

Increasing the Board Diversity of Health Care Companies Could Impact Racial Disparities in Health Outcomes

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I. Introduction

In the past few years, there has been much discussion around the need to increase diversity¹ among corporate boards. This idea is not new, as the call to add gender and racial diversity to corporate boards started after the Civil Rights Movement. In the first two parts of this paper, I will review the reasons why diversity is needed and provide historical and current data on the status of diversity on corporate boards. While some gains have been made over the past three decades, particularly regarding gender diversity on corporate boards, boards have not yet reached gender and racial parity among board members. The ramifications of homogenous corporate boards are well-documented and long-reaching. So much so that the call for diversity among corporate boards is coming from every conceivable direction. Later in this paper, I will give a snapshot of the current societal discontentment with the state of corporate boards by providing statistical data on how boards look today and a summary of recent efforts to increase diversity from institutional investors, state and federal legislators, and, federal regulators.

One ramification of board homogeneity that has not been discussed in great detail is in the area of healthcare. The focus of this paper is to highlight the need for diversity on the boards of healthcare companies² specifically to address racial disparities in healthcare. In the final part of this paper, I will discuss how the stakes for healthcare companies have never been higher because the healthcare needs of traditionally underserved populations have never been greater. Over the past two years, as a result of a global pandemic, society has become acutely aware of unacceptable health inequities that have long existed in historically marginalized communities. Failure to meet the moment and adequately address stakeholder interests, i.e., the interests of the people and communities served, comes at too high a risk for minorities who have historically seen disparate health outcomes. Lofty and aspirational statements about diversity and inclusion in healthcare are not enough. Through this paper, I hope to advance one specific strategy to tackle racial diversity within the corporate structures of healthcare companies as a way to help reverse negative health outcomes in minority populations. Increasing racial diversity on boards can be a means of increasing health equity. Racial and ethnic diversity among the boards of healthcare organizations can lead to better health outcomes for minority patients because a more diverse board is better suited to address the healthcare concerns of our growing diverse population.

1 The word diversity may have several meanings. For most of the research in this space, board diversity has generally meant gender diversity. However, for the sake of this paper, the call for increased board diversity refers to racial and ethnic diversity on boards.

2 For the sake of this paper, healthcare companies means the full gamut of companies and non-profits in the healthcare space, including, but not limited to, medical facilities, hospital systems, pharmaceutical companies, managed care organizations, home health agencies, medical device manufacturers, health insurance companies, management service organizations (MSOs), accountable care organizations (ACOs), independent practice associations, accrediting bodies, professional associations, and healthcare industry vendors.

II. The Need For Diversity On Corporate Boards Has Been Discussed In-Depth By Many Scholars.

Change happens from the inside out, and structural change happens from the top down.³ Therefore, we should look to the board of a corporation if we want to make any changes to the way a corporation or organization operates. After all, "the board is the sun around which the planets of corporate governance revolve."⁴ For there to be any real change seen in the way society sees people of color, corporations that exist to both employ and serve our community at large must lead the way. For any real change seen in how those corporations treat (i.e., serve, employ, promote, and support) people of color, the board of directors must lead the way.⁵ That is because corporate boards exercise oversight and are the main engine for corporate governance and corporate culture.⁶

A. Why Do We Need Diversity On Corporate Boards?

There are many reasons that have been used to promote diversity on corporate boards, not the least of which is improved financial success of a company.⁷ For the sake of this paper, I'd like to establish the need for diversity through the lens of corporate governance. Many scholars that have written on the topic of board diversity have done so from the angle of using diversity to improve corporate governance.⁸ Specifically, one article noted that "With regard to governance, diverse boards have been associated with improved monitoring, decision-making, and leadership."⁹ The article went further to state, "Diversity at the board level can enhance performance and quality of governance."¹⁰ Another article concluded, "An organization's stakeholders are adversely affected by homogenous corporate boards, even if not fiscally, then ethically. Among these adverse impacts are 'less effective governance, ethical lapses such as securities fraud, and negative financial performance outcomes.'"¹¹ Thus, scholars have established

³ Julie I. Siciliano, *The Relationship of Board Member Diversity to Organizational Performance*, 15 J. Bus. Ethics 1313, 1313-14 (1996)(discussing theoretical frameworks that suggest that "properly structured governing boards have the potential to influence organizational outcomes.").

⁴ Gregory H. Shill, Matthew L. Strand, Article, *Diversity, ESG, and Latent Board Power*, 46 Del. J. Corp. L. 255, 260 (2022) (citing Leo E. Strine, Jr., *Can We Do Better by Ordinary Investors? A Pragmatic Reaction to the Dueling Ideological Mythologists of Corporate Law*, 114 Colum. L. Rev. 449, 474 (2104)).

⁵ Yaron Nill, *Horizontal Directors*, 114 NW. U. L. Rev. 1179, 1188 (2020)("While most of the operational decision-making can be, and is, delegated to management, the board is still required to be an active participant in some of the more important managerial business decisions, such as mergers, stock issuance, and changes to company governance documents.").

⁶ Naomi Cahn, June Carbone, Nancy Levit, Article, *The Instrumental Case for Corporate Diversity*, 40 L. & Ineq. 117, 117-18 (2022)(the instrumental case for diversity uses diversity as a tool and metric for reforming corporate culture).

⁷ Richa Joshi, *Board Diversity: No Longer Optional*, Harv. L. Sch. F. on Corp. Governance (Oct. 11, 2020)(there's a correlation between diversity and financial performance), <https://corpgov.law.harvard.edu/2020/10/11/board-diversity-no-longer-optional/>.

⁸ See e.g., Shill, *supra* note 4.

⁹ *Id.* at 307.

¹⁰ *Id.* at 309.

