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Making Mandates Last: Increasing Female Representation on Corporate Boards in the U.S.

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MAKING MANDATES LAST: INCREASING FEMALE REPRESENTATION ON CORPORATE BOARDS IN THE U.S.

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ABSTRACT

A lack of female representation on corporate boards has plagued our country for decades. Until a few years ago, there was not a single state or federal regulation that required corporations to fill board seats with female directors. Instead, the federal government talked around the issue. In 2010, the SEC established an optional reporting structure for corporations to communicate their hiring practices, but did little else. With no national plan in place, many states implemented legislation that urged corporations to hire female directors. But this legislation barely moved the needle. The country needed a mandate. And in 2018, California implemented the first one – SB 826. SB 826 required each publicly held corporation with executive offices in California to place specific numbers of women on its board, depending on the board's size. The private sector quickly followed, with institutions such as Goldman Sachs and Nasdaq announcing that in order to receive funding or list on its exchange, corporations must have at least one female director.

After SB 826 was enacted, the number of women on California boards more than doubled. And many states are now using SB 826 as a model to enact similar bills. But while SB 826 saw few legal challenges overall, in May 2022, it was overturned under California's Equal Protection Clause. Even if this decision is appealed, states looking to follow California's lead should be cautious of another threat to such a mandate's longevity – the internal affairs doctrine. The internal affairs doctrine is a conflict of laws principle that establishes that the state law of incorporation governs a company's internal affairs. More than half of the corporations in the U.S. are incorporated in Delaware, leaving state statutes highly vulnerable to being rendered ineffective. It is clear that mandates work. But when mandates are put in place, they should stay in place.

In this Note, I propose two alternative solutions [to the female representation problem] that would increase female participation on corporate boards. First, even if Equal Protection challenges ultimately fail, rather than relying on sporadic state statutes, stakeholders should pressure Delaware to enact a corporate code that would mandate female representation on corporate boards. Second, to circumvent Equal Protection challenges altogether, the private sector should expand its mandates to consider the number of female directors in relation to the size of each board, similarly to SB 826.

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INTRODUCTION

In 2012, Facebook filed an IPO with a seven-member, all-male board of directors.[1] Although Facebook users resided in over 100 different countries[2], the company's small, homogenous board embodied an American reality – few stakeholders[3] cared about ensuring that qualified women had opportunities to serve on boards.[4] As early as 2003, several European countries mandated that female directors comprise 40% of their corporations' boards.[5] But in the U.S., more than ten years after Europe's actions, corporations were neither required nor pressured to consider the ways in which board candidates contributed to diversity.[6] And Facebook CEO Mark Zuckerberg was free to ignore a pipeline of

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1. Facebook, Initial Public Offering (Form S-1) (Feb. 1, 2012).
2. *World Map of Social Networks*, VINCOS BLOG (last visited Aug. 15, 2022), [https://perma.cc/2GQP-CUEN].
3. I will use the term "stakeholders" throughout this Note to describe anyone who cares about the advancement of women on corporate boards, such as politicians, CEOs, bankers and investors, or individuals currently serving on corporate boards.
4. *See* David F. Larcker & Brian Tayan, *Pioneering Women on Boards: Pathways of the First Female Directors*, STAN. CLOSER LOOK SERIES (Sept. 3, 2013), [https://perma.cc/UM4Y-8XJA]. This article also notes that women seem to need above-average performance in order to receive a board seat. *Id.* at 4; *See also* Dan Konigsburg & Sharon Thorne, *Deloitte Global's Latest Women in the Boardroom Report Reveals Crucial Link Between Women's Leadership and More Diverse Boards; Overall Rate of Progress Remains Slow*, DELOITTE (Feb. 1, 2022), [https://perma.cc/5SKU-6VQS]. Deloitte's report illustrates that companies with female CEOs have significantly more balanced boards than those with male CEOs. However, only 5% of CEOs (globally) are women, leaving women still struggling to gain footing on corporate boards. *Id.*; *See also* Connie Guglielmo, *Facebook, Under Fire for Lack of Female Directors, Maybe Needs a List*, FORBES (Apr. 27, 2012), [https://perma.cc/5F6P-5TYH] (listing qualified women in Silicon Valley who Zuckerberg failed to consider for Facebook's board); Milton Ezrati, *Senator Warren's Accountable Capitalism Bill Has Big Problems*, FORBES (Feb. 5, 2019), [https://perma.cc/TJJ2-48RT] (discussing political problems with implementing a federal corporate charter, one tool that stakeholders could use to enact a national mandate).
5. *See* S.B. 826, 2017-2018 Leg., Reg. Sess., 3 (Cal. 2018). SB 826 includes statistics about European mandates in the text of the bill. In 2003, Norway was the first country to legislate a mandatory 40% quota for female representation on corporate boards. Since then, other European nations that have followed include France, Spain, Iceland, and the Netherlands. Germany is the largest economy to mandate a gender quota, requiring 30% of board seats be held by women.
6. *Id.*

talented women.[7] That same year, women filled just 16% of board seats in the Fortune 500 despite making up over one third of the Fortune 500 workforce.[8]

These statistics represent a significant gap that different industry players are now working to fill. While the federal government recognized that board diversity was a problem in 2009, it has taken underwhelming action, if any, to improve it.[9] It took until 2018 for California to impose the country's first state mandate and until 2020 for Goldman Sachs to impose the private sector's first mandate.[10] These mandates came after public pressure mounted following the #MeToo Movement[11] and after several banks published studies illustrating that women on corporate boards positively impact the economy.[12]

Over the last few years, bank-led initiatives have led to incremental changes. In 2020, Goldman Sachs stated that it would only underwrite IPOs in the U.S. and Europe if a company had at least one female director on its board.[13] In 2021, Goldman increased its requirement to two directors who contribute to diversity, one of whom must be a woman.[14] Other banks have urged corporations to fill board seats with candidates who contribute to diversity.[15] From 2014–2016, 49% of companies that filed the 75 largest IPOs did so without a single female director on the board.[16] In contrast, in 2020, only one major company went public

7. In response to Facebook's all-male filing, *Forbes* assembled a list of highly qualified female candidates who Facebook could have considered for a board director position. *See* Guglielmo, *supra* note 4.
8. *See, e.g.*, Ryan Golden, *At Fortune 500 Companies, Women Account for a Third of Workers, Firm Says*, HR DIVE (June 30, 2021), [https://perma.cc/33HH-5TGG]. This statistic was calculated through the third quarter of 2021. *Id.*
9. *See* Luis A. Aguilar, Comm'r, SEC, Diversity in the Boardroom Yields Dividends, Address at Stanford Law School (Sept. 10, 2009), [https://perma.cc/W8H9-6AQ5].
10. David Solomon, *Diverse Leadership Is Needed More than Ever – Here's What We're Doing*, GOLDMAN SACHS (Feb. 4, 2021), [https://perma.cc/CB7N-BFXD].
11. *See, e.g.*, Jeff Green & Malathi Nayak, *How Boardroom Diversity Has Evolved in the #MeToo Era*, BLOOMBERG (Oct. 18, 2021), [https://perma.cc/MSY8-JYGP].
12. *See, e.g.*, Julia Dawson, Richard Kersley & Stefano Natella, *The CS Gender 3000: Women in Senior Management*, CREDIT SUISSE RSCH. INST. (Sept. 2014), [https://perma.cc/4JJG-8F3B].
13. Solomon, *supra* note 10.
14. *See, e.g.*, Emma Hinchliffe, *Goldman Sachs Took a Stand on Board Diversity. The Bank Just Placed Its 50th Diverse Director*, FORTUNE (Apr. 5, 2022), [https://perma.cc/5ER8-FFAH].
15. *See, e.g.*, Cydney Posner, *BlackRock Advocates That at Least Two Women Be on Each Company Board*, COOLEY PUBCO (Feb. 6, 2018), [https://perma.cc/6USH-F6TM].
16. *See* Valentina Zarya, *Think Going Public Makes Companies Prioritize Diversity? Think Again*, FORTUNE (July 20, 2017), [https://perma.cc/3QPF-74JM].

in the U.S. with an all-male board.[17] But that company, Dun & Bradstreet Holdings, used Goldman as its underwriter.[18] And in January 2020, when Goldman held an Investor Day and touted its diversity initiatives, it waited five hours to bring on a female speaker.[19] Under fire for its involvement in Dun & Bradstreet's IPO, Goldman reasoned that the "business data provider wasn't covered by the bank's diversity policy because it went public before the rules took effect" a few months later on July 1, 2020.[20]

State legislation has the potential to be more comprehensive, but it is also more vulnerable to legal challenges.[21] In 2018, California passed SB 826, a first-of-its-kind bill that mandated particular numbers of female directors on corporate boards, depending on the size of the board.[22] Not only did California consider proportional representation, but it also implemented a penalty for corporations that failed to comply.[23] Like mandates and pressure from the banks, SB 826 worked. In 2017, the year before the bill was announced, 117 publicly traded companies with executive offices in California had no women on their boards.[24] In 2020, that number had dropped to 17.[25] But SB 826 only lasted a few years.[26] In May 2022, it was overturned after facing Equal Protection challenges from conservative special interest groups.[27]

