

# AN INTRODUCTION TO VIEWPOINT DIVERSITY SHAREHOLDER PROPOSALS

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## *Abstract*

*In this Article, Part I provide a primer on viewpoint diversity shareholder proposals. Following the Introduction, the Article proceeds into Part II which provides a brief overview of shareholder proposals. Such proposals have been described as having “transformed the corporate landscape in the U.S.” over the last 30 years.<sup>1</sup> Part III explains the need for viewpoint diversity proposals. Part IV provides some examples of viewpoint diversity proposals, including proposals related to (1) protection of employees, (2) selection of board and related members, and (3) viewpoint discrimination in policymaking. Part V provides concluding remarks.*

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<sup>1</sup> Kosmas Papadopoulos, *The Long View: The Role of Shareholder Proposals in Shaping U.S. Corporate Governance (2000-2018)*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 6, 2019), <https://corpgov.law.harvard.edu/2019/02/06/the-long-view-the-role-of-shareholder-proposals-in-shaping-u-s-corporate-governance-2000-2018/>.

## I. INTRODUCTION

Is it too extreme to say that cancel culture has brought a new type of McCarthyism to the United States?<sup>2</sup> Certainly there is an argument to be made that people have lost jobs for voicing opinions not in lockstep with the new orthodoxy of political correctness, and many more live in fear of repercussions and choose to self-censor in order to avoid the same fate.<sup>3</sup> The full story of corporate complicity in this “soft totalitarianism” is yet to be told, but early reports give reasons for concern.<sup>4</sup> A 2020 survey conducted by the Cato Institute reported that:

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<sup>2</sup> See John Kass, *Column: One Wrong 'Like' Will Get You Canceled By Cancel Culture*, CHI. TRIB. (June 26, 2020, 5:00 AM), <https://www.chicagotribune.com/columns/john-kass/ct-cancel-culture-kass-20200626-zahoolv4jjaezed2p6qlopevrm-story.html>; Lance Morrow, *Dawn of the Woke*, WALL ST. J. (Aug. 2, 2020, 12:24 PM), <https://www.wsj.com/articles/dawn-of-the-woke-11596385455>; Bobbie L. Washington, *The Woke Cancel Culture is McCarthyism 2.0*, MEDIUM (June 14, 2020), <https://medium.com/@screamingbear/the-woke-cancel-culture-is-mccarthyism-2-0-2747d3184df8>.

<sup>3</sup> See *infra* Section IV.A.

<sup>4</sup> Cf. Fred Bauer, *The Left and 'Discriminating Tolerance'*, NAT'L REV. (June 22, 2015, 8:00 AM), <https://www.nationalreview.com/2015/06/herbert-marcuse-and-new-intolerance/> (“Herbert Marcuse—academic, political revolutionary, and psychological theorist—holds an important place in the genealogy of outrage culture. An immigrant from Germany who taught at a number of American universities, Marcuse was a member of the Marxist-influenced Frankfurt School, which wanted to deconstruct Western liberal capitalism . . . Marcuse made a rather cunning inversion (one that has been aped countless times since by cultural organs across the United States): The fact that society is so radically unequal means that we should be intolerant and repressive in the name of tolerance and liberty. He rejected what he termed ‘indiscriminate tolerance’—a tolerance that accepts all viewpoints—in favor of ‘liberating tolerance’ or ‘discriminating tolerance.’ Unlike many of his disciples, Marcuse was frank about what this intolerance would mean: ‘Liberating tolerance, then, would mean intolerance against movements from the Right and toleration of movements from the Left.’”); Rod Dreher, *The Road to Soft Totalitarianism*, AM. CONSERVATIVE (June 1, 2020, 1:57 PM), <https://www.theamericanconservative.com/dreher/anarcho-tyranny-road-to-soft-totalitarianism/> (“I will say simply that by ‘totalitarianism,’ I mean an all-encompassing ideology that seeks to control not just the actions, but the thoughts of those under its power. By ‘soft,’ I mean to distinguish it from the ‘hard’ totalitarianism of the Soviet-style dictatorships. This is going to be something much more akin to Aldous Huxley’s *Brave New World* than Orwell’s *Nineteen Eighty-Four*. It will be like James Poulos’s concept of the ‘Pink Police State’—hardline managerial progressivism that permits personal liberties, but restricts political ones. And it will be administered not wholly by the state, but by corporations and other institutions run by managerial elites, enabled by the vast network of surveillance

- “[S]elf-censorship is on the rise in the United States. Nearly two-thirds—62%—of Americans say the political climate these days prevents them from saying things they believe because others might find them offensive.”<sup>5</sup>
- “These fears cross partisan lines. Majorities of Democrats (52%), independents (59%) and Republicans (77%) all agree they have political opinions they are afraid to share.”<sup>6</sup>
- “Strong liberals stand out, however, as the only political group who feel they can express themselves. Nearly 6 in 10 (58%) of staunch liberals feel they can say what they believe.”<sup>7</sup>
- “Nearly a quarter (22%) of Americans would support firing a business executive who personally donates to Democratic presidential candidate Joe Biden’s campaign. Even more, 31% support firing a business executive who donates to Donald Trump’s re-election campaign.”<sup>8</sup>
- “Support increases to 50% of strong liberals who support firing executives who personally donate to Trump. And more than a third (36%) of strong conservatives support firing an executive for donating to Biden’s presidential campaign.”<sup>9</sup>
- “Young Americans are also more likely than older Americans to support punishing people at work for personal donations to Trump. Forty-four percent (44%) of Americans under 30 support firing executives if they donate to Trump. This share declines to 22%

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technology that is already in place, thanks to the ubiquity of the Internet, smartphones, and smart devices.”).

<sup>5</sup> Emily Ekins, *Poll: 62% of Americans Say They Have Political Views They’re Afraid to Share*, CATO INST. (July 22, 2020), <https://www.cato.org/publications/survey-reports/poll-62-americans-say-they-have-political-views-theyre-afraid-share>.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

among those over 55 years old—a 20-point difference.”<sup>10</sup>

- “An age gap also exists for Biden donors, but is less pronounced. Twenty-seven percent (27%) of Americans under 30 support firing executives who donate to Biden compared to 20% of those over 55—a 7-point difference.”<sup>11</sup>
- “Nearly a third (32%) of employed Americans say they personally are worried about missing out on career opportunities or losing their job if their political opinions became known.”<sup>12</sup>
- “These concerns are also cross-partisan, although more Republicans are worried: 28% of Democrats, 31% of independents, and 38% of Republicans are worried about how their political opinions could impact their career trajectories.”<sup>13</sup>
- “Those with the highest levels of education are most concerned. Almost half (44%) of Americans with post-graduate degrees say they are worried their careers could be harmed if others discovered their political opinions, compared to 34% of college graduates, 28% of those with some college experience, and 25% of high school graduates.”<sup>14</sup>
- “Democrats with graduate degrees (25%) are about as likely as high school graduates (23%) to be worried their political views could harm their employment.”<sup>15</sup>
- “About a quarter of Republicans with high school degrees (27%) or some college (26%) worry their political opinions could harm them at work—but this number increases to 40% among Republican college graduates and 60% of those with post-graduate degrees.”<sup>16</sup>
- “The share of independents who have these concerns increases from 18% among high school graduates, to