¹¹ Lindsey Sporrer, Robin Kowalski, Note, *A Rock and a Hard Place: Why Requiring Corporations to Add Women to Boards is the Best Option*, 31 S. Cal. Interdis. L. J. 169, 179 (2021).

that if a corporation increased diversity among its board members it would see an improvement in the performance of the company and ensure long-term success.¹²

Perhaps the most often discussed reason for increasing diversity among board members is because of the effects of homogeneity. When a board is made of similarly situated people it has limited viewpoints to consider when discussing complex problems, which limits critical thinking.¹³ Thus, adding diversity to a corporate board promotes better and more "high-quality decisions."¹⁴ As one author explains, "Homogenous groups tend toward excessive conformity."¹⁵ Further, "because members of homogenous groups share the same background and experiences, the group as a whole has a narrower perspective, which prevents the group from considering a fuller spectrum of alternatives when making decisions. Adding greater diversity to the group counteracts these shortcomings."¹⁶ Additionally, "the range of backgrounds and views associated with gender and racial diversity on boards enables the entire board to consider a wider range of options and solutions to corporate issues. That consideration facilitates higher quality decisions."¹⁷

When discussing the effects of homogeneity on corporate boards, many scholars refer to "groupthink" which deprives a board of the opportunity for critical analysis that exists when there is more diversity among the group.¹⁸ One qualitative study on board diversity revealed that diverse board members help avoid groupthink because of "a diversity of experiences and sensibilities" that "promotes richer discussions."¹⁹ Additionally, homogenous boards may foster some degree of unconscious bias that will inhibit independent thinking which ultimately impedes progress and can lead to poor financial performance.²⁰ A corporation that wants to avoid groupthink needs to have a heterogenous board; in doing so the corporation will signal to its internal stakeholders and its

¹² Siciliano, *supra* note 3, at 1317 (study of 240 YMCA's found more diverse occupational backgrounds of board members led to a greater emphasis on social agency mission and higher levels of revenue, and an increase in board gender diversity increased the organization's ability to fulfill its social agency mission, however, the effects of ethnic diversity could not be considered because 96% of the board members were White).

¹³ Lisa M. Fairfax, Symposium Article, *Women and the New Corporate Governance: Clogs in the Pipeline: The Mixed Data on Women Directors and Continued Barriers to Their Advancement*, 65 Md. L. Rev. 579 (2006).

¹⁴ *Id.* at 589; see also, Steven A. Ramirez, *Games CEOs Play and Interest Convergence Theory: Why Diversity Lags in America's Boardrooms and What To Do About It*, 61 Wash. & Lee L. Rev. 1583 (2004)(suggesting that gender and racial board diversity could deter corruption, increase shareholder value and lead to better decision-making).

¹⁵ *Id.* at 590.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See e.g., Anat Alon-Beck, Michal Agmon-Gonnen, Darren Rosenblum, Article, *No More Old Boys' Club: Institutional Investors' Fiduciary Duty to Advance Board Gender Diversity*, 55 U.C. Davis L. Rev. 445, 452 (2021)("There is broad agreement among scholars that corporate governance suffers from a lack of diversity.... One group's dominance infuses corporate governance with groupthink and deprives it of the critical analysis of opportunity and risk that diversity brings.").

¹⁹ Lissa L. Broome, John M. Conley, Symposium Article, *Diversity From the Perspective of Corporate Boards and Lawyer Disciplinary Boards*, 15 St. Louis U. J. Health L. & Pol'y 121, 125 (2021).

²⁰ Shill, *supra* note 4, at 294-95 ("Board composition is important from at least two perspectives: the quality of corporate policy decisions and the need for representative legitimacy. Homogenous organizations are associated with an increased risk of unconscious bias, which can both undermine independent thinking and harm financial performance.").

external shareholders that it is committed to good governance and to appointing the most qualified board members.²¹ Board diversity is, therefore, a vital benefit to any company.²²

B. Mandates Are The Surest Way To See Significant Increases In Board Diversity.

Corporations must be mandated to increase diversity and inclusion on corporate boards because, without a mandate²³, a large-scale change in board diversity will not happen on its own based on history and the slow progress we've made so far. While many companies have made statements supporting diversity in theory, or supporting their diverse employees and customers, most have not made any real, measurable change to their corporate governance structure.²⁴ Still, others have gone so far as to implement anti-racism and diversity training to address microaggressions and unconscious bias in the workplace, but training only goes so far, as it can bring awareness of diversity issues but does not make the structural changes needed to advance diversity and inclusion in senior leadership.²⁵ It has been said that "Balancing boards to achieve gender equality without quotas would take forty to fifty years."²⁶ With all the work that has gone into gender equality, the idea that it will take another half a century to achieve gender parity on boards, without mandates, makes me hesitant to think how long it would take to achieve racial and ethnic parity on boards - or worse if that is even possible without a mandate.

When discussing the necessity of a board gender diversity mandate, one author wrote, "Because the move toward a balance of men and women on corporate boards will likely not happen in a reasonable amount of time without quotas, and because quotas are meaningless without government involvement, mandates, referred to by some as 'feminization laws,' may be a necessary evil."²⁷ The author went on to explain that without a widespread mandate, boards would continue to be homogenous saying, "the selection process for board members will likely continue to be predominantly circular, meaning the current demographic composition of predominantly men would remain. One reason for this is that male directors' selection bias influences them to choose

²¹ Beck, *supra* note 18, at 461-66.

²² Abhilasha Gokulan, Note, *Increasing Board Diversity: A New Perspective Based in Shareholder Primacy and Stakeholder Approach Models of Corporate Governance*, 96 N.Y.U. L. Rev. 2136, 2139 (2021) ("[R]egardless of whether a corporation's purpose is to further shareholder interests or further stakeholder interests, board diversity will always be a vital benefit to the corporation.").

²³ Elsewhere in this paper I will note the various efforts to mandate increased board diversity, including state and federal legislation. I don't propose to choose one form of mandate over another, only to say that a mandate is necessary to ensure that progress is made.