While many scholars examined SB 826's vulnerability at length under the Equal Protection Clause, few have considered the ways in which SB 826 and similar state mandates could be overturned by the internal affairs doctrine, and none have done so in depth.[28] The internal

17. *See* Jeff Green, *Just One Major U.S. IPO Debuted with an All-Male Board in 2020*, BLOOMBERG (Feb. 22, 2021), [https://perma.cc/L33K-VV8L].
18. *Id.*
19. *See* Thornton McEnery, *Goldman Sachs Investor Day Has Few Women Presenters Amid Diversity Push*, N.Y. POST (Jan. 29, 2020), [https://perma.cc/876N-AE6F].
20. Green, *supra* note 17.
21. *See, e.g.*, Alisha Haridasani Gupta, *Another California Board Diversity Law Was Struck Down, But It Already Had a Big Impact*, N.Y. TIMES (May 19, 2022), [https://perma.cc/D9R4-WP4R].
22. *Id.*
23. S.B. 826, 2017-2018 Leg., Reg. Sess., 5 (Cal. 2018).
24. *See* Jayne Juvan & Chaz Weber, *An Unconstitutional Mandate? California's Gender-Based Board Law and Its Uncertain Legal Future,* BUS. L. TODAY (Nov. 27, 2018), [https://perma.cc/DY6J-J9RU].
25. Cydney Posner, *New Report on California Board Gender Diversity Mandate*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 18, 2020), [https://perma.cc/TH4Y-835X].
26. *See* Gupta, *supra* note 21.
27. *Id.*
28. *See, e.g.*, Mohsen Manesh, *The Contested Edges of Internal Affairs*, 87 TENN. L. REV. 251 (2020). Professor Manesh discusses the future of the internal affairs doctrine in

affairs doctrine states that the law of the state of incorporation governs a company's internal affairs.[29] More than half of U.S. corporations are incorporated in Delaware.[30] This means that when other states attempt to control the internal affairs of Delaware corporations, those states are at odds with the internal affairs doctrine. And just one decision deferential to the doctrine could render state mandates ineffective.

But it is clear that mandates work. Even though SB 826 was recently overturned, stakeholders should use the California bill as a blueprint to implement two alternative solutions to make mandates last. Because other states are still forging ahead with similar legislation,[31] stakeholders should pressure Delaware to enact a corporate code similar to California's SB 826. A Delaware mandate, while still vulnerable to Equal Protection challenges, would avoid both internal affairs doctrine challenges and confusion among individual state statutes. Second, and more practically, stakeholders should focus on what the private sector has already done and look for ways to expand its mandates.

This Note proceeds in four parts. Part I explores why the U.S. has not implemented broader solutions to increase female representation on corporate boards. Part II focuses on the state's role by examining California's SB 826. Part III provides an overview of the internal affairs doctrine, California's attempts to legislate around it, and discusses why courts have consistently upheld the doctrine. Part IV then pivots to a discussion of alternative solutions.

I. WHY DIDN'T THE U.S. TAKE EARLIER ACTION TO DIVERSIFY CORPORATE BOARDS?

A. Lack of Commitment from the Federal Government

In 2009, three years before Facebook's all-male filing, the federal government acknowledged that corporate board diversity was severely

light of Sciabacucchi v. Salzburg, 227 A.3d 202 (Del. 2020), a case that allows corporations to draft forum selection provisions in their bylaws. He discusses SB 826 in the context that state law of incorporation applies regardless of forum. *Id.* at 262.

29. *See, e.g.*, Frederick Tung, *Before Competition: Origins of the Internal Affairs Doctrine*, 32 J. CORP. L. 33 (2006).

30. Suzanne Raga, *Why Are the Majority of U.S. Companies Incorporated in Delaware?*, MENTAL FLOSS (Mar. 11, 2016), [https://perma.cc/K7AW-KQUX].

31. *See, e.g.*, Rich Ehisen, *Will More States Set Board Diversity Mandates?*, LEXISNEXIS (Jan. 13, 2022), [https://perma.cc/C8LS-MPV4].

lacking in the U.S.[32] A year later, it enacted the SEC Proxy Disclosure Enhancement Regulation, which requires corporations to disclose whether their committees consider the ways in which board candidates contribute to diversity.[33] If corporations have a process of considering diversity, they must report how they implemented it and whether it was effective.[34] But the SEC's reporting policy did not create grand increases in female representation. In 2009, females made up 15% of board seats at Fortune 500 companies.[35] A few years later, in 2012, females made up 16% of the same category.[36]

More recently, in October 2021, the Biden-Harris Administration unveiled a National Strategy to Achieve Gender Equality which includes a section on recruiting women in corporate leadership.[37] The section states that the Biden-Harris Administration will promote transparency and encourage organizations to disclose the gender balance of their management and board positions.[38] But this newest statement only takes a *slightly* stronger position than the SEC did over ten years ago. There is little distinction between reporting how a corporation considers diversity when hiring and reporting the makeup of the board. The common denominator between the SEC approach and the Biden-Harris Administration approach is the word "report." It doesn't make corporations take any action. It only prioritizes transparency.[39]

Had the government taken a stronger stance years ago when it first recognized the problem, it might have prevented qualified women from being overlooked for corporate boards. So why hasn't it imposed a stronger solution? Although a federal solution would have the broadest reach, it also has the potential to create political and constitutional backlash.

32. Aguilar, *supra* note 9.
33. 17 C.F.R. §§ 229, 239, 240, 249, 274 (2010).
34. *Id.*
35. *See, e.g.*, Rachel Soares & Jan Combopiano, *2009 Catalyst Census: Fortune 500 Women Board Directors (Report)*, CATALYST (Dec. 9, 2009), [https://perma.cc/BB6T-D867].
36. *See, e.g.*, Rachel Soares, *2012 Catalyst Census: Fortune 500 Women Board Directors (Report)*, CATALYST (Dec. 11, 2012), [https://perma.cc/M45K-VYRZ].
37. Fact Sheet: National Strategy on Gender Equity and Equality, THE WHITE HOUSE (Oct. 22, 2021), [perma.cc/Q22R-N93F].
38. *Id.* at 12.
39. *Id.*

B. *A Political Non-Starter*

The federal government acting in the corporate space has long been a source of political tension.[40] In 2017, at the same time that states began to draft their own legislation, Senator Elizabeth Warren proposed the Accountable Capitalism Act. The Act would have required corporations with revenue over $1 billion to obtain a federal corporate charter.[41] Warren proposed creating a new agency to oversee the charter, the Office of United States Corporations, housed inside the Department of Commerce.[42] Her proposition did not receive any bi-partisan support. Though it was proposed again in 2020, it gained little traction after the onset of the COVID-19 pandemic.[43] Had the Accountable Capitalism Act gone into effect, it would have been the first instance in which the government oversaw large corporations' internal affairs.[44] Conservative scholars called the bill "socialist and unconstitutional" and accused Warren of believing she could make better decisions than the corporations.[45]

Looking beyond polarized partisan lines, Harvard Law School's Forum on Corporate Governance published an analysis stating that the Accountable Capitalism Act would likely produce little change.[46] The Act only proposed that a corporation's employees elect 40% of the corporation's board.[47] It did not propose any mandates that would ensure board candidates contributed to diversity and furthered female representation.[48] Supporters of the Act argued that employees would select candidates who contributed to diversity.[49] But as Harvard points out, nothing substantiates this claim.[50] Why couldn't a corporation's employees vote for all male board candidates? Many employees are already share-

40. Ezrati, *supra* note 4. Ezrati focuses on the "newness" of a corporate charter and its implications.
41. Accountable Capitalism Act One-Pager (2017), [https://perma.cc/6XWK-BQMQ].
42. *Id.*
43. Accountable Capitalism Act, S. 3215, 116th Cong. (2020).
44. Ezrati, *supra* note 4 ("A federal corporate charter is new. So far in this country's experience, the states have chartered corporations according to their various views of how companies should organize and conduct themselves.").
45. *See, e.g.*, Lee Edwards, *The Accountable Capitalism Act: Socialist and Unconstitutional*, HERITAGE FOUND. (Sep. 24, 2018), [https://perma.cc/UBV3-BRLX].
46. Denise Kuprionis, *Will Warren's Accountable Capitalism Act Help? The Answer is No.*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 10, 2018), [https://perma.cc/55TT-D49S].
47. *Id.*
48. Accountable Capitalism Act, S. 3215, 116th Cong. (2020).
49. *Id.*
50. *Id.*

holders of the corporations where they work, and therefore, have been voting for board directors for years.[51]

C. *States' Fear of Lawsuits Results in Little Change*

Enacting legislation to increase female representation on corporate boards was not an idea unique to the California legislature. Other states have enacted watered-down versions of SB 826 to avoid Equal Protection challenges such as those already brought in California.[52] Many states began drafting their legislation as a mandate, but while moving through the legislative process, reduced the idea to mere urging.[53] For example, after SB 826's implementation, Illinois proposed a similar bill with nearly identical corporate board diversity requirements.[54] But the version that the governor signed replaced mandates with a reporting requirement reminiscent of the SEC's 2010 disclosure policy.[55] In 2021, the University of Illinois published a study illustrating that females were underrepresented on Illinois corporate boards. It partially attributed the gap to the fact that there is no diversity requirement in place.[56]

When enacting SB 826, Governor Jerry Brown himself acknowledged that with a mandate, constitutional challenges could arise, but he signed the bill anyway.[57] At the time, women were so underrepresented on California boards that implementing a mandate seemed necessary to create change. The next section explores this further.