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

35% among those with some college, 41% of college graduates, and 49% of post-graduates.”<sup>17</sup>

- “A slim majority (51%) of Republicans under 30 fear their views could harm their career prospects ....”<sup>18</sup>

In response to the foregoing concerns, this Article provides an introduction to viewpoint diversity shareholder proposals, which may help restore some much needed balance to corporations and their workplaces.<sup>19</sup> Much of this overview will rely on the *2020 Investor Value Voter Guide* published by the Free Enterprise Project (FEP) of the National Center for Public Policy Research (NCPPr).<sup>20</sup> This reliance is based on FEP being the source of the viewpoint diversity shareholder proposals discussed herein.<sup>21</sup> However, FEP represents a conservative point of view and readers should keep that in mind throughout this Article.<sup>22</sup> For balancing views, “As You Sow” (AYS) is recommended as a resource, given that FEP identifies AYS as its primary adversary when it comes to shareholder proposals.<sup>23</sup>

The NCPPr describes itself in part as follows:

The National Center for Public Policy Research is a communications and research foundation supportive of a strong national defense and dedicated to providing free market solutions to today’s public policy problems. We believe that the principles of a free market, individual liberty and personal

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> The issue of how one measures viewpoint diversity beyond partisanship is beyond the scope of this Article.

<sup>20</sup> See *Investor Value Voter Guide*, FREE ENTER. PROJECT (2020) [hereinafter “*FEP Voter Guide*”] (available at [https://nationalcenter.org/wp-content/uploads/2020/04/Investor\\_Value\\_Voter\\_Guide\\_2020\\_web.pdf](https://nationalcenter.org/wp-content/uploads/2020/04/Investor_Value_Voter_Guide_2020_web.pdf)).

<sup>21</sup> Many of the citations herein are taken from the *FEP Voter Guide*.

<sup>22</sup> Cf. Jessica Shankleman, *Tim Cook Tells Climate Change Sceptics to Ditch Apple Shares*, GUARDIAN (Mar. 3, 2014, 11:23AM) (describing NCPPr as “a radical right-wing think tank” and stating “Apple chief executive Tim Cook . . . became visibly angry when questioned by [NCPPr] about the profitability of investing in renewable energy.”).

<sup>23</sup> See *About Us*, AS YOU SOW, <https://www.asyousow.org/about-us> (last visited Mar. 7, 2021) (“As You Sow is the nation’s non-profit leader in shareholder advocacy. Founded in 1992, we harness shareholder power to create lasting change that benefits people, planet, and profit. . . . Our mission is to promote environmental and social corporate responsibility through shareholder advocacy, coalition building, and innovative legal strategies.”).

responsibility provide the greatest hope for meeting the challenges facing America in the 21st century.

In 1982, we started The National Center to provide the conservative movement with a versatile and energetic organization capable of responding quickly and decisively to fast-breaking issues. Today, we continue to fill this critical niche through a top-flight research and communications operation driven by results and the bottom line.

In the 1980s, The National Center helped change public opinion through vocal national campaigns aimed at supporting Reagan administration initiatives concerning the USSR, arms control, Central America and human rights. With the Cold War won, The National Center now trains its sights on other issues . . .<sup>24</sup>

The FEP describes itself in part as follows:

Launched in 2007, the National Center for Public Policy Research's Free Enterprise Project focuses on shareholder activism and the confluence of big government and big business. The Free Enterprise Project (FEP) is the conservative movement's only full-service shareholder activism and education program: It files shareholder resolutions, engages corporate CEOs and board members at shareholder meetings, petitions the Securities and Exchange Commission (SEC) for interpretative guidance, and sponsors effective media campaigns to create the incentives for corporations to stay focused on their missions.

As the leading voice for conservative-minded investors, FEP annually files more than 90 percent of all right-of-center shareholder resolutions. Dozens of liberal organizations, however, annually file more than 95 percent of all policy-oriented shareholder resolutions and continue to exert undue influence over corporate America. . . .

Through the years, FEP has been a leading voice for the conservative investor on a divergent range of topics including: health care, immigration, gun rights, energy, taxes, subsidies, regulations, religious freedom, food policies, media bias, federalism, corporate free speech, ideological diversity, voter

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<sup>24</sup> *About the National Center*, NAT'L. CTR. FOR PUB. POLY RES., <https://nationalcenter.org/about/> (last visited Mar. 7, 2021) (setting forth covered issues).

integrity, freedom of conscience, property rights, workers' rights and other important public policy issues. The Free Enterprise Project is also the nation's leading program for confronting liberal shareholder activism.<sup>25</sup>

## II. WHAT ARE SHAREHOLDER PROPOSALS?<sup>26</sup>

Corporations are generally required to hold a meeting of their shareholders at least once a year, and at the very least allow shareholders to vote for at least some of the corporation's directors at that meeting—typically via proxy. The Securities Exchange Act of 1934 allows shareholders, subject to certain conditions, to submit shareholder proposals to be included in the corporation's proxy statement.<sup>27</sup> “Shareholder proposals have the potential to significantly impact corporate behavior. For example, ‘the Harvard Shareholder Rights Project founded by Professor Bebchuk . . . has helped many pension funds

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<sup>25</sup> *About the Free Enterprise Project*, NAT'L CTR. FOR PUB. POL'Y RES., <https://nationalcenter.org/programs/free-enterprise-project/> (last visited Jan. 31, 2021).