²⁴ See Blair Johnson, Article, *How the Black Lives Matter Movement Enhanced Corporate Governance in 2020*, 8 Emory Corp. Governance & Accountability Rev. 99 (2021).

²⁵ Frank Dobbin & Alexandra Kalev, *Why Doesn't Diversity Training Work? The Challenge for Industry and Academia*, Anthropology Now, 48-49 (Sep. 2018)("There is ample evidence that training alone does not change attitudes or behavior, or not by much and not for long. In their review of 985 studies on antibias interventions, Paluck and Green found little evidence that training reduces bias. In their review of 31 organizational studies using pretest/posttest assessments or a control group, Kulik and Robertson identified 27 that documented improved knowledge of, or attitudes toward, diversity, but most found small, short-term improvements on one or two of the items measured. In their review of 39 similar studies, Bezrukova, Joshi and Jehn identified only five that examined long-term effects on bias, two showing positive effects, two negative, and one no effect.").

²⁶ Sporrer, *supra* note 11, at 170-71.

²⁷ *Id.* at 171.

other male board directors."²⁸ If this thinking is true, then logically the demographic composition of most corporate boards will remain predominantly *White* men without a mandate to increase racial diversity on boards. Therefore, "Without intervention, the cycle of men in leadership positions being appointed to board seats and then others viewing all-male boards as the status quo, will continue."²⁹ Moreover, without a mandate to increase racial and ethnic diversity, the status quo of *White* male corporate boards will continue.

Still another impediment to achieving racial and ethnic parity on corporate boards without a mandate is the issue of low turnover. Board members tend to stay on boards for several years and are rarely voted off.³⁰ One author noted that only a mandate could offset the low turnover and other barriers to gender parity on boards.³¹ Likewise, only a mandate can offset the barriers minorities have experienced in becoming corporate board members.

The goal is to see better health outcomes in minority populations by increasing the number of racially and ethnically diverse board members of healthcare companies. This necessitates a change in healthcare companies across the country because the problem of disparate health outcomes is not localized to any one specific state or region.³² Without a mandate, this kind of seismic shift won't happen quickly enough to meet the sense of urgency tackling health disparities requires.³³ We need a mandate that requires healthcare companies to provide specific and actionable plans to improve racial equity and be required to report on their progress.³⁴ Reporting on progress will ensure that these companies work towards measurable changes in racial and ethnic diversity and will ensure that we have data to compare, track and trace. The data is of supreme importance because, "Despite corporations' long-standing statements in support of diversity within their organizations, they have traditionally disclosed very little regarding the state of demographic diversity within their ranks."³⁵ A mandate for increased racial and ethnic board members of

²⁸ *Id.* at 181.

²⁹ *Id.* at 192.

³⁰ Shill, *supra* note 4, at 296-97 ("Directors are rarely voted off board by shareholders. Additionally, director tenure exceeds ten years on average.... Thus, the project of diversifying the board has proceeded in part not by seeking the resignation or retirement of longstanding, largely homogenous directors but rather, by adding seats to the board, and then seating new, more diverse directors alongside the old directors.").

³¹ Sunitha Malepati, Article, *The Future (Public Company Boardroom) is Female: From California SB 826 to a Gender Diversity Listing Standard*, 28 Am. U. J. Gender Soc. Pol'y & L. 493, 504 (2020) ("In order to achieve gender parity in boardrooms across America, it must be mandated" due to the low board turnover coupled with the prior experience requirement and unconscious gender bias.).

³² The Economic Benefits of Reducing Racial Disparities in Health: The Case of Minnesota, [Int J Environ Res Public Health](#), 2019 Mar; 16(5): 742. ("Across all types of diseases, illnesses, and accidents, Blacks are 1.16 times more likely to die than Whites." Additionally, "even in locations where there are relatively few racial minorities, there are sizeable economic benefits to be gained from eradicating racial health disparities.")

³³ Sporrer, *supra* note 11, at 171 ("[W]hile shareholder activism is a healthy and positive way to create a change – and is perhaps more effective, lasting, and reaches beyond state borders – it cannot change the landscape as quickly as the mandate has.").

³⁴ Veronica Root Martinez & Gina-Gail S. Fletcher, *Equality Metrics*, 130 Yale L. J. F. 869, 875 (2021).

³⁵ *Id.* at 888 citing Allison Herren Lee, Comm'r, SEC, Remarks at the Council of Institutional Investors Fall 2020 Conference: Diversity Matters, Disclosure Works, and the SEC Can Do More (Sept. 22, 2020) ("72 percent of companies in the Russell 1000 do not disclose any racial or ethnic data about their employees and only four percent disclose the complete information they are required to collect and maintain under EEOC rules. Less than half of all Fortune 100 companies disclose data on the ethnic and gender compositions of their boards.").

healthcare companies that includes a reporting requirement will provide the data needed on racial diversity to assess the impact on health outcomes and whether additional changes need to occur.

III. There Has Been Progress In Increasing Gender And Racial Diversity On Corporate Boards, But Parity Has Not Yet Been Achieved.