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51. *Id.*
52. The states that have already enacted a bill encouraging corporations to hire directors that contribute to diversity are: Colorado, Illinois, Maryland, New York, Washington, and Pennsylvania. *See* Billy Culleton, *State Lawmakers Continue Push to Increase Diversity in Corporate Boardrooms*, MULTISTATE (Mar. 17, 2021), [https://perma.cc/8V34-W82T].
53. *See* Michael Hatcher & Weldon Latham, *States Are Leading the Charge to Corporate Boards: Diversify!*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 12, 2020), [https://perma.cc/ZYP2-B38T].
54. *See, e.g.*, *Illinois-Headquartered Publicly Listed Corporations Must Report on Board Diversity by 2021*, SIDLEY AUSTIN (Sept. 5, 2019), [https://perma.cc/F6DG-PECY].
55. *Id.*
56. *See* Phil Ciciora, *Women, Minority Representation on Illinois Corporate Boards Lags, Study Says*, ILL. NEWS BUREAU (Mar. 25, 2021), [https://perma.cc/R9PW-7XQ5].
57. *See* Letter from Edmund G. Brown, Governor of Cal., to Members of Cal. State Senate (Sept. 30, 2018), [https://perma.cc/LT7Z-4LW3].

II. EXAMINING CALIFORNIA'S SB 826

A. *Why Pass SB 826?*

In 2018, California passed SB 826, the United States' first corporate board gender mandate.[58] In June 2017, a year before the California legislature passed the bill, there were 446 publicly traded corporations with principal executive offices in California, but female directors held only 15% of their board seats.[59] More than a quarter of those corporations had no female directors at all.[60] This may be partially attributed to Silicon Valley's start-up culture. Over the last several years, women in Silicon Valley have faced relentless discrimination.[61] But this discrimination is more likely a reflection of a national problem. The number of women on California boards was lower than the national average, but not by much.[62] In 2017, women held less than 20% of board seats at S&P 500 companies in the U.S.[63]

In fact, when providing other reasons for enacting the bill, California cited several nationwide studies.[64] The largest was the 2014 Credit Suisse study.[65] The Credit Suisse study included over 2,000 companies worldwide over a period of six years.[66] It examined everything from stock performance, return on equity, market capitalization, and price-to-equity ratios.[67] Credit Suisse found that over the six years, companies

58. S.B. 826, 2017-2018 Leg., Reg. Sess. (Cal. 2018).
59. Evan Symon, *California 'Woman Board Quota' Law Faces Legal Challenge in Court*, CAL. GLOBE (Dec. 19, 2019), [https://perma.cc/5QS9-K8MA].
60. *Id.*
61. *See, e.g.*, Liza Mundy, *Why Is Silicon Valley So Awful to Women?*, ATLANTIC (Apr. 2017), [https://perma.cc/4YYV-CE6Y]. Mundy takes readers into the depths of the tech industry, illustrating women being taken less seriously by men in power. Of a woman whose career had gone well in Silicon Valley she states that to succeed, she'd "made a point of ignoring slights and oafish comments." *Id. See also Silicon Valley's Sexism Problem*, ECONOMIST (Apr. 15, 2017), [https://perma.cc/6MHN-US2V].
62. Lynn Blake, *Corporate Boards: Where Are the Women?*, STATE ST. CORP. (Sept. 27, 2017), [https://perma.cc/S8Z5-KLG3]; Symon, supra note 59.
63. *Id.*
64. S.B. 826, 2017-2018 Leg., Reg. Sess. (Cal. 2018).
65. *Id.* at 2.
66. *Id.* at 3.
67. *Id.* at 10, 12, 14. By stock performance, I mean the price of the company's stock on each day that the market closes, examined over a period of time (in this instance, six years). Return on equity (ROE) is the measure of a company's net income divided by its shareholders' equity. Market capitalization refers to the value of a company, calculated by multiplying the total number of shares by the present share price. Finally, price-to-equity ratios (P/E ratios) indicate how much a company is worth. P/E ratios

with female directors outperformed those with all-male directors in almost every measurement.[68] Scholars have used this data to suggest that female representation on boards positively impacts the economy.[69] Some have even argued that mandating females on boards would protect pensions for retirees and pay dividends for shareholders.[70] This might be true or it might be just a correlation.[71] But California uses it to its advantage. Rather than emphasizing that women should be represented on corporate boards because they deserve to be represented on corporate boards, California purports that placing women on corporate boards is good for business.[72] What California doesn't mention, and what should be considered when enacting future mandates in the U.S., is that gender diversity is good for its own reasons.

Perhaps California forgoes this "diversity for the sake of diversity" narrative because implementation under this rationale has had little success on the national stage. The NFL's Rooney Rule is a good example of both why the "diversity for the sake of diversity" argument has failed and why mere encouragement does not produce the same results as a mandate.[73] In 2003, the NFL's Workplace Diversity Committee realized that the league had a historically low number of people of color acting as head coaches.[74] The Rooney Rule requires every team with a head coaching vacancy to interview at least one candidate who contributes to diversity.[75] There is no requirement to actually hire any person from any particular background.[76] The hope is that when teams interview candidates from underrepresented groups, they often discover that candidates from those groups are the best for the job.[77] But the Rooney Rule's results are underwhelming: only three of the last twenty head coaching vacancies were filled by minority candidates.[78] In 2020, the NFL respond-

are a company's stock price divided by the company's earnings per share for a designated period of time.

68. *Id.*
69. *See, e.g.*, Shirley Leung, *Investors Want More Women, Minorities on Corporate Boards*, BOS. GLOBE (July 25, 2017), [https://perma.cc/C2DE-ZGRV].
70. *See id.*
71. Frank Dobbin & Jiwook Jung, *Corporate Board Gender Diversity and Stock Performance: The Competence Gap or Institutional Investor Bias?*, 89 N.C. L. REV. 809, 818 (2011).
72. S.B. 826, 2017-2018 Leg., Reg. Sess., 2 (Cal. 2018).
73. *The Rooney Rule*, NFL FOOTBALL OPERATIONS (last visited Aug. 26, 2022), [https://perma.cc/79FD-QYJ3].
74. *Id.*
75. *Id.*
76. *See id.*
77. *See id.*
78. *See NFL Expands Rooney Rule to Boost Diversity*, REUTERS (May 19, 2020), [https://perma.cc/X5JJ-PVAC].

ed to this statistic by expanding the rule to require teams to interview two candidates who contribute to diversity.[79] But the Rooney Rule continues to come under fire. In early 2022, coaches accused the NFL of interviewing candidates who contribute to diversity only to satisfy the rule, with no intention of hiring those candidates.[80]

The recent controversy surrounding the Rooney Rule illustrates that even when those in power are encouraged to effect change, mandates can be more effective than encouragement. And effective action is needed. Credit Suisse ended their study by stating that if public corporations in the United States do not take action soon, it will take forty to fifty years to achieve gender parity.[81] Through SB 826, California engaged in these proactive steps by ensuring that women had a seat at the table, more than doubling female representation in just over three years.[82]

1. What Was SB 826 and How Did Corporations Comply?

SB 826 mandated that all publicly traded domestic or foreign corporations with principal executive offices in California have at least one woman on their board by the end of 2019.[83] Under SB 826, a corporation could also increase the number of directors on its board to establish its compliance.[84] The requirement increased through the end of 2021 depending on the size of each board.[85] Until it was overturned in May 2022, a board with four or fewer directors required a minimum of one female director, a board with five or fewer directors required a minimum of two female directors, and a board of six or more directors required a minimum of three female directors.[86] If a corporation did not comply, it was subject to a fine of $100,000 for the first violation and

79. *Id.*
80. *See, e.g.*, Tyler Lauletta, *Brian Flores' Discrimination Lawsuit is Exposing the NFL's Worst-Kept Secret – the Rooney Rule is Failing Black Coaches*, INSIDER (Feb. 4, 2022), [https://perma.cc/JGL2-2HPM]. In 2022, Brian Flores, a Black candidate, interviewed for a head coaching position with the New York Giants. But before he had finished interviewing for the job, he found out the position had already been given to a white candidate. *Id.*
81. S.B. 826, 2017-2018 Leg., Reg. Sess., 4 (Cal. 2018).
82. Levi Sumagaysay, *More Women than Men Were Named to California Boards in 2021, as Mandate Prepared to Grow More Strict*, MKT. WATCH (Dec. 18, 2021), [https://perma.cc/7YSY-LM4R].
83. Cal. S.B. 826.
84. *Id.*
85. *Id.*
86. *Id.*