<sup>26</sup> Recent changes to the shareholder proposal rules were adopted too late for analysis in this Article. *See generally*, Stephen Bainbridge, *The Securities and Exchange Commission Amends the Shareholder Proposal Rule*, PROFESSORBAINBRIDGE.COM (Sept. 24, 2020), <https://www.professorbainbridge.com/professorbainbridgecom/2020/09/the-securities-and-exchange-commission-amends-the-shareholder-proposal-rule-and-annoys-yours-truly.html>; Ann Lipton, *Goodbye Iroquois Brands*, BUS. L. PROF BLOG (Sept. 26, 2020), [https://lawprofessors.typepad.com/business\\_law/2020/09/goodbye-iroquois-brands.html](https://lawprofessors.typepad.com/business_law/2020/09/goodbye-iroquois-brands.html). In addition, the impact of the ability of corporations to exclude proposals under the relevant rules is beyond the scope of this Article. *See generally* Press Release, SEC, SEC Proposes Amendments to Modernize Shareholder Proposal Rule (Nov. 5, 2019) (available at <https://www.sec.gov/news/press-release/2019-232>) (“Exchange Act Rule 14a-8 . . . permits a company to exclude a shareholder proposal from its proxy statement if the proposal fails to meet any of several specified substantive or procedural requirements . . .”). *Cf.* Stefan J. Padfield, *The Inclusive Capitalism Shareholder Proposal*, 17 U.C. DAVIS BUS. L.J. 147, 148 (2017) (“Even if the suggested proposals are rejected, the proposal process can be expected to facilitate a better understanding of the strengths and weaknesses of [the issues raised].”).

<sup>27</sup> Connor Hannagan, *The False or Misleading Nature of the Exclusion for False or Misleading Statements Under Rule 14A-8(I)(3)*, 96 DENV. L. REV. 91, 91 (2018) (“Rule 14a-8 of the Securities Exchange Act of 1934, as amended, requires public companies to include shareholder proposals in proxy materials.”); *cf.* Press Release, SEC, SEC Proposes Amendments to Modernize Shareholder Proposal Rule (Nov. 5, 2019) (available at <https://www.sec.gov/news/press-release/2019-232>).

formulate and submit (often successful) shareholder proposals requesting that staggered boards be declassified.”<sup>28</sup>

### III. WHY DO WE NEED VIEWPOINT DIVERSITY PROPOSALS?

The FEP believes there is a need for viewpoint diversity shareholder proposals at least in part because:

The vast majority of members of the boards of directors of the largest companies in the United States are, where their viewpoints are discernable, demonstrably left of center. As Baron Political Affairs, LLC revealed in 2019, every single director of a Fortune 1-10 company who had been elected to political office or who had worked for an administration was (or had worked for) a Democrat. The ratio shifted to 2 Democrats for every Republican in the Fortune 100 generally, but only to 5:1 for financial or tech firms within that group. FEP’s own research, as part of a proposal-review proceeding this past winter, confirmed this trend at AT&T, where every member of the board of directors who had held elective or appointed office had done so as a Democrat or with a Democratic administration.<sup>29</sup>

In addition, reports of perceived anti-conservative bias by corporations appear routinely.<sup>30</sup> For example, the Free Speech Alliance

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<sup>28</sup> Padfield, *supra* note 26, at 156 (quoting Robert C. Clark, *Harmony or Dissonance? The Good Governance Ideas of Academics and Worldly Players*, 70 BUS. L. 321 (2015)).

<sup>29</sup> FEP Voter Guide, *supra* note 20, at 24 (citing *The Political Isolation of Corporate America*, BARON PUB. AFF. (2019), <https://baronpa.com/prb/the-political-isolation-of-corporate-america/> (last accessed April 7, 2020)); Letter from Scott Shepard, FEP Coordinator, to SEC Shareholder Proposals Office 3–4, n.1 (Jan. 3, 2020) (on file with FEP) (Letter in Response to AT&T’s Request for No-Action Determination).

<sup>30</sup> See generally Rod Dreher, *Google Blacklists Conservative Websites*, AM. CONSERVATIVE (July 21, 2020, 1:21 PM), <https://www.theamericanconservative.com/dreher/google-blacklists-conservative-websites/>. See Press Release, Project 21, Black Activists Call for Bias Investigation at ESPN (July 23, 2020) (available at <https://nationalcenter.org/project21/2020/07/23/black-activists-call-for-bias-investigation-at-espn/>) (“Veteran ESPN host Sage Steele was reportedly excluded from a network documentary on race and sports because—despite being biracial—her political and social views were not considered by colleagues to be racially authentic. . . . Steele has been critical of athletes kneeling for the national anthem. . . . Project 21, a leading voice of black conservatives for over 25 years, is sponsored by the National Center for Public Policy Research.”).



reported that the “Facebook Oversight Board Is Packed with Liberals[.]”<sup>31</sup> and a 2018 story in Wired reported on a survey showing that “Conservatives Feel Out of Place in Silicon Valley”—noting that this poll “adds to concerns that political divisions are affecting tech workplaces.”<sup>32</sup> Furthermore, corporate policy decisions often reject conservative views on traditional marriage<sup>33</sup> and gun rights.<sup>34</sup> Of course, corporations are arguably in lose-lose positions in many of these cases, which is to say some meaningful group of stakeholders will be offended whether the corporation leans left or right, or stays silent, and there are sound arguments for favoring left-leaning positions, such as the makeup of relevant employee and customer markets; but, all of these considerations

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<sup>31</sup> NB Staff, *Free Speech Alliance: Facebook Oversight Board is Packed with Liberals*, MRCNEWSBUSTERS (May 7, 2020, 12:43 PM), <https://www.newsbusters.org/blogs/nb/nb-staff/2020/05/07/free-speech-alliance-facebook-oversight-board-packed-liberals>.

<sup>32</sup> Nitasha Tiku, *Survey Finds Conservatives Feel Out of Place in Silicon Valley*, WIRED (Feb. 2, 2018, 7:00 AM), <https://www.wired.com/story/survey-finds-conservatives-feel-out-of-place-in-silicon-valley/>.

<sup>33</sup> See, e.g., Joel Gehrke, *Mozilla CEO Brendan Eich Forced to Resign for Supporting Traditional Marriage Laws*, WASH. EXAMINER (Apr. 3, 2014, 12:00 AM), <https://www.washingtonexaminer.com/mozilla-ceo-brendan-eich-forced-to-resign-for-supporting-traditional-marriage-laws>.