There is no doubt that progress has been made over the past few decades to increase board diversity, particularly in the space of gender diversity.³⁶ Despite this, progress has been slow and gender parity has still not been achieved.³⁷ In fact, in 2018, before the legislation was introduced to mandate increases in gender diversity in California companies, research showed 17% of Russell 3000 companies (most of the public companies listed on major U.S. stock exchanges) still had all-male boards.³⁸ At that time, 445 of the Russell 3000 index companies were headquartered in California, one of this country's most progressive states; however, only 565 of the 3,645 board seats of those companies were held by women.³⁹

One author notes that the progress made in increasing the number of women board members is especially lacking when viewed in the context of the percentages of women in the workforce, on college campuses, and in professional school programs.⁴⁰ Specifically, "in 2003, women held 13.6% of available board seats at Fortune 500 companies. These figures reveal that women and people of color occupy only a small portion of available corporate board seats. Moreover, these figures appear relatively low when compared to the number of women and people of color in the labor force and school population. In 2004, women comprised roughly 46% of the U.S. labor force and held more than 50% of all managerial and professional positions. Then too, in 2002, women earned 57.4% of all bachelor's degrees in the U.S., 58.7% of all master's degrees, 46.3% of all doctorate degrees, and 48% of all law degrees. Women also earned 35% of all MBA Degrees from 2002 to 2003. When viewed in the context of these figures, women appear to be under-represented in the corporate board room."⁴¹ There may be a number of reasons why more women are not on corporate boards including "a preference for board cohesiveness, the trend toward smaller boards, the failure of the 'business case' for diversity, the failure to build a pipeline for women, and traditions of exclusion based on stereotypes."⁴²

³⁶ Fairfax, *supra* note 13, at 582 (Based on data collected from 904 publicly held companies in 2004, 82% of Fortune 1000 companies had at least one woman on the board which was up from 63% reported in 1994, representing a 20% increase in 10 years.).

³⁷ *Id.* (Increases in the number of Fortune 1000 companies having a woman on the board slowed in the early 2000's with 69% of companies in 1995, 74% in 1999, 74% in 2000, 78% in 2001, 79% in 2002 and 80% in 2003); see also, Jayne Barnard, Symposium, *Current Developments in Gender and the Workplace: More Women on Corporate Boards? Not So Fast*, 13 Wm. & Mary J. of Women & L. 703, 708-710- (2007)(Despite an increase in demand for independent directors with financial experience after the passing of the Sarbanes-Oxley Act, the number of women on corporate boards increased slowly going from 9.6% in 1995 to 14.7% in 2005 with many women sitting on multiple boards.).

³⁸ Jacqueline Concilla, Note, *A Glimmer of Hope for California's "Well-Intentioned" Attempt to Put More Women in the Boardroom*, 93 S. Cal. L. Rev. 603,604 (2020).

³⁹ *Id.*

⁴⁰ Fairfax, *supra* note 13, at 584.

⁴¹ Lisa M. Fairfax, Symposium Article, *People of Color, Women, and the Public Corporation: Some Reflections on the Diversity of Corporate Boards: Women, People of Color, and the Unique Issues Associated with Women of Color*, 79 St. John's L. Rev. 1105, 1110-11 (2005).

⁴² Barnard, *supra* note 37, at 714-15.

Whatever the reason, we still haven't gotten there yet with gender diversity representation on corporate boards. In Q3 2019, 7.1% of Russell 3000 boards still remained all male.⁴³ In the 2020 Morgan Stanley Capital International (MSCI) Women on Boards Report which reports on global trends in gender parity, there was a noticeable slowdown in the rate of increase in women on boards of companies in the MSCI ACWI Index, with only a 0.6% increase reported in 2019.⁴⁴ Additionally, 31% of companies in the MSCI Emerging Markets index still have all-male boards.⁴⁵ And in even worse news, the U.S. does not even rank in the top 10 countries ranked by percentage of companies that have three or more women board directors.⁴⁶ One ray of light was that of the companies assessed, the U.S. only had one company without any women on the board in 2020.⁴⁷ Additionally, while only 0.8% of companies have majority female boards, the company with the highest proportion of women directors was Omnicom Group, an American company, having women represent 66.7% of its board.⁴⁸ There is some progress being made with increasing the number of women on boards both domestically and internationally, even if it is happening slowly.

Progress with racial diversity on boards has come even slower.⁴⁹ Research has shown that in comparison with women, women of color and people of color have seen much slower progress in board representation.⁵⁰ Some have even called barriers for women of color to ascend to corporate board membership a "concrete" ceiling as opposed to a "glass" ceiling because of "double outsider status."⁵¹ This may be partially attributed to the number of women of color in executive positions such that "one would expect a relatively low number of women of color executives would translate into a relatively small number of women of color directors."⁵² Furthermore, the situation seems even bleaker when you consider the different racial groups separately. For example, "In 2003 and 2004, people of color held roughly 10% of board seats at Fortune 500 companies. More specifically, African Americans held 8.1% of such seats in 2004, while Latinos held roughly 1.6% in 2003, and Asian Americans held 1% in 2003. These figures

⁴³ Joshi, *supra* note 7, at 2.

⁴⁴ Thirty Percent Coalition: MSCI Women on Boards 2020 report, (Nov. 2020)(Exhibit 1 – All Country World Index), https://www.30percentcoalition.org/images/PDF/NON_Coalitions_Documents/MSCI_Women_on_Boards_November_2020.pdf.

⁴⁵ *Id.* at Exhibit 2.

⁴⁶ *Id.* at Exhibit 5 (The top 5 companies: Norway, Italy, Belgium, Portugal, and France, all have 100% companies with 3 or more women on boards; while number 10 Austria has 83.3% of companies with 3 or more women on boards.).

⁴⁷ *Id.* at p.10 (Southern Copper Corp. had 0 women on its board).

⁴⁸ *Id.* at Exhibit 7 (Other U.S. companies with majority female boards include Best Buy with 55.6%, General Motors Co. with 54.5%, Cable One with 54.5%, Ulta Beauty with 54.5%, and Viacom CBS with 53.8%).

⁴⁹ Fairfax, *supra* note 13, at 583-84 ("[W]omen, and in particular White women, appear to be faring better than any other disadvantaged group with respect to board representation. Women of color account for 3% of the total board seats. Thus, the vast majority of women board members are White. In addition, women appear to be better represented on corporate boards than all people of color combined.... People of color have experienced more dramatic increases in board representation within the last decade.... However, the board representation of these groups both individually and collectively still lags behind women.").

⁵⁰ *Id.* at 585 (The number of women directors at Fortune 500 companies increased from 9.6% in 1995 to 13.6% in 2003 and the number of women of color directors at Fortune 500 companies increased only 0.5% from 1999 to 2003 when they held a reported 3% of board seats at Fortune 500 companies.).

