For Out of State Care	Must Be Enrolled in Company's Health Plan
Unilever PLC	public	x		x	
United Talent Agency	private	x		x	
UnitedHealth Group	public	x		x	
URBN	public	x		x	
Vanguard	private	x		x	
Vimeo	public	x		x	
Vinson & Elkins Law Firm	private	x		x	x
Vox Media	private	x		x	
Warner Brothers	public	x		x	x
Wells Fargo	public	x		x	
WPP Group Inc.	public	x		x	
Yahoo	subsidiary of public company	x		x	
Yelp	public	x		x	
Zendesk Inc.	public	x	x		x
Zillow	public	x	x		