$300,000 for a second violation on an annual basis.[87] For example, if a corporation was supposed to have two female directors and failed to fill either seat, it would have been fined $100,000 for the first violation and $300,000 for the second.[88]

To track compliance, California instructed corporations to complete a Corporate Disclosure Statement indicating their board make-up as outlined by SB 826.[89] The form was short, only three pages, and solicited a handful of responses, most of which involved checking boxes.[90] Corporations were required to check the number of its directors and the number of its directors who were female or from underrepresented groups.[91] They then completed the form by listing the names of the directors.[92] One year after the bill's implementation, California's Secretary of State released a report summarizing its progress.[93] In March 2020, the report counted 625 public companies with principal executive offices in California according to 2019 Form 10-Ks.[94] It stated that 330 of those corporations were impacted by SB 826, meaning that they needed to add at least one female director to their boards.[95] Of those 330 corporations, 282 (85%) of impacted corporations reported that they were in compliance with the bill.[96]

While these statistics are encouraging, California had trouble arriving at the numbers that eventually landed in the March 2020 report.[97] This is because the number of publicly traded corporations in California changes from year to year.[98] For example, in 2018, the year before the bill was implemented, California estimated that there were only 446 publicly traded corporations with principal executive offices in California.[99] In March 2020, the Secretary of State noted that the state did not

87. *Id.* at 5.
88. *Id.*
89. CAL. SEC'Y OF STATE, CORPORATE DISCLOSURE STATEMENT (2020) [hereinafter CORPORATE DISCLOSURE STATEMENT]; Press Release, Cal. Sec'y of State, Secretary of State Alex Padilla Releases Women on Boards March Report (Mar. 2, 2020) [https://perma.cc/2TFP-E562].
90. *Id.* at 1.
91. *Id.*
92. *Id.* at 2.
93. *See* Press Release, Cal. Sec'y of State, Secretary of State Alex Padilla Releases Women on Boards March Report (Mar. 2, 2020) [https://perma.cc/2TFP-E562].
94. ALEX PADILLA, CAL. SEC'Y OF STATE, WOMEN ON BOARDS: MARCH 2020 REPORT (2020), [perma.cc/F3C8-ETN9] [hereinafter WOMEN ON BOARDS 2020].
95. *Id.*
96. *Id.*
97. *See id.*
98. *See id.*
99. *See* S.B. 826, 2017-2018 Leg., Reg. Sess. (Cal. 2018).

have the data to include a summary of corporations that had either left California or relocated to California within the previous year.[100] The following year, California edited its Corporate Disclosure Statement, which asked whether the corporation relocated to or from the state in that calendar year.[101]

Because SB 826 was implemented with relative ease and few early legal challenges, two years later, the legislature expanded its stance on board diversity.[102] AB 979, which was also overturned in 2022, was a nearly identical bill mandating that a certain number of board seats be filled by members of underrepresented groups.[103] While SB 826 only saw two challenges during its first two and a half years of implementation, after AB 979 went into effect, both bills faced more challenges in California courts.[104]

2. Challenges to SB 826

While the legislature expected a flood of lawsuits after SB 826's implementation[105], until it was overturned, there were only four.[106] It's possible that few lawsuits were filed because adding one, two, or three women as board directors was a small lift. The lift was even smaller considering the bill allowed corporations to satisfy the requirement by adding an extra seat rather than reevaluating its makeup.[107] It is therefore unsurprising that of the four plaintiffs, none was a corporation trying to get out of fulfilling the requirement. Instead, those who challenged the bill had only tangential relationships to the corporations they sued.[108]

100. *See* WOMEN ON BOARDS 2020, *supra* note 94.
101. *See* CORPORATE DISCLOSURE STATEMENT, *supra* note 89.
102. A.B. 979, 2019-2020 Leg., Reg. Sess. (Cal. 2020).
103. *Id.*
104. *See* Complaint, Nat'l Ctr. for Pub. Pol'y Rsch. v. Weber, No. 2:21-at-01111 (E.D. Cal. Nov. 22, 2021); Complaint, All. for Fair Board Recruitment v. Weber, No. 2:21-cv-01951-JAM-AC (C.D. Cal. July 12, 2021).
105. *See* Letter from Edmund G. Brown, Jr., Governor of Cal., to Members of Cal. State Senate, *supra* note 57.
106. Meland v. Weber, No. 2:19-cv-02288-JAM-AC, 2021 WL 6118651 (E.D. Cal. Dec. 27, 2021); Crest v. Padilla, No. 19STCV27561, 2022 WL 1565613 (Cal. Super. Ct. May 13, 2022); Complaint, *Nat'l Ctr. for Pub. Pol'y Rsch.*, No. 2:21-at-01111; Complaint, *All. for Fair Board Recruitment*, No. 2:21-cv-01951-JAM-AC.
107. S.B. 826, 2017-2018 Leg., Reg. Sess., 4 (Cal. 2018).
108. *Meland,* 2021 WL 6118651; *Crest*, 2022 WL 1565613; Complaint, *Nat'l Center for Pub. Pol'y Rsch.*, No. 2:21-at-01111; Complaint, *All. for Fair Board Recruitment*, No. 2:20-cv-05644.

Conservative special interest groups relentlessly pushed their way through the courts. Special interest groups filed two of the four suits on behalf of the plaintiffs, each challenging SB 826 on Equal Protection grounds.[109] One was successful.[110] Almost immediately after the bill was implemented, Judicial Watch filed *Crest v. Padilla* on behalf of taxpayers.[111] The plaintiffs argued that because SB 826 employed gender classifications, expenditures of taxpayer funds relating to the bill were illegal under California's constitution.[112] In May 2022, a California judge ruled that SB 826 was invalid under the state's equal protection clause.[113] Shortly afterwards, Secretary Weber announced plans to appeal the decision.[114] Judicial Watch also filed a lawsuit against AB 979, the "sister-bill" to SB 826, which mandated that corporations also place candidates on their boards who contribute to diversity.[115] In April 2022, a California judge ruled that AB 979 was unconstitutional under the state's equal protection clause.[116]

The other two cases[117] were filed by organizations with no business activity in California. But one plaintiff, Alliance for Fair Board Re-

109. *See Meland*, 2021 WL 6118651; *Crest,* 2022 WL 1565613. *Meland*, the unsuccessful Equal Protection suit, was filed on behalf of a shareholder of OSI, a publicly traded corporation headquartered in California and incorporated in Delaware. OSI's board was made up of seven males. Because OSI's board of directors are elected by shareholders, the plaintiff claimed that SB 826 violated the Fourteenth Amendment by forcing him to discriminate against male candidates. A federal district court judge dismissed his claim for lack of standing, but that decision was reversed by the Ninth Circuit. On appeal, in determining whether the plaintiff had standing, the court applied Delaware law. The judge's application of Delaware law acknowledges that OSI, while engaging in significant activity in California, is a Delaware corporation governed by Delaware law.

110. *See* Gupta, *supra* note 21.

111. *Crest*, 2022 WL 1565613.

112. *Crest*, 2022 WL 1565613, at 1.

113. *See* Gupta, *supra* note 21.

114. *See, e.g.*, Cydney Posner, *California to Appeal Decision Striking Down Board Gender Diversity Statute*, JD SUPRA (May 23, 2022), [https://perma.cc/RFJ8-436T].

115. Crest v. Padilla, No. 20 STCV 37513, 2022 WL 1073294, at 4-5 (Cal. Super. Ct. Apr. 1, 2022).

116. *Crest*, 2022 WL 1073294, at 20.

117. Complaint, Nat'l Ctr. for Pub. Pol'y Rsch. v. Weber, No. 2:21-at-0111 (E.D. Cal. Nov. 11, 2022); Complaint, All. for Fair Board Recruitment v. Weber, No. 2:21-cv-019151-JAM-AC (C.D. Cal. July 12, 2021). The last case was filed by the National Center for Public Policy Research. It filed Equal Protection Clause claims against SB 826 and AB 979. Although the Center was a nonprofit headquartered in Washington D.C., it positioned itself as a shareholder because it invested in at least fourteen California companies subject to the statute. The court never evaluated the substance of this claim.

cruitment, filed claims under the internal affairs doctrine.[118] The internal affairs doctrine is a choice of law rule that states that the state law of incorporation governs a corporation's internal affairs. In the next section, I will explain the internal affairs doctrine in depth. In its complaint, Alliance for Fair Board Recruitment argued that California lacked jurisdiction to regulate the internal affairs of entities incorporated under the laws of other states.[119] Alliance for Fair Board Recruitment is a Texas, non-profit membership association whose members seek employment as corporate directors of publicly traded companies across the U.S., including in California.[120] Because the Texas organization did not position itself as a shareholder or corporation impacted by SB 826, it likely would have had trouble establishing standing.[121] But, if just one corporation or shareholder filed a suit under the internal affairs doctrine, a court could have struck down the bill without even confronting the constitutional question. The next section turns to why.