⁵¹ Fairfax, *supra* note 39, at 1116.

⁵² *Id.*

reveal that women and people of color occupy only a small portion of available corporate board seats."⁵³

Despite the fact that women and people of color have both experienced increases in board membership over the same period of time, progress in racially diverse board membership lags behind that of gender-diverse board membership.⁵⁴ In Q3 2019, ethnic diversity in Russell 3000 companies was just over 10% in 2019, only a slight improvement over a decade when the number was 8.4% in 2008.⁵⁵ That number seems even smaller when viewed in comparison to the number of women on the boards of Russell 3000 companies, which was at a record high of 21% in Q3 2019.⁵⁶ Also in 2019, 37% of S&P 500 companies did not have a single Black board member.⁵⁷ One study found, "boards consider almost no candidates who are racial/ethnic minorities (0.2 candidates per open vacancy, on average)."⁵⁸

If we consider that many boards recruit members who are CEOs or former CEOs, the future of racial board diversity seems even more depressing given that in 2020 there were only 4 Black CEOs of Fortune 500 companies – and there have been only 15 Black CEOs of Fortune 500 companies since 1955.⁵⁹ As one author noted, "Black workers largely fail to reach the upper echelons of power within firms" holding only 3% of executive roles in companies with 100 or more employees; and thus, are overlooked for board membership.⁶⁰

⁵³ *Id.* at 1110-11 ("A 2002 study found that people of color held only 6.9% of the more than 11,000 board seats available within Fortune 1000 companies) (citing Executive Leadership Council, 2004 Census of African Americans on Boards of Directors of Fortune 500 Companies; The Honored Few, *Hispanic Bus.*, Jan./Feb. 2004, at 48; and Committee of 100, *The Committee of 100's Asian Pacifica American (APA) Corporate Board Report Card*, 9-10 (2004)).

⁵⁴ *Id.* at 1110.

⁵⁵ Joshi, *supra* note 7, at 2.

⁵⁶ Stewart M. Landefeld, Evelyn Cruz Sroufe, Allison C. Handy, and Christopher Wassman, *Accelerating Gender Diversity on Boards: Reviewing Legislative Action*, Corp. Governance Advisor, Volume 28, No. 4 (July/August 2020) (Almost half of the open board seats at S&P 500 companies went to women in 2019. "As of the fourth quarter of 2019, the percentage of women on Russell 3000 boards was at 21%, with 7.7% of Russell 3000 companies having no female directors.").

⁵⁷ J. Yo-Jud Cheng, Boris Groysberg & Paul M. Healy, *Why Do Boards Have So Few Black Directors?*, HARV. BUS. REV. (Aug. 13, 2020).

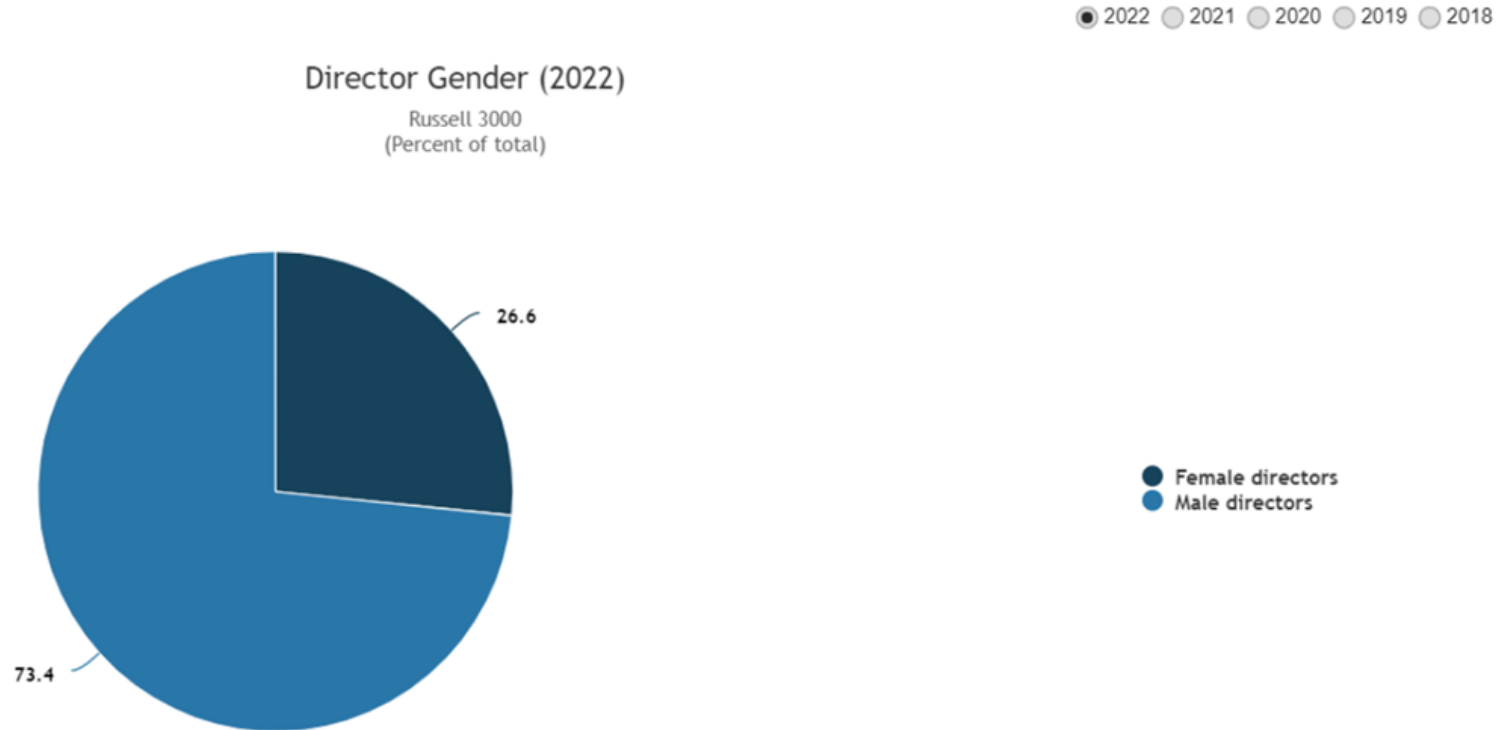
⁵⁸ *Id.* at p. 3.