<sup>34</sup> See, e.g., Tiffany Hsu, *Citigroup Sets Restrictions on Gun Sales by Business Partners*, N.Y. TIMES (Mar. 22, 2018), <https://www.nytimes.com/2018/03/22/business/citigroup-gun-control-policy.html>; Matthew Rocco, *Citigroup Sets Gun Rules for its Retail Clients*, FOX BUS. (Mar. 22, 2018), <https://www.foxbusiness.com/markets/citigroup-sets-gun-rules-for-its-retail-clients>; Joe Simonson, *Bank of America Sponsors Anti-Gun Panel*, DAILY CALLER (Mar. 23, 2018, 12:26 PM), <https://dailycaller.com/2018/03/23/bank-of-america-sponsors-anti-gun-panel/>; Danny Vena, *Salesforce.com Won't Sell Software to Some Gun-Selling Companies*, MOTLEY FOOL (May 30, 2019, 5:08 PM), <https://www.fool.com/investing/2019/05/30/salesforce-wont-sell-softwarecompanies-guns.aspx>; Amy B. Wang, *Bank of America to Stop Lending to Some Gun Manufacturers in Wake of Parkland Massacre*, CHI. TRIB. (April 12, 2018, 7:45 AM), <https://www.chicagotribune.com/business/ct-biz-bank-of-america-gun-manufacturers-loans-20180412-story.html>; see also Ursula Perano, *Bank of America to Stop Lending to Private Prisons and ICE Detention Centers*, AXIOS (June 26, 2019), <https://www.axios.com/bank-of-america-privateprisons-immigrant-detention-7f42d0d7-8488-45e3-b167-1c410a54a4d2.html>; Taylor Telford & Renae Merle, *Bank of America Cuts Business Ties with Detention Centers, Private Prisons*, WASH. POST (June 27, 2019, 1:42 PM), <https://www.washingtonpost.com/business/2019/06/27/bank-america-cuts-business-ties-with-detention-centers-private-prisons/>.

arguably further highlight the need for viewpoint diversity protections.<sup>35</sup> Relying on market forces does not necessarily solve these problems, since there are concerns that proxy advisory firms<sup>36</sup> and institutional shareholders<sup>37</sup> likewise lean left.

The bottom-line is that viewpoint discrimination in the workplace arguably harms corporations in a myriad of ways.<sup>38</sup> Thus, shareholders should take action to restore some semblance of balance, and shareholder proposals provide one opportunity for doing so.

#### IV. EXAMPLES OF VIEWPOINT DIVERSITY PROPOSALS

In providing a general introduction, FEP describes the first two types of viewpoint diversity proposals discussed below, which it broadly labels “Workforce Composition Proposals,” as follows:

FEP’s proposals in this area have been aimed at protecting employees throughout these corporations from blacklist-style viewpoint discrimination while also expanding true diversity within corporate management. Specifically, we are asking

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<sup>35</sup> See Richard Hanania, *It Isn’t Your Imagination: Twitter Treats Conservatives More Harshly Than Liberals*, QUILLETTE (Feb. 12, 2019), <https://quillette.com/2019/02/12/it-isnt-your-imagination-twitter-treats-conservatives-more-harshly-than-liberals/>; Alex Thompson, *Twitter Appears to Have Fixed “Shadow Ban” of Prominent Republicans Like the RNC Chair and Trump Jr.’s Spokesman*, VICE NEWS (July 25, 2018, 1:37 PM), [https://www.vice.com/en\\_us/article/43paqq/twitter-is-shadow-banning-prominent-republicans-like-the-rnc-chairand-trump-jrs-spokesman](https://www.vice.com/en_us/article/43paqq/twitter-is-shadow-banning-prominent-republicans-like-the-rnc-chairand-trump-jrs-spokesman).

<sup>36</sup> See John G. Matsusaka & Chong Shu, *Why Proxy Advice Might Be Slanted*, CLS BLUE SKY BLOG (Apr. 30, 2020), [https://clsbluesky.law.columbia.edu/2020/04/30/why-proxy-advice-might-be-slanted/\(providing framework explaining why “ISS” voting recommendations are generally ‘to the left’ of those of most investors” and stating that “the proxy advice market has consolidated into two companies that some believe control as much as 97 percent of that market . . . . The companies \[are\] ISS and Glass Lewis.”\).](https://clsbluesky.law.columbia.edu/2020/04/30/why-proxy-advice-might-be-slanted/(providing%20framework%20explaining%20why%20%27ISS%27%20voting%20recommendations%20are%20generally%20%27to%20the%20left%27%20of%20those%20of%20most%20investors%27%20and%20stating%20that%20%27the%20proxy%20advice%20market%20has%20consolidated%20into%20two%20companies%20that%20some%20believe%20control%20as%20much%20as%2097%20percent%20of%20that%20market%20...%20The%20companies%20[are]%20ISS%20and%20Glass%20Lewis.%27))

<sup>37</sup> Caleb Griffin, *Margins: Estimating the Influence of the Big Three on Shareholder Proposals*, U. OXFORD: FAC. L. BLOG (July 7, 2020), <https://www.law.ox.ac.uk/business-law-blog/blog/2020/07/margins-estimating-influence-big-three-shareholder-proposals>.

<sup>38</sup> See Nandita Bose, *Trump’s Executive Order Targets Political Bias at Twitter and Facebook*, FOX BUS. (May 28, 2020), <https://www.foxbusiness.com/technology/trumps-executive-order-targets-political-bias-at-twitter-and-facebook> (“The executive order . . . could expose tech companies to more lawsuits.”); *FEP Voter Guide*, *supra* note 20, at 21 (“Significant academic evidence supports the proposition that protecting against viewpoint discrimination is not just good for civil society generally, but for the organizations whose viewpoint diversity and expression is enriched by the establishment of such prohibitions.”).

corporations to study the risks that arise and effects that result from refusing to protect employees against McCarthyite viewpoint discrimination in the workplace. We also have submitted proposals seeking fuller disclosure of board candidates' ideological dispositions and worldviews before shareholders vote on those candidates, in an effort to facilitate increased viewpoint diversity in the nation's boardrooms. In sum, we aim to guarantee all Americans an equal comfort in expressing themselves and their ideas in the workplace, while also ensuring that corporations enjoy the full benefits that arise from avoiding echo chambers and capturing the widest possible array of diversity of thought and insight.<sup>39</sup>

*A. Protection of Employees*<sup>40</sup>

On Tuesday, July 14, 2020, New York Times editor Bari Weiss published what Fox News described as “a scathing resignation letter” that is worth quoting from at length here, as it illuminates exactly why employees need viewpoint diversity protection, and why businesses suffer when they fail to provide it.<sup>41</sup>

I was hired with the goal of bringing in voices that would not otherwise appear in your pages: first-time writers, centrists, conservatives and others who would not naturally think of The Times as their home. The reason for this effort was clear: The paper's failure to anticipate the outcome of the 2016 election meant that it didn't have a firm grasp of the country it covers. Dean Baquet and others have admitted as much on various occasions. The priority in Opinion was to help redress that critical shortcoming. . . .

But the lessons that ought to have followed the election—lessons about the importance of understanding other Americans, the necessity of resisting tribalism, and the centrality

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<sup>39</sup> *FEP Voter Guide*, *supra* note 20, at 19.

<sup>40</sup> The extent to which state law may protect viewpoint diversity is beyond the scope of this Article. See Daniel Lebovic, *Political Affiliation Discrimination*, LEGALMATCH (June 3, 2020), <https://www.legalmatch.com/law-library/article/political-affiliation-discrimination.html> (noting eleven states “have passed laws . . . [stating] employers may not take unfavorable job actions (i.e., termination, demotion) based on political affiliation or activity”).