III. THE INTERNAL AFFAIRS DOCTRINE AND SB 826

A. *What is the Internal Affairs Doctrine?*

The internal affairs doctrine is a choice of law rule.[122] Corporations select which state to incorporate in based on the laws that will govern their internal affairs.[123] In its simplest form, the internal affairs doctrine states three things: (1) corporate law is state law; (2) each corporation is formed under the law of its chosen state of incorporation; and (3) the law of that state of incorporation must govern the corporation's internal affairs.[124] In 1982, the Supreme Court heard *Edgar v. Mite Corp.* and defined a corporation's internal affairs as matters regarding the relationships between the corporation and its current officers, directors, and shareholders.[125] The Court stated that only one state should have the authority to regulate these affairs. Otherwise, a corporation could be faced with conflicting demands.[126]

118. Complaint at 3, *All. for Fair Board Recruitment*, No. 2:21-cv-01951-JAM-AC.
119. *Id.*
120. Complaint at 5, *All. for Fair Board Recruitment*, No. 2:21-cv-019151-JAM-AC.
121. *Id.*
122. *See* Tung, *supra* note 29, at 107.
123. *Id.* at 103.
124. *Id.*
125. Edgar v. Mite Corp., 457 U.S. 624 (1982).
126. *Edgar*, 102 S. Ct. at 624.

The internal affairs doctrine has received significant attention because it forces state legislatures to compete to attract corporations. In this Note, I will focus on how the internal affairs doctrine applies to corporations that have principal executive offices in a state outside their state of incorporation. Courts across the U.S. have widely accepted the internal affairs doctrine, which has enabled corporations to continue incorporating under the law of any state, knowing their choice will be respected elsewhere.[127] For disputes over a corporation's internal affairs, state and federal courts have generally applied the law of the incorporating state.[128]

This logic is rooted in a historical context.[129] In the New Deal era, corporations began incorporating in their home states.[130] The internal affairs doctrine ultimately became a highly deferential standard, recognizing the state's territorial sovereignty.[131] The doctrine became more complicated when businesses grew and became interstate,[132] and even more so when states like Delaware began crafting a corporate code that attracted most of the nation's businesses.[133] By upholding the internal affairs doctrine and the law of the state of incorporation, courts offer consistency for corporations and investors.[134] Therefore, the purpose of the internal affairs doctrine as it functions today is more about offering predictability than deferring to state sovereignty.

Because the internal affairs doctrine was judicially created and is judicially enforced, courts still confront questions about when to apply it.[135] For example, until ten years ago, Alabama courts were inconsistent in applying the internal affairs doctrine to corporations with activity in Alabama but incorporated elsewhere.[136] Sometimes its state courts applied Alabama law; other times, they applied the law of the state of incorporation.[137] There was no general reasoning for this; decisions de-

127. *See* Stephen Bainbridge, *Can California Require Delaware Corporations to Comply with California's New Board of Director Gender Diversity Mandate? No.*, PROFESSOR BAINBRIDGE.COM (Sept. 1, 2018), [https://perma.cc/PHE7-H4JS].
128. *Id.*
129. Tung, *supra* note 29.
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *See* Manesh, *supra* note 28.
136. Jay M. Ezelle & C. Clayton Bromberg, Jr., *The Internal Affairs Doctrine in Alabama*, ALA. LAW. (Mar. 2011).
137. *Id.*

pended on the court or the judge.[138] In 2011, the Alabama Supreme Court reviewed its past decisions when deciding *Bentley* and held that internal disputes should be resolved under the state of incorporation.[139] To avoid this kind of uncertainty, many states codified the internal affairs doctrine so that courts consistently apply it to each case.[140]

A handful of states, however, try to legislate around the internal affairs doctrine by building exceptions into their corporate codes.[141] The reason is simple – states want control over the corporations that do their principal business in their state. The next section turns to California's attempt to gain this control.

B. *The Internal Affairs Doctrine and California*

1. California's § 2115 Exception

This section first examines Section § 2115 of California's corporate code, which, decades ago, was California's first attempt at legislating around the internal affairs doctrine. I will then discuss why it failed and introduce California's newest attempt, Section § 2115.5, which California enacted simultaneously when passing SB 826. Finally, I will discuss whether the newest attempt will survive internal affairs doctrine challenges.

Section § 2115 of the California Corporate Code is a long-arm statute that creates an exception to the internal affairs doctrine.[142] It purports to allow California to regulate the internal affairs of out-of-state (foreign) corporations by creating a category of pseudo-foreign corporations.[143] The term pseudo-foreign corporations acknowledges that a corporation is incorporated in another state, but purports that it is not truly foreign if most of its activity is in California.[144]

Qualifying as a "pseudo-foreign corporation" is tricky. Compliance can vary from year to year, depending on the corporation's perfor-

138. *Id.*
139. *Id.* at 144.
140. *Id.* at 143.
141. *See* Mark E. Kruse, *California's Statutory Attempt to Regulate Foreign Corporations: Will It Survive the Commerce Clause?*, 16 SAN DIEGO L. REV. 943 (1979).
142. CAL. CORP. CODE § 2115 (West 2010).
143. *Id.*
144. Matt Stevens, *Internal Affairs Doctrine: California Versus Delaware in a Fight for the Right to Regulate Foreign Corporations*, 48 B.C. L. REV. 1047 (2007).

mance.[145] A corporation may qualify as a pseudo-foreign corporation and become covered under § 2115 if (1) more than 50% of its outstanding voting securities are held of record by persons having addresses in California, and (2) the average of its property factor, payroll factor, and sales factor, has more than 50% of its activity in California during its latest full income year.[146]

The code lays out specific tests for each of these requirements.[147] For years after its 1947 enactment, California courts regularly expressed dissatisfaction with the tests and their ever-changing compliance.[148] The code also saw several amendments. The most significant was in 1975, when the legislature amended § 2115 to exclude publicly traded corporations, meaning that California no longer purported to control the internal affairs of corporations incorporated in other states if they were listed on a U.S. exchange.[149] This exclusion reduced litigation and eliminated much of § 2115's effect.[150] Therefore, a corporation is subject to this exception to the internal affairs doctrine *only* when it: (1) satisfies § 2155's tests and (2) it is not a public corporation listed and traded on a major U.S. exchange.[151] These are high hurdles to jump through, and therefore, § 2155 reaches very few corporations.

But in 2005, a Delaware decision further impacted the few corporations still within § 2155's reach. The Delaware Supreme Court heard the landmark case *VantagePoint Venture Partners v. Examen*, which held that § 2115 conflicted with the internal affairs doctrine.[152] In *VantagePoint*, the plaintiff brought specific issues relating to shareholder voting rights against Examen. Examen was not a publicly traded company.[153] It

145. VantagePoint Venture Partners 1996 v. Examen, Inc., 871 A.2d 1108 (Del. 2005).
146. CORP. § 2115.
147. *Id.* These tests include a securities ownership test, in which California examines the record date for the most recent shareholders' meeting during the most recent full income year. Then, the state walks through a three-factor test which provides an approximate estimate of how much business the corporation is conducting in California. The property factor calculation divides the average value of the corporation's real property owned and rented in California by the average value of all of its real property. The payroll factor calculation divides the total compensation the corporation paid in California during the taxable year by the total compensation it paid everywhere during the taxable year. Finally, the sales factor calculation divides the corporation's total sales in California during the taxable year by its total sales everywhere during the taxable year.
148. *VantagePoint*, 871 A.2d at 1114-15.
149. CORP. § 2115.
150. *See* Stevens, *supra* note 144.
151. CORP. § 2115.
152. *VantagePoint*, 871 A.2d at 1108.
153. *VantagePoint*, 871 A.2d at 1108.

was incorporated in Delaware with offices in California and met the triggers of § 2115.[154] To arrive at its holding, the Delaware Supreme Court first determined that shareholder voting rights were within the meaning of internal affairs.[155] It did so by relying on *CTS Corporation v. Dynamics*, a case in which the United States Supreme Court held that voting rights are internal affairs and should be governed by the state law of incorporation.[156]

The Delaware Supreme Court then had to decide whether California's codified exception governed its pseudo-foreign corporations or if Delaware law applied under the internal affairs doctrine.[157] In deciding the latter, the Court stated: "State regulation of corporate governance is regulation of entities whose very existence and attributes are a product of state law."[158]

California's § 2115 undermines the "predictability" of the internal affairs doctrine in two ways. First, it asserts control over corporations' internal affairs headquartered outside of California; second, it changes which corporations are subject to the exception each year. While § 2115 still technically exists in California's corporate code, post-*VantagePoint*, its reach is ineffective.[159] And since *VantagePoint*, no California court has directly addressed the statute's enforceability, although in dicta, some cases have reiterated that courts must apply the state law of incorporation regarding a corporation's internal affairs.[160] *VantagePoint* aside, § 2115 would not have helped California implement SB 826. SB 826 applied to only public corporations.[161] To successfully implement SB

154. *VantagePoint*, 871 A.2d at 1108.
155. *VantagePoint*, 871 A.2d at 1108.
156. CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69 (1987).
157. *VantagePoint*, 871 A.2d at 1108.
158. *VantagePoint*, 871 A.2d at 1108.
159. Keith Paul Bishop, *The "Long Arm" of Section 2115 California Corporations Code May be Shorter Than Some Believe*, NAT'L L. REV. (Feb. 25, 2015), [https://perma.cc/9K5W-S887].
160. *See* Adam R. Moses, Haig Maghakian & Mark Vible, *Of Long Arms and Internal Affairs*, CORP. COUNS. (Dec. 23, 2014), [https://perma.cc/LK4V-LN7X]; *See also* Lidow v. Superior Ct., 141 Cal. Rptr. 3d 729 (Ct. App. 2012). *Lidow* reiterated *VantagePoint's* holding in its dicta. The court agreed with *VantagePoint* when it stated that courts must apply the law of the state of incorporation regarding issues of corporate internal affairs. While *Lidow* was primarily decided as an employment law case, its adherence to this principle suggests that courts would uphold *VantagePoint* in the future. California courts haven't had the opportunity to comment on *VantagePoint*, even in dicta, because until SB 826's enactment, the state did not see any cases regarding § 2115 under the internal affairs doctrine.
161. S.B. 826, 2017-2018 Leg., Reg. Sess., 3 (Cal. 2018).