⁵⁹ Mike Hyter and Audra Bohannon, *Less Than 1 Percent of Fortune 500 CEOs Are Black* (June 5, 2020), <https://chiefexecutive.net/less-than-1-percent-of-fortune-500-ceos-are-Black-corporate-america-must-change/>.

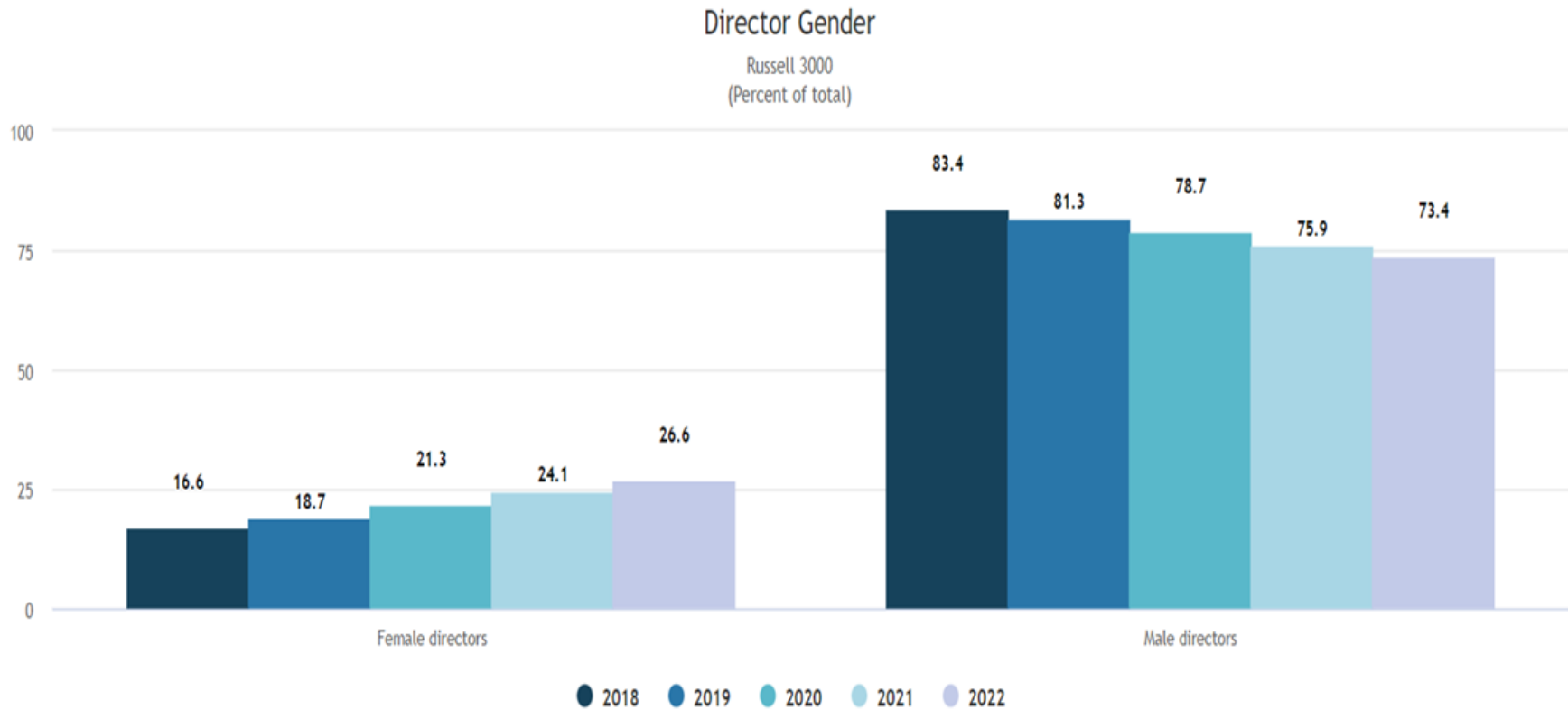
⁶⁰ Martinez et al., *supra* note 34, at 886-87 ("[A]ll of the money, resources, time, and statements do not appear to have resulted in corporate cultures that overcome systemic racism. For example, Black workers largely fail to reach the upper echelons of power within firms. Indeed, in 2020, only 1%, or four, chief executive officers of Fortune 500 companies were Black, despite the fact that Black Americans make up 13.4% of the general population. Even more concerning, according to Equal Employment Opportunity Commission data, Black people hold just 3% of executive or senior-level roles among U.S. companies with 100 or more employees. Corporate boards also lack significant demographic diversity. Despite pledges to diversity board membership, non-White groups make up just 12.5% of board directors, even as they represent 40% of the U.S. population. Black directors, specifically, make up just 4% of more than 20,000 directors, while Black women make up just 1.5%.") (citing Te-Ping Chen, *Why Are There Still So Few Black CEOs?*, Wall St. J. (Sept. 28, 2020) and Peter Eavis, *Diversity Push Barely Budes Corporate Boards to 12.5%*, *Survey Finds*, N.Y. Times (Sept. 15, 2020)).