<sup>41</sup> Brian Flood, *Bari Weiss Quits New York Times After Bullying by Colleagues Over Views: ‘They Have Called Me a Nazi and a Racist’*, FOX NEWS (July 14, 2020), <https://www.foxnews.com/media/bari-weiss-quits-new-york-times-bullying>.

of the free exchange of ideas to a democratic society—have not been learned. Instead, a new consensus has emerged in the press, but perhaps especially at this paper: that truth isn't a process of collective discovery, but an orthodoxy already known to an enlightened few whose job is to inform everyone else. . . . I was always taught that journalists were charged with writing the first rough draft of history. Now, history itself is one more ephemeral thing molded to fit the needs of a predetermined narrative.

My own forays into Wrongthink have made me the subject of constant bullying by colleagues who disagree with my views. They have called me a Nazi and a racist; I have learned to brush off comments about how I'm "writing about the Jews again." Several colleagues perceived to be friendly with me were badgered by coworkers. My work and my character are openly demeaned on company-wide Slack channels where masthead editors regularly weigh in. There, some coworkers insist I need to be rooted out if this company is to be a truly "inclusive" one, while others post ax emojis next to my name. Still other New York Times employees publicly smear me as a liar and a bigot on Twitter with no fear that harassing me will be met with appropriate action. They never are. . . .

I do not understand how you have allowed this kind of behavior to go on inside your company in full view of the paper's entire staff and the public. And I certainly can't square how you and other Times leaders have stood by while simultaneously praising me in private for my courage. Showing up for work as a centrist at an American newspaper should not require bravery.

Part of me wishes I could say that my experience was unique. But the truth is that intellectual curiosity—let alone risk-taking—is now a liability at The Times. Why edit something challenging to our readers, or write something bold only to go through the numbing process of making it ideologically kosher, when we can assure ourselves of job security (and clicks) by publishing our 4000th op-ed arguing that Donald Trump is a unique danger to the country and the world? And so self-censorship has become the norm.

What rules that remain at The Times are applied with extreme selectivity. If a person's ideology is in keeping with the new orthodoxy, they and their work remain unscrutinized. Everyone else lives in fear of the digital thunderdome. Online venom is excused so long as it is directed at the proper targets.

Op-eds that would have easily been published just two years ago would now get an editor or a writer in serious trouble, if not fired. . . .

Even now, I am confident that most people at The Times do not hold these views. Yet they are cowed by those who do. Why? Perhaps because they believe the ultimate goal is righteous. Perhaps because they believe that they will be granted protection if they nod along as the coin of our realm—language—is degraded in service to an ever-shifting laundry list of right causes. Perhaps because there are millions of unemployed people in this country and they feel lucky to have a job in a contracting industry.

Or perhaps it is because they know that, nowadays, standing up for principle at the paper does not win plaudits. It puts a target on your back. Too wise to post on Slack, they write to me privately about the “new McCarthyism” that has taken root at the paper of record.

All this bodes ill, especially for independent-minded young writers and editors paying close attention to what they’ll have to do to advance in their careers. Rule One: Speak your mind at your own peril. Rule Two: Never risk commissioning a story that goes against the narrative. Rule Three: Never believe an editor or publisher who urges you to go against the grain. Eventually, the publisher will cave to the mob, the editor will get fired or reassigned, and you’ll be hung out to dry.

For these young writers and editors, there is one consolation. As places like The Times and other once-great journalistic institutions betray their standards and lose sight of their principles, Americans still hunger for news that is accurate, opinions that are vital, and debate that is sincere. I hear from these people every day. “An independent press is not a liberal ideal or a progressive ideal or a democratic ideal. It’s an American ideal,” you said a few years ago. I couldn’t agree more. America is a great country that deserves a great newspaper.

None of this means that some of the most talented journalists in the world don’t still labor for this newspaper. They do, which is what makes the illiberal environment especially heartbreaking. I will be, as ever, a dedicated reader of their work. But I can no longer do the work that you brought me here to do—the work that Adolph Ochs described in that famous 1896 statement: “to make of the columns of The New York Times a forum for the

consideration of all questions of public importance, and to that end to invite intelligent discussion from all shades of opinion.”<sup>42</sup>

Shortly after Weiss published her resignation letter, Andrew Sullivan published a related resignation column in the *New York* magazine.<sup>43</sup> Again, the column is worth quoting at length.

What has happened, I think, is relatively simple: A critical mass of the staff and management at *New York* Magazine and Vox Media . . . seem to believe, and this is increasingly the orthodoxy in mainstream media, that any writer not actively committed to critical theory in questions of race, gender, sexual orientation, and gender identity is actively, physically harming co-workers merely by existing in the same virtual space. Actually *attacking*, and even mocking, critical theory’s ideas and methods, as I have done continually in this space, is therefore out of sync with the values of Vox Media. That, to the best of my understanding, is why I’m out of here.

Two years ago, I wrote that we all live on campus now. That is an understatement. In academia, a tiny fraction of professors and administrators have not yet bent the knee to the woke program — and those few left are being purged. The latest study of Harvard University faculty, for example, finds that only 1.46 percent call themselves conservative. But that’s probably higher than the proportion of journalists who call themselves conservative at the *New York Times* or CNN or *New York* Magazine. And maybe it’s worth pointing out that “conservative” in my case means that I have passionately opposed Donald J. Trump and pioneered marriage equality, that I support legalized drugs, criminal-justice reform, more redistribution of wealth, aggressive action against climate

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<sup>42</sup> Bari Weiss, *Resignation Letter*, BARI WEISS, <https://www.bariweiss.com/resignation-letter>. Compare *id.* (“Twitter is not on the masthead of The New York Times. But Twitter has become its ultimate editor.”) with Kurt Schlichter, *Why You Should Be Optimistic About Trump Winning*, TOWNHALL.COM (July 13, 2020, 12:01 AM), <https://townhall.com/columnists/kurtschlichter/2020/07/13/why-you-should-be-optimistic-about-trump-winning-n2572320> (describing Twitter as “a veritable orgy of liberal confirmation bias”).

<sup>43</sup> Sam Dorman, *Andrew Sullivan Announces Resignation from New York Magazine, Says Reason 'Pretty Self-Evident'*, FOX NEWS (July 14, 2020), <https://www.foxnews.com/media/andrew-sullivan-resigns-new-york-magazine> (“Sullivan, who had been a writer-at-large for New York since 2016, added he would address ‘the broader questions’ surrounding his departure in his final column Friday.”).