826, the California legislature needed to draft another exception to the internal affairs doctrine, and it did so.

2. California's Newest Attempt: Would § 2115.5 Have Survived the Internal Affairs Doctrine?

In 2018, while drafting SB 826, California simultaneously drafted § 2115.5 of its corporate code. Section 2115.5 was a new exception to the internal affairs doctrine that applied only to the election of board directors.[162] While § 2115.5 is still technically on the books, its reach is ineffective. Because SB 826 was overturned on Equal Protection grounds, California courts never had to decide whether § 2115.5 would survive the internal affairs doctrine. But it's still important to consider whether § 2115.5 would have survived for two reasons. First, other states continue to propose versions of SB 826 and would likely have to enact a similar corporate code to implement a bill successfully.[163] And second, because California courts never evaluated this issue, California (or other states) could use a similar strategy to control other aspects of a corporation's internal affairs, creating a showdown between California and Delaware.[164]

California Corporate Code Section 2115.5 states that SB 826: "shall apply to a foreign corporation that is a publicly held corporation to the exclusion of the law of the jurisdiction in which the foreign corporation is incorporated."[165] The second part of § 2115.5 defines a publicly held corporation as any foreign corporation with shares listed on a major U.S. stock exchange.[166] Before SB 826 was overturned, the question was: would § 2115.5 survive the internal affairs doctrine, or would courts treat it like § 2115 and hold that a corporation's state of incorporation governs its internal affairs? This question was ultimately left unanswered when SB 826 was overturned, and is still important to evaluate in light of other states considering the same path to increasing female representation on corporate boards.[167]

While § 2115 covers all of a corporation's internal affairs,[168] § 2115.5 refers directly back to SB 826.[169] It covers only the election of

162. CAL. CORP. CODE § 2115.5 (West 2010).
163. *See, e.g.*, DELOITTE, PROGRESS AT A SNAIL'S PACE, 18, 163 (2021).
164. *See, e.g.*, Stevens, *supra* note 144.
165. *Id.*
166. *Id.*
167. *See* Ehisen, *supra* note 31.
168. CAL. CORP. CODE § 2115 (West 2010).

board directors, and more specifically, female board directors.[170] It is common for courts to hear cases about specific portions of a corporation's internal affairs. Courts have held that those individual elements of a corporation's internal affairs are governed by the internal affairs doctrine (and therefore the state law of incorporation).[171] For example, in 1979, the U.S. Supreme Court heard *Burks v. Lasker*, holding that actions of board directors are internal affairs.[172] Nearly a decade later, the Court heard *CTS Corp. v. Dynamics,* holding that shareholders' voting rights are internal affairs.[173] Recently, the Court of Chancery heard *JUUL Labs*, in which a shareholder requested to inspect JUUL Labs' books under § 1601 of California's Corporate Code.[174] Because JUUL Labs is incorporated in Delaware, the court applied Delaware law and denied the defendant's request.[175]

Ultimately, then, SB 826 covered activity that courts have consistently held to be governed by the state law of incorporation: the makeup of corporate boards and shareholder voting rights. But the cases discussed above did not involve a statutory provision like § 2115.5. Therefore, a court determining that the mandatory election of female board directors is within the definition of internal affairs is not enough on its own to defeat the protection offered by § 2115.5.[176] To defeat such a protection, a court has to both deem the activity internal affairs *and* provide reasoning for why the statute is invalid under the internal affairs doctrine.

A court would likely examine § 2115.5 by applying *VantagePoint*'s reasoning that rendered § 2115 ineffective.[177] Both California and Delaware courts disliked § 2115 because its coverage formula created a large amount of uncertainty, and each time the legislature amended the code, it created further confusion.[178] But while § 2115 is a robust section of the corporate code with multiple, complicated element tests, § 2115.5 is

169. *Id.* § 2115.5.
170. *Id.*
171. *See, e.g.*, VantagePoint Venture Partners 1996 v. Examen, Inc., 871 A.2d 1108 (Del. 2005); CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69 (1987); Edgar v. MITE Corp., 457 U.S. 624 (1982).
172. Burks v. Lasker, 441 U.S. 471 (1979).
173. *CTS Corp*., 481 U.S. 69.
174. JUUL Labs, Inc. v. Grove, 238 A.3d 904 (Del. Ch. 2020).
175. *JUUL Labs, Inc.*, 238 A.3d at 920.
176. *See, e.g.*, *VantagePoint*, 871 A.2d at 1116-17.
177. *VantagePoint*, 871 A.2d at 1117.
178. *See, e.g.*, Bainbridge, *supra* note 127.

just a few sentences. A company is covered if it is (1) publicly traded and (2) has principal executive offices in California.[179]

During § 2115.5's first year of implementation, California determined which corporations were covered by doing much of its own research, combining California filings with SEC filings.[180] While this information built a statistical foundation, it was not without gaps.[181] And it did not capture which corporations moved principal executive offices in or out of the state in a given year.[182] In subsequent years, California added questions to SB 826's compliance form to capture these gaps in the research.[183] The Secretary of State published the first report including these statistics in March of 2021, demonstrating its administrability.[184] But even if a court found that § 2115.5 had a simpler and more straightforward application than § 2115, it would still be remarkable for a court to hold that state-drafted exceptions should be applied over the internal affairs doctrine.

When the Supreme Court heard *Edgar v. Mite Corp.* in the 1980s, the Court held that the internal affairs doctrine should be applied over an Illinois statute meant to carve out exemptions to govern a corporation's internal affairs.[185] Since this decision, Delaware has relied on *Edgar* to uphold the internal affairs doctrine in both the Court of Chancery and the Delaware Supreme Court.[186] Therefore, for decades, *Edgar* has contributed to enforcing Delaware's defensive principle, meaning that only Delaware can regulate corporations incorporated in Delaware.[187]

But there are exceptions to this defensive principle in instances where the Delaware Supreme Court deems activity as outside of internal affairs.[188] Last year, in *Salzberg v. Sciabacucchi*, the Delaware Supreme Court declined to apply the internal affairs doctrine for the first time in

179. CAL. CORP. CODE § 2115.5 (West 2010).
180. CAL. SEC'Y OF STATE, WOMEN ON BOARDS (2019), [https://perma.cc/H323-T4FG].
181. *Id.*
182. *Id.*
183. CORPORATE DISCLOSURE STATEMENT, *supra* note 89.
184. CAL. SEC'Y OF STATE, WOMEN ON BOARDS: MARCH 2021 REPORT (2021), [https://perma.cc/XW3E-Q48U] [hereinafter WOMEN ON BOARDS 2021].
185. Edgar v. MITE Corp., 457 U.S. 624 (1982).
186. *See* McDermott, Inc. v. Lewis, 531 A.2d 206, 216 (Del. 1987) (relying on *Edgar* to hold that the state of incorporation governs internal affairs).
187. *See*, *e.g.*, Steven E. Segal, *CTS Corporation and the Internal Affairs Veil of State Takeovers*, 60 U. Colo. L. Rev. 189 at 190-191; *See also* Gregg Jarrell, *State Anti-Takeover Laws and the Efficient Allocation of Corporate Control: An Economic Analysis of Edgar v. Mite Corp*, 2 Sup. Ct. Econ. Rev. 111 at 116.
188. *See, e.g.*, Salzberg v. Sciabacucchi, 227 A.3d 102, 103 (Del. 2020).

decades.[189] The court held that corporations may use their charters and bylaws to restrict securities litigation to federal court.[190] The Court supported its reasoning by deciding that forum selection did not fit within the internal affairs doctrine. When shareholders bring securities claims, the claim is not based on corporate law.[191] It's based on federal securities law.[192] While some have questioned whether *Sciabacucchi* has pushed the boundaries of the internal affairs doctrine, this case only makes a distinction about whether a specific action is considered an internal affair.[193]

SB 826 is distinguishable from a *Sciabacucchi* exception in two ways. First, the activity governed by SB 826 cannot be distinguished as something other than internal affairs. Corporate Code § 2115.5 was drafted with this in mind to protect elections of corporate board directors. Second, in *Sciabucucci*, the corporations themselves carved out the forum selection exception in their bylaws. While drafting SB 826 and § 2115.5, the state has attempted to circumvent the doctrine. This creative drafting is exactly what Delaware courts attempt to prevent by relying on the "defensive principle" set out in *Edgar*.[194] If corporations implemented their own rules regarding board diversity, they would not be subject to an internal affairs doctrine challenge. There would not be a conflict of law. And unlike forum selection, board elections would not get tangled in securities law. Nobody has ever said that corporations cannot make their own rules for hiring. The SEC proved this in 2010, when it implemented a self-reporting process for corporations to publish information about their hiring practices but did not institute a mandate.