A. Current Data On Gender Parity On Corporate Boards.

In the charts below, 2022 data on gender parity shows that women comprise 26.6% of the membership on Russell 3000 company boards, having seen small increases each year since 2018.⁶¹

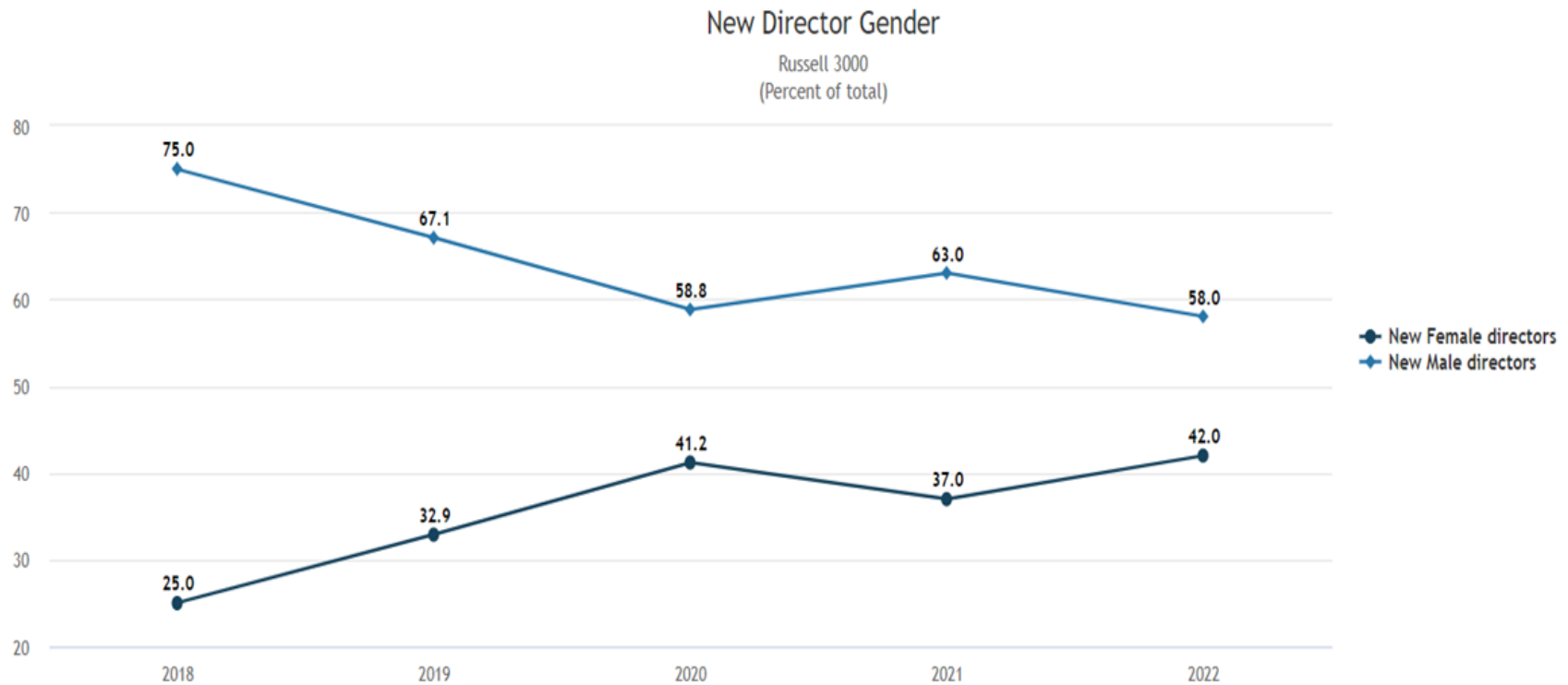


⁶¹ <https://conferenceboard.esgauge.org> (Board Composition Data – Gender).



The number of women added as new directors of Russell 3000 companies has gone up from 25% in 2018 to 42% in 2022.⁶² Interestingly, the number of women added as new directors saw a decrease in 2021 before rebounding in 2022.

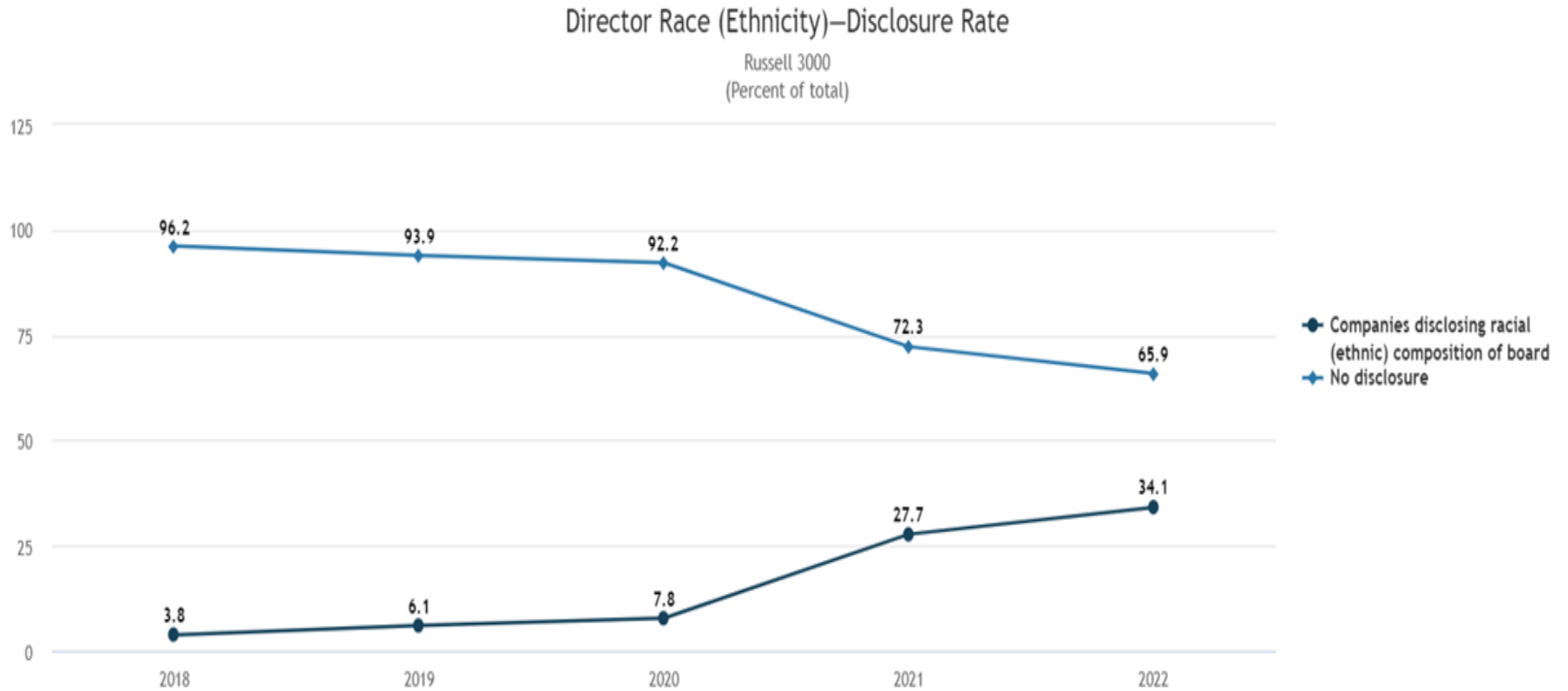
⁶² <https://conferenceboard.esgauge.org> (New Director Data – Diversity).