The foregoing arguably makes a mockery of corporate commitments to workplace diversity, and one could be forgiven for concluding that corporate commitments to workplace diversity only apply so long as one does not express conservative views.<sup>49</sup> If the reality is that only “historically oppressed” groups are protected by commitments to diversity, while “oppressor” groups are not, then corporations should say so.<sup>50</sup> Until then, corporations should commit to protecting all employees

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I'm a long time reader, and to be honest I always thought you were a little over the top, although I enjoy your writing and perspective. I no longer think you're exaggerating the threat we face. I'm happy for you to share anonymized excerpts of this email, but please do not share my name, the specific industry I'm in, or anything else that could be connected to me other than the city. I've used [] to indicate things I especially don't want shared. I'm sure I would be fired for sending you this. [Note from Rod: I have put “deleted” inside the bracketed information.] I have a PhD from [deleted] and I'm in a senior role at [deleted] firm in Washington DC; I specialize in our [deleted]. I've been highly successful—in 3.5 years with the company I've gotten a raise or promotion every 6 months. I'm well respected and I now run my own team. Despite this, I have no doubt if my political beliefs were public I would be fired instantly. When I interviewed with this company, I was asked point blank if I could “put my political beliefs aside” to do unbiased [work in this field], because I had previously worked for a Koch organization. For years I have routinely heard my Roman Catholic faith and my politics (libertarian-GOP) mocked. To be clear, *no one knows* about my beliefs because they assume everyone is a far leftist. People (including executives) hate-watched the Kavanaugh hearings in the office during the workday; people loudly proclaim their hatred for Trump, Kavanaugh, Barr, etc. The one openly GOP/Trump guy in the office is roundly attacked and mocked daily. These people are so sure everyone agrees with them that many times, they have ranted to me about their hatred of Trump, Kavanaugh, Barr, and even Koch (my former employer), assuming I agree. *Id.*

<sup>49</sup> Cf. *We Believe in Equality for All*, SALESFORCE, <https://www.salesforce.com/company/equality/> (“We strive to create a workplace . . . where everyone feels seen, heard, valued, and empowered to succeed.”); *What We're Looking For*, BANK OF AMERICA, <https://careers.bankofamerica.com/en-us/company/candidates> (“you can come . . . with a different life perspective, and you are valued for your unique point of view”).

<sup>50</sup> Cf. Rachel del Guidice, *The Tyranny in the Left's Goal of Outlawing 'Hate Speech'*, DAILY SIGNAL (June 17, 2020), <https://www.dailysignal.com/2020/06/17/the-tyranny-in-the-lefts-goal-of-outlawing-hate-speech/> (“Here's the bottom line of what [hate speech] criminalization advocates are actually after. What they want to get rid of is speech that



from viewpoint discrimination. And even if corporations affirmatively adopt diversity policies that only protect marginalized groups, corporations should keep in mind that new groups become marginalized as new factions rise to dominance. For example, Christian conservatives arguably constitute a marginalized group in many contexts today.<sup>51</sup>

Furthermore, if it turns out that studies showing positive corporate benefits flowing from racial and gender diversity are actually pointing to a more powerful effect captured by viewpoint diversity more generally, then corporate decision-makers are arguably duty-bound to pursue diversity that transcends the bounds of gender, race, and other historically marginalized and oppressed groups.<sup>52</sup>

Turning to the specific proposal, the version submitted to Apple reads: “Shareholders request that Apple Inc. . . . issue a public report detailing the potential risks associated with omitting ‘viewpoint’ and ‘ideology’ from its written equal employment opportunity (EEO) policy.”<sup>53</sup> FEP goes on to note that “the true aim of these proposals is to negotiate with

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harms the self-respect of so-called marginalized or victim groups. And what that means in the end is that those victim groups are free to speak as much as they want against the oppressor group, which in America . . . is defined by the left . . . as white Americans. So it would be perfectly permissible to speak against the oppressor group while the oppressor’s speech, which would harm the self-respect or dignity of victim groups, would be silenced.”); Arthur Milikh, “*Hate Speech*” and the New Tyranny Over the Mind, HERITAGE FOUND. (May 19, 2020), <https://www.heritage.org/civil-society/report/hate-speech-and-the-new-tyranny-over-the-mind> (“Leading restriction advocates want not only to banish ‘hate speech,’ but also to *criminalize* it. . . . Such laws would severely restrict political deliberation on any number of critical issues confronting the country.”).

<sup>51</sup> Cf. ROD DREHER, THE BENEDICT OPTION: A STRATEGY FOR CHRISTIANS IN A POST-CHRISTIAN NATION 3 (2017) (“The culture war that began with the Sexual Revolution in the 1960s has now ended in defeat for Christian conservatives. The cultural left—which is to say, increasingly the American mainstream—has no intention of living in postwar peace. It is pressing forward with a harsh, relentless occupation. . . .”).

<sup>52</sup> FEP *Voter Guide*, *supra* note 20, at 21 (“Significant academic evidence supports the proposition that protecting against viewpoint discrimination is not just good for civil society generally, but for the organizations whose viewpoint diversity and expression is enriched by the establishment of such prohibitions.”); *c.f.* Zachary Michael Jack, *Why Search Committees Need to Emphasize Ideological Diversity*, CHRONICLE HIGHER EDUC. (July 24, 2020), <https://community.chronicle.com/news/2380-why-search-committees-need-to-emphasize-ideological-diversity?cid=VTEVPMSD1> (including following comment from a David Epstein: “I have done some research on top management teams and found that diversity of thought rather than demographic variables has more significant impacts.”).

<sup>53</sup> FEP *Voter Guide*, *supra* note 20, at 67 n.47.

companies and convince them to amend their equal employment opportunity policies to add protections against viewpoint discrimination. In 2020, we filed these proposals with Apple, Starbucks, Twitter, Facebook, Salesforce, Netflix and Alphabet.”<sup>54</sup>

The FEP Voter Guide lists the current status of its EEO proposals as follows:

- “Apple petitioned the U.S. Securities and Exchange Commission (SEC) seeking to omit FEP’s proposal. Lawyers at the SEC granted Apple’s request, thereby giving federal approval for corporate blacklisting.”<sup>55</sup>
- “Our proposal to Starbucks was presented and defeated at the company’s shareholder meeting on March 18th.”<sup>56</sup>
- “We withdrew our proposal to Facebook once the company revealed that it had an internal viewpoint protection policy in place, and once it agreed to make that policy public.”<sup>57</sup>
- “Salesforce petitioned the SEC seeking to omit our proposal. A decision is pending.”<sup>58</sup>
- “Alphabet petitioned the SEC seeking to omit our proposal. A decision is pending.”<sup>59</sup>
- “Netflix has indicated that it intends to include our proposal in its proxy statement. A vote is expected later this spring.”<sup>60</sup>
- “Twitter has indicated that it intends to include our proposal in its proxy statement. A vote is expected later this spring.”<sup>61</sup>

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<sup>54</sup> *Id.* at 20.