But if SB 826 does not survive the internal affairs doctrine, the country cannot revert to relying on the SEC's reporting structure that puts the onus on the corporations themselves to make the changes. The next section turns to ways that the United States could enact and keep gender mandates for corporate boards.

189. *Salzberg*, 227 A.3d at 103.
190. *Salzberg*, 227 A.3d at 103.
191. *See* Dhruv Aggarwal, Albert H. Choi & Ofer Eldar, *Federal Forum Provisions and the Internal Affairs Doctrine*, 10 HARV. BUS. L. REV. 383, 386 (2020) [hereinafter, Aggarwal et al.]. The authors explain the way in which the court distinguished this on internal affairs vs. inter-affairs.
192. *Id.*
193. *See, e.g.*, Manesh, *supra* note 28, at 262.
194. *See* Segal, supra note 187, at 197-98.

IV. ALTERNATIVE SOLUTIONS: IMPLEMENTING LASTING MANDATES

Mandates work and are necessary to increase corporate board diversity.[195] But singular state bills like California's SB 826 are subject to too many legal challenges and will not impose a lasting solution. The country should use SB 826 as a model to implement similar solutions in different forums. In this section, I have identified two ways to do this. First, if other states continue to move forward with their own SB 826-type bill despite Equal Protection threats, singular state statutes are still vulnerable under the internal affairs doctrine. First, stakeholders should pressure Delaware to enact the legislation that would require female representation on corporate boards. Second, stakeholders should pressure the private sector, including banks, exchanges, and investment institutions, to expand their mandates and replicate the incremental proportionality requirements outlined in SB 826. These solutions would build beyond SB 826's reach by offering a cross-border application. They would also offer a consistent standard for corporations with activity in multiple states and provide an easier blueprint for courts.

A. *Why Not Delaware?*

California is often the thought leader in effecting change in the U.S.[196] It has been historically unafraid to act first, creating a path for other states to rise to its standards in both social and business situations.[197] For example, in 2004, now Governor Gavin Newsom (then Mayor of San Francisco) ordered city halls to issue marriage licenses to same sex couples.[198] The first legal same sex marriage in the country happened shortly afterwards.[199] And in 1986, California enacted Proposition 65, which now requires businesses to provide warnings about significant exposures to chemicals that cause cancer, birth defects, or other

195. *See,* e.g., S.B. 826, 2017-2018 Leg., Reg. Sess., 3 (Cal. 2018); VERA JOUROVA, GENDER BALANCE ON CORPORATE BOARDS: EUROPE IS CRACKING THE GLASS CEILING (2016).

196. *See, e.g.*, Gabrielle Canon, *California Is America, Only Sooner: How the Progressive State Could Shape Biden's Policies,* GUARDIAN (Jan. 22, 2021), [https://perma.cc/9ZWC-S9BJ].

197. *See, e.g.*, *Is Gay Marriage Legal in California?*, GAY FAMILY L. CTR. (Dec. 29, 2016), [https://perma.cc/X5E7-HSA7] [hereinafter *Gay Marriage]*; CAL. OFF. OF ENV'T HEALTH HAZARD ASSESSMENT, *About Proposition 65* (last visited, Jan. 1, 2022), [https://perma.cc/E2GR-BMYY].

198. *See Gay Marriage*, *supra* note 197.

199. *Id.*

reproductive harms.[200] Because it's often easier for manufacturers to print Prop. 65 warnings on products exported to every state, rather than only administering warnings to those shipped to California, products are sold all over the country that adhere to California's requirement.[201] Regarding both same sex marriage and manufacturer health warnings, there were no legal structures already in place. California forged into uncharted territory. What made SB 826 any different? By codifying an exception to the internal affairs doctrine, SB 826 attempted to defy a standard that courts adhered to for over 100 years.

While Delaware is the 49th smallest state by square miles[202], it holds the most influence over U.S. corporations. It offers plenty of incentives for corporations to make it their place of incorporation.[203] In addition to its tax benefits[204], it is also home to the Court of Chancery, which oversees corporate-specific disputes and implements consistent policies.[205] Nearly 50% of all publicly traded corporations are incorporated in Delaware, including more than 66% of Fortune 500 corporations and nearly 100% of start-ups.[206] Therefore, rather than waiting for other states to take action, stakeholders should pressure Delaware to create the corporate code that would mandate female representation on corporate boards. Enacting a gender mandate in Delaware would reach a large number of corporations across the country, in addition to nearly every new corporation.

If individual states enact their own corporate board mandates with different requirements, corporate governance has the potential to become confusing for both courts and corporations. Codifying the mandate in Delaware would avoid these issues. Few corporations incorpo-

200. *See About Proposition 65*, CAL. OFF. OF ENV'T HEALTH HAZARD ASSESSMENT (last visited Aug. 19, 2022), [https://perma.cc/E2GR-BMYY].

201. *Id.*

202. *See, e.g.*, *Size of States*, STATE SYMBOLS USA (last visited Aug. 19, 2022), [https://perma.cc/S6QU-VG7T].

203. *See, e.g.*, Faith Stevelman, *Regulatory Competition, Choice of Forum, and Delaware's Stake in Corporate Law*, 34 DEL. J. CORP. L. 57, 59-60 (2009). Stevelman discusses Delaware's perks such as tax shells, the Court of Chancery, and the internal affairs doctrine.

204. *See, e.g.*, Chauncey Crail, Rob Watts, and Jane Haskins, *Why Incorporate in Delaware? Benefits & Considerations*, FORBES (Aug 7. 14, 2022), [https://perma.cc/K6P5-2V7W] (noting that corporations registered in Delaware that do not do business in the state do not pay corporate income tax; noting that Delaware does not have a sales tax, investment income taxes, inheritance taxes, or personal property taxes).

205. *Id.*

206. *See, e.g.*, Elaine Zelby, *How Delaware Became the State Where Companies Incorporate*, MEDIUM: USELESS KNOWLEDGE BLOG (Jan. 30, 2019), [https://perma.cc/XQ6P-EFGG].

rated in Delaware confine their businesses to one state or region.[207] Board directors live and work in different states throughout the country and come together to meet a few times per year.[208]

Delaware may argue that if it enacts a progressive corporate code such as SB 826, businesses may move their state of incorporation to Nevada.[209] Nevada has established similar, corporation-friendly laws that provide corporations with tax incentives.[210] But this is a weak argument for two reasons. First, SB 826 was in effect in California for over three years, and California never showed that corporations were fleeing the state because of it.[211] It would be difficult for established corporations to change their state of incorporation just because they do not want to place a single woman on the board. And second, the private sector has implemented its own mandates regarding female representation on corporate boards. While private sector mandates are not as dependable as state legislation[212], they make it likely that every corporation, regardless of where it is incorporated, will soon have to consider the way in which their board candidates contribute to diversity.

B. *Improve Private Sector Mandates*

1. U.S. Exchanges

While pressuring Delaware to enact diversity mandates for corporate boards would provide the most seamless way to enact legislation, stakeholders have not yet engaged in this advocacy. And state mandates

207. Tung, *supra* note 29, at 102.

208. *Id.*

209. *See, e.g.*, Jaclyn Schultz, *Business Boom: Companies Choosing to Move to Nevada as Pandemic Winds Down*, FOX 5 KVVU-TV (May 4, 2021). This article states that several businesses have recently moved to Nevada, but they aren't relocating from Delaware. Most have relocated from states where it is more expensive to incorporate, such as California.

210. *See, e.g.*, Nikki Nelson, *Why Incorporate in Delaware or Nevada?*, WOLTERS KLUWER (July 11, 2020), [https://perma.cc/3MGK-JDSH].

211. *Compare* CAL. SEC'Y OF STATE, DIVERSITY ON BOARDS (2022), [https://perma.cc/D37L-JBS7], *with* CAL. WOMEN ON BOARDS 2021, *supra* note 184. In 2021, 647 corporations reported having principal executive offices in California. In 2022, 716 corporations reported having principal executive offices in California. By 2022, SB 826's mandate was well established, giving corporations the opportunity to move their offices elsewhere if they so desired. Instead, the number of offices in California increased. I do not attribute this to SB 826, but rather, I include the statistic to illustrate that the mandate did not have a negative impact on California businesses.