<sup>55</sup> *Id.* at 23.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

### B. Selection of Board and Related Members

FEP argues that “as companies are increasingly participating in political and public policy discussions, they should consider the ideological balance of their boards to ensure voices from a diversity of viewpoints are represented.”<sup>62</sup> Thus, “[a] second, related set of proposals advanced by FEP in 2020 requests that corporations report the political dispositions of candidates for board membership.”<sup>63</sup> Put another way, FEP “asked corporations to value viewpoint diversity on their boards of directors, or at least to report on the political and philosophical dispositions of its board candidates with at least the same attention and in at least the same detail that they provide to those candidates’ surface-diversity characteristics.”<sup>64</sup> In 2020, FEP “filed these resolutions with Walgreens, Costco, John Deere, AT&T, Johnson & Johnson, Wells Fargo, Pfizer, Boeing, Eli Lilly, Prudential, and JPMorgan Chase.”<sup>65</sup>

FEP argues its proposal is in accord with the findings of researchers “who have articulated the need for organizational thought leaders to express their recognition of the viewpoint-discrimination problem and to lead by example in fixing it.”<sup>66</sup> FEP cites a 2013 study that considered “whether diversity in points of view within corporate boards, as captured by the diversity in political ideology of board members, can affect a firm’s performance.”<sup>67</sup> FEP notes that study concluded “that ideologically diverse boards are associated with better firm performance, lower agency costs and less insiders’ discretionary power over the firm’s Political Action Committee (PAC) spending.”<sup>68</sup>

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<sup>62</sup> *Id.* at 24.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 26.

<sup>65</sup> *Id.* at 24.

<sup>66</sup> *Id.* at 25 (citing Jose L. Duarte et al., *Political Diversity Will Improve Social Psychological Science*, 38 BEHAV. & BRAIN SCI. 1, 11–12 (2015)).

<sup>67</sup> *Id.* (citing Incheol Kim et al., *Corporate Boards’ Political Ideology Diversity and Firm Performance*, 21 J. EMPIRICAL FIN. 223, 223 (2013)).

<sup>68</sup> *Id.* The issue of how viewpoint diversity proposals intersect with the current debate regarding corporate purpose is beyond the scope of this Article. However, it seems fair to say that an argument in favor of viewpoint diversity can be advanced in accordance with either perspective. Cf. Diana C. Nicholls Mutter, *The Morals of the Women on Boards Story: Global Board Gender Diversity Efforts Still Need Fairness-Based Arguments to Move Regulation to the Next Chapter*, 53 INT’L L. 235, 275 (2020) (“[I]n the U.S., where shareholder primacy is often assumed to be a governing norm, boards are still more than able to

FEP sums up its view of the relevant research as follows:

[D]iversity studies and campaigns too often focus on the surface diversity of sex, race or similar difference—the proxies of true diversity—rather than on real diversity of insight and worldview. But most of them end up acknowledging, even if only in passing, that surface diversity matters primarily insofar as it serves as an imperfect proxy for intellectual diversity and difference in worldview.<sup>69</sup>

Finally, FEP notes that its proposals in this area “do not attempt to establish quotas for intellectual diversity on corporate boards, even though many of these boards appear to be more bereft of right-of-center representatives than of any of the surface diversity categories on which the AYS coalition fixates.”<sup>70</sup>

The FEP Voter Guide lists the current status of its board diversity proposals as follows:

- “FEP’s proposals to Walgreens, Wells Fargo, Prudential, and JPMorgan Chase were withdrawn following successful negotiations in which the respective companies agreed to amend board nominating policies to reflect a greater need for viewpoint diversity.”<sup>71</sup>

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pursue diversity efforts under the protection of the business judgment rule. In fact, members of the Business Roundtable in the U.S. stated recently that corporations should consider the interests of stakeholders other than shareholders in making decisions.”)

<sup>69</sup> *FEP Voter Guide*, *supra* note 20, at 25. The extent to which successful proposals to increase “surface diversity” on corporate boards may reduce the need for viewpoint diversity proposals is beyond the scope of this Article. *Cf.* Levi Sumagaysay, *California is Trying to Legally Require More Diversity on Corporate Boards*, MARKETWATCH (Sept. 1, 2020, 2:55 PM) (“After establishing a law that required female representation on corporate boards, state legislature passes bill that ‘pushes the envelope’ by requiring companies to have members from underrepresented ethnic, racial and sexual-orientation groups.”).

<sup>70</sup> *FEP Voter Guide*, *supra* note 20, at 26. *Cf.* Keith Paul Bishop, *California’s Racial/Ethnic Quota Bill Is Amended To Expand Definition Of “Underrepresented Communities,”* CAL. CORP. & SEC. L. (July 30, 2020), <https://www.calcorporatelaw.com/californias-racial/ethnic-quota-bill-is-amended-to-expand-definition-of-underrepresented-communities> (noting “California bill that would require publicly held corporations have a minimum number of ‘directors from underrepresented communities’”).

<sup>71</sup> *FEP Voter Guide*, *supra* note 20, at 27.

- “The SEC allowed AT&T, Johnson & Johnson, and Pfizer to omit FEP’s proposals.”<sup>72</sup>
- “The proposals to Costco and John Deere were voted on and defeated in January and February at each corporation’s respective annual meeting.”<sup>73</sup>
- “Boeing shareholders will have the chance to vote on FEP’s proposal at the company’s annual meeting, scheduled for April 27, 2020.”<sup>74</sup>
- “Eli Lilly shareholders will have an opportunity to vote on FEP’s proposal at the company’s annual meeting, scheduled for May 4, 2020.”<sup>75</sup>

### *C. Viewpoint Discrimination in Policy-Making*

FEP discusses a number of AYS proposals it characterizes as seeking to force corporations to adopt policies that will silence right-leaning voices.<sup>76</sup> I focus here on one of FEP’s own related proposals. Specifically, a proposal designed to root out the use of the Southern Poverty Law Center (SPLC) by corporations for the purpose of “blacklisting conservatives.”<sup>77</sup>

FEP describes the SPLC as equating “organizations that believe in traditional marriage” with “the Ku Klux Klan.”<sup>78</sup> The SPLC thus labels such groups “hate groups,” and this designation is then used by certain corporations to deny these groups funding they would otherwise be

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 28–51 (discussing (1) “AYS Proposals I: Ethnic and Gender Quotas on Corporate Boards and in General Hiring;” (2) “AYS Proposals II: The Facebook Trifecta;” (3) “As You Sow Seeks to Muzzle Pro-Business Organizations;” (4) “As You Sow Activists Seek to Codify Business Roundtable Statement;” (5) “Anti-Life Activists Seek Greater Corporate Support”).

<sup>77</sup> *Id.* at 52. *Cf.* Press Release, Nat’l Ctr. for Pub. Pol’y Res., Mastercard Unable to Defend Its Support for Marxist Group “Black Lives Matter” (June 16, 2020) (““Americans from all backgrounds recoil at the brutal death of George Floyd. But that outrage doesn’t justify promoting radical groups like Black Lives Matter,” said Horace Cooper, co-chairman of the Project 21 black leadership network at the National Center for Public Policy Research, who questioned Mastercard executives at today’s meeting.”) (available at <https://nationalcenter.org/ncppr/2020/06/16/mastercard-unable-to-defend-its-support-for-marxist-group-black-lives-matter/>).

<sup>78</sup> *FEP Voter Guide*, *supra* note 20, at 52.

eligible for.<sup>79</sup> For example, Amazon relies on SPLC designations to exclude “U.S. Internal Revenue Service-approved charities from receiving customer selected donations through the AmazonSmile Program.”<sup>80</sup>

FEP asserts that Amazon’s reliance on the SPLC for this purpose is particularly troubling because (1) SPLC’s “hate group” rhetoric “is so outlandish, it has required SPLC to pay millions to settle a threatened defamation lawsuit”;<sup>81</sup> (2) “dozens of media reports . . . have detailed the current internal turmoil within the Southern Poverty Law Center brought on by corruption and misdeeds at the highest levels of leadership”;<sup>82</sup> (3) former SPLC employees “have described in great detail how the now-terminated SPLC founder developed the [hate group] list to generate large donations from ‘gullible northern liberals.’”<sup>83</sup> FEP argues elsewhere that while Twitter “stopped working with the Southern Poverty Law Center (SPLC) a year ago,” Amazon “defended—and even fought for—its relationship with the discredited left-wing special interest group.”<sup>84</sup>

FEP’s resolution states: “Shareholders request that Amazon issue a report, at reasonable cost and omitting proprietary information, evaluating the range of risks and costs associated with discriminating against different social, political, and religious viewpoints.”<sup>85</sup>

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<sup>79</sup> *Id.* (“Separate and distinct from their efforts to exclude conservative individuals from employment and corporate boards, many groups on the left actively work to defund conservative and religious organizations, and they have enlisted companies to help them in this endeavor.”).

<sup>80</sup> *Id.* at 53.

<sup>81</sup> *Id.* at 53.

<sup>82</sup> *Id.* at 54 (quoting Letter from Brian Glicklich, Executive Director, Citizens for Corporate Accountability, to Jeff Bezos & Jay Carney, Amazon (April 4, 2019) (available at <http://citizensforcorporateaccountability.org/wp-content/uploads/2016/04/final-amazon-demand-letter.pdf>) (asking Amazon to (1) “Immediately terminate use of SPLC’s ‘hate group’ list and associated materials in determining eligibility for the Amazon Smile program,” and (2) “Publicly renounce the use of SPLC’s ‘hate group’ list and associated materials in decision-making about any aspect of Amazon’s business.”)).

<sup>83</sup> *FEP Voter Guide*, *supra* note 20, at 54.

<sup>84</sup> David Almasi, *Amazon Helps Left Punish Its Political Enemies*, NAT’L CTR. FOR PUB. POL’Y RES. (June 4, 2020), <https://nationalcenter.org/ncppr/2020/06/04/amazon-helps-left-punish-its-political-enemies/>.

<sup>85</sup> *FEP Voter Guide*, *supra* note 20, at 52.

## V. CONCLUSION

It seems fair to say that corporations are taking sides in our culture wars like never before.<sup>86</sup> Perhaps, these decisions should be treated like all other business decisions. There is at least some reason to believe, however, that the current level of corporate politicization is unsustainable and inefficient, even when using the yardsticks for efficiency preferred by proponents of stakeholder governance. The seemingly inevitable pushback against politicized corporations can take many forms, including a variety of pressure tactics from shareholders, regulators, and other stakeholders.<sup>87</sup> This tug-of-war for the political soul of our corporations can reasonably be expected to be very costly. Perhaps viewpoint diversity can come to play an insulating role in corporate governance like independence and disinterestedness does currently.<sup>88</sup> For example, I have elsewhere proposed that a viewpoint-diverse board could provide a safe harbor against certain types of judicial scrutiny.<sup>89</sup> Similar safe harbors for viewpoint diverse boards, committees, etc., may be created in response to other pressure tactics.<sup>90</sup> One could envision, for example, a new basis for

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<sup>86</sup> See Alana Semuels, *Why Corporations Can No Longer Avoid Politics*, TIME (Nov. 21, 2019, 7:48 AM), <https://time.com/5735415/woke-culture-political-companies/> (“For decades, most companies went to great lengths to avoid opining on social issues. No longer.”).

<sup>87</sup> Cf. Fred Lucas, *White House Weighs Bill in Response to Big Tech on Free Speech*, DAILY SIGNAL (Aug. 09, 2020), <https://www.dailysignal.com/2020/08/09/white-house-weighs-bill-in-response-to-big-tech-on-free-speech/> (reporting that White House chief of staff Mark Meadows said President Trump’s thinking reflects the view that social media “censorship has gotten to the point where if they are going to censor, then I’m going to make sure they are regulated”).

<sup>88</sup> Cf. Lisa M. Fairfax, *The Uneasy Case for the Inside Director*, 96 IOWA L. REV. 127, 153 (2010) (“The existence and impact of structural bias makes it normatively difficult to have truly independent directors . . . . [I]ncreasing board diversity could reduce the impact of structural bias because such bias is understood to flourish in homogeneous and highly cohesive groups.”).

<sup>89</sup> Stefan Padfield, *Corporate Governance and the Omnipresent Specter of Political Bias: The Duty to Calculate ROI*, 104 MARQ. L. REV. 47 (2020).

<sup>90</sup> Delaware may be particularly suited to embrace viewpoint diversity, given that it has a long-standing tradition of requiring a “politically balanced state judiciary,” though this requirement is currently being challenged at the U.S. Supreme Court. See Stephen M. Bainbridge, *Press Accounts of the Supreme Court’s Oral Argument in Carney v. Adams, re Delaware’s Political Balance Requirement*, PROFESSORBAINBRIDGE.COM (Oct. 6, 2020), <https://www.professorbainbridge.com/professorbainbridge.com/2020/10/press-accounts-of-the-supreme-courts-oral-argument-in-carney-v-adams-re-delawares-political-balance-.html>.

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excluding shareholder proposals based on a relevant demonstration of viewpoint diversity.