212. *See, e.g.*, Solomon, *supra* note 10.

are also subject to Equal Protection challenges. But changes are already underway in the private sector. In August 2021, Nasdaq passed regulations that require companies listed on its exchange to have at least one female board director and one board director who identifies as an underrepresented minority.[213] Nasdaq proposed this rule to the U.S. Securities and Exchange Commission in December 2020, and it was approved just eight months later,[214] a similar timeline to passing a bill in the legislature. Rather than reaching corporations in just one state, Nasdaq's listing requirements apply to public corporations in every state, in addition to global entities listing in the United States.[215] Therefore, an exchange-mandate is likely the most practical solution with the largest reach.

Additionally, a few years earlier, in May 2019, the New York Stock Exchange acknowledged the historic lack of diversity on corporate boards.[216] But rather than imposing listing or reporting requirements, it created the NYSE Board Advisory Council, made up of nineteen corporate executives nationwide.[217] The Council aims to connect candidates who contribute to board diversity with companies seeking new directors, mostly by tapping into the council members' personal networks.[218] But with no numerical goals or reporting structure, this council may not be strong enough to effect change on a grand scale.[219] There are over 2,000 companies listed on NYSE.[220] If it implemented a similar mandate as Nasdaq, one which would *require* its listed companies to fill a

213. *See, e.g.*, Sarah E. Aberg & Matthew Lin, *SEC Approves Nasdaq Diversity Rule*, NAT'L L. REV. (Aug. 20, 2021), [https://perma.cc/2UDW-2U9P].
214. *Id.*
215. *Id.*
216. *Initiative to Advance Board Diversity,* NYSE, [https://perma.cc/X4D4-JNT2].
217. *Id.*
218. *Id.*
219. *See, e.g.*, Elizabeth King, T*he Importance of the NYSE's Market-Driven Approach to Board Diversity*, NYSE (Jun. 16, 2022), [https://perma.cc/JR3U-65PC]. A few weeks after SB 826 was overturned, the NYSE Board Advisory Council put out a statement regarding the importance of board diversity. In it, King discusses the ways that the private sector, such as State Street and Goldman, have advocated for board diversity over the last several years. She states that much of NYSE's focus has been on networking. She further states that the Council has connected 30 board candidates successfully through its networking opportunities. But this is the first time that NYSE has released a numerical figure, and it has done so buried in a press release. NYSE's efforts could be strengthened by reporting their goals, results, and discussing how to improve and expand on its strategies.
220. *The NYSE Listed Company Network: Over 2,300 Innovators, Game-Changers and Leaders*, NYSE, (last visited Aug. 19, 2022), [https://perma.cc/84CM-XEZG].

board seat with a candidate who contributes to diversity, its efforts would have a broader reach.

If exchange mandates are the easiest way to increase board diversity, stakeholders should pressure Nasdaq to strengthen its mandates. First, Nasdaq should impose the same proportionality requirements as SB 826, in which a larger board requires more female directors. Currently, Nasdaq does not include any guidelines regarding the size of the board. A corporation with twenty directors could comply with the requirement by electing the same number of female directors as a corporation with four directors. Second, Nasdaq should be less forgiving with its exceptions. Currently, it allows corporations to list (or remain listed) if they have a reasonable explanation for why they do not have females or underrepresented minorities on their boards.[221] SB 826 included no such opt out. Instead of giving corporations a chance to delay fulfilling the requirement, SB 826 imposed a fine for those corporations that did not comply.[222] While Nasdaq's mandates currently offer more flexibility and have a larger reach, they could be even stronger by taking a page from SB 826 and imposing a penalty structure for non-compliance.

2. Banks and Investment Institutions

As discussed in the Introduction, Goldman Sachs has been pressuring corporations to diversify their boards in order to receive underwriting funds for years. Goldman recently turned this practice into a mandate.[223] But Goldman is not the only bank pressuring corporations in this manner. In 2018, after quietly encouraging corporations to elect female board directors, BlackRock made it official.[224] BlackRock stated that public companies in which it invests should have at least two female directors.[225] BlackRock is the largest asset management firm in the U.S. and oversees more than $9.4 trillion in investments.[226] After making this announcement, it identified 300 corporations in the Russell 1000 Index[227] that needed to increase their female directors.[228] And BlackRock

221. *See, e.g.*, Aberg & Lin, *supra* note 213.
222. S.B. 826, 2017-2018 Leg., Reg. Sess., 3 (Cal. 2018).
223. Solomon, *supra* note 10.
224. Posner, *supra* note 15.
225. *Id.*
226. *See, e.g.*, *Total Assets Under Management (AUM) of BlackRock From 2008 to 1st Quarter 2022*, STATISTA (last visited Aug. 19, 2022), [https://perma.cc/E8BE-EE6V].
227. The Russell 1000 Index represents the top 1,000 companies by market capitalization in the United States.

isn't the only investment firm to hold this view. State Street[229] recently voted against the reelection of directors at over 400 corporations in hopes for greater board diversity.[230]

Other banks are not only urging corporations to diversify their boards, but publishing material illustrating the benefits of doing so.[231] California cited some of these studies in SB 826.[232] After the 2014 Credit Suisse study illustrated that corporations with female directors outperform corporations with all male directors in almost every measure, powerhouse investment institutions took action.[233] The private sector's main motivation is profit.[234] The difference between a correlation and causation isn't what matters.[235] What matters is that the economic advantage exists. Banks continue to publish studies convincing stakeholders that female directors are good for business, signaling that their mandates show no signs of slowing down.[236]

But these mandates could be improved in two ways. First, like Nasdaq's listing requirements, the banks have offered no recommendations regarding female representation compared to the size of the board. Second, the banks should work together to develop a consistent standard or requirement. Because many banks have published different requirements, and some have published none at all, they have caused confusion for U.S. corporations. During the summer of 2021, KPMG[237] recognized this confusion. It released a board diversity disclosure analytics tool, available at no cost for any company.[238] With this tool, KPMG aims to make it easier for corporations, board directors, investors, employees, and other stakeholders to compare diversity disclosure practic-

228. *Total Assets Under Management (AUM) of BlackRock From 2008 to 1st Quarter 2022*, *supra* note 226.

229. State Street Global Advisors is a "Top 5" asset manager in the United States, managing millions in investment funds.

230. Posner, *supra* note 15.

231. *See* S.B. 826, 2017-2018 Leg., Reg. Sess., 3 (Cal. 2018). S.B. 826 cites to several studies in its text.

232. *Id.*

233. Dawson, Kersley & Natella, *supra* note 12, at 23.

234. *See, e.g.*, Sadia Rashid & Uzma Rashid, *Work Motivation Differences Between Public and Private Sector*, 1 AM. INT. J. OF SOC. SCI. 24, 25 (2012).

235. *Id.*

236. *See, e.g.*, *Our Approach to Engagement on Board Diversity,* BLACKROCK, 1, 3 (Mar. 2021), [https://perma.cc/E8BE-EE6V].

237. *KPMG Announces FY20 Revenue of US$29.22 Billion,* KPMG (last visited Jan. 2, 2022), [https://perma.cc/F6AW-9JBV]. KPMG International is one of the "big four" accounting organizations that works with a large percentage of publicly traded U.S. corporations.

238. *Id.*

es.[239] The tool filters by sector, index, and company size to identify trends.[240]

Any mandate moves the needle, but relying on individual investment institutions to implement mandates would be the most sporadic solution. While it would avoid the legal challenges brought against SB 826, it does not have the same consistent, broad reach as relying on exchange listing requirements or Delaware legislation.

V. CONCLUSION

As the number of women in America's corporate workforce has grown, the number of women on boards has remained stagnant. While other countries addressed this problem nearly two decades ago with gender quota mandates, the United States imposed no national solutions. Over the last several years, individual states and the private sector had plenty of room to implement their own solutions. Many states attempted to implement legislation urging corporations to fill director positions with female candidates. California was the first state to implement a mandate. But as more states continue to draft legislation that would implement their own mandates, they should consider potential challenges under the internal affairs doctrine. The U.S. Supreme Court, Delaware courts, and state courts have historically deferred to the internal affairs doctrine when hearing issues that are within the definition of a corporation's internal affairs. This holds true even when states attempt to legislate around the internal affairs doctrine by carving out exceptions in their corporate codes.

But over the last three years, California has illustrated that mandates work. At the end of 2021, the number of women on California boards had more than doubled while the number of corporations without any women on their boards had decreased to just fourteen.[241] Advocates such as investors, private sector leaders, politicians, and corporate leaders cannot let mandates be overturned and fizzle out. Instead, they should use SB 826 as a blueprint to implement alternative solutions that would offer consistent standards and ensure that progress toward gender parity continues even if state legislation is overturned.

239. *Id.*

240. *Disclosing Board Diversity,* KPMG (last visited, Jan. 2, 2022), [https://perma.cc/G3XS-JRE4].

241. *See, e.g.*, Levi Sumagaysay, *Since Nation's First Law Requiring Women on Boards, the Number of Female Directors at California Companies has Doubled*, MARKET WATCH (May 4, 2021), [https://perma.cc/C9H3-Y4JS].