B. Current Data On Minority Board Membership.

Current data on racial parity shows the number of companies that are now reporting the racial composition of their boards.⁶³ In 2018, 96.2% of Russell 3000 companies did not disclose the racial or ethnic composition of their boards. As of 2022, that number has dropped to 65.9%.

⁶³ <https://conferenceboard.esgauge.org> (Board Composition Data – Race(Ethnicity)).

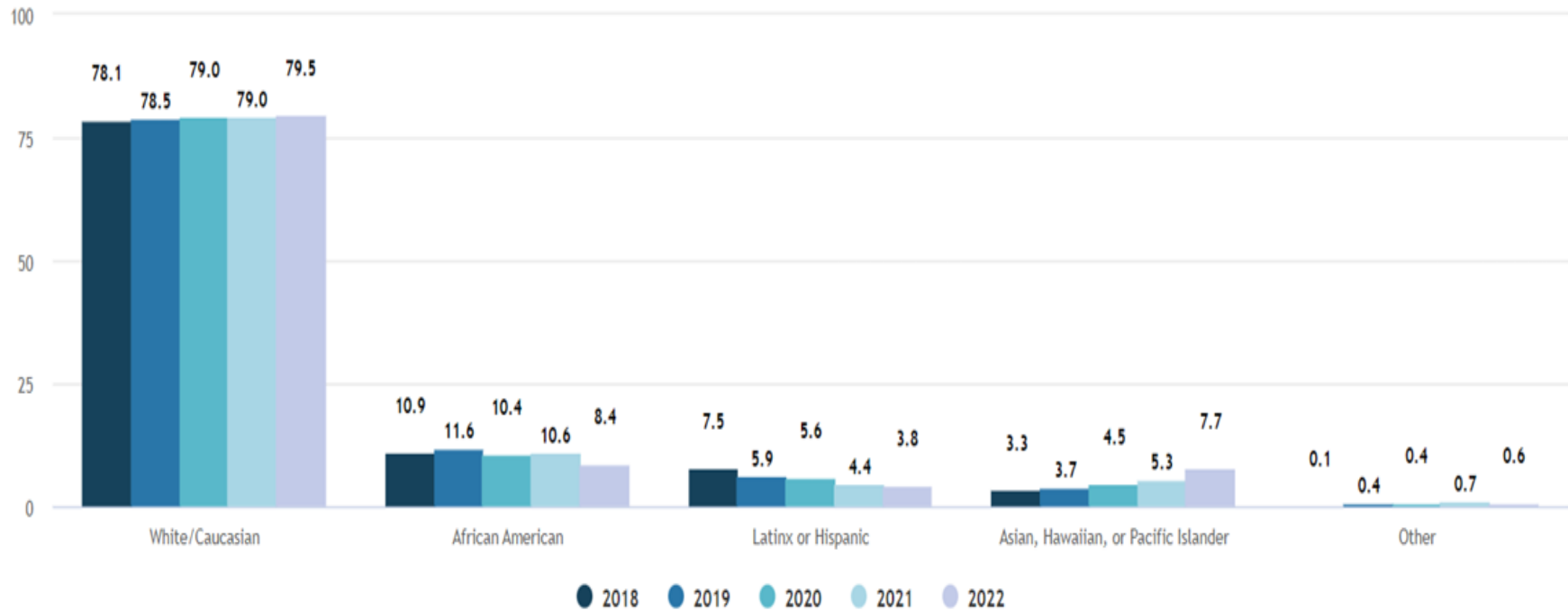


Of those that have reported, African Americans are the largest diverse group identified as having 8.4% of board membership on Russell 3000 boards in 2022; however, the number of African Americans and Latinx or Hispanic members on these boards has decreased overall since 2018. The number of Asian, Hawaiian or Pacific Islander members on Russell 3000 boards has seen the greatest increase going from only 3.3% in 2018 to 7.7% in 2022. The number of White board members on Russell 3000 companies has also increased slightly from 78.1% in 2018 to 79.5% in 2022.⁶⁴

⁶⁴ <https://conferenceboard.esgauge.org> (Board Composition Data – Race(Ethnicity)).

Director Race (Ethnicity)

Russell 3000
(Percent of total)



The qualifications of incoming board members are also worth noting, given the lack of diversity in executive leadership. While the trend of adding other C-suite executives is rising and in 2022 represented 8.6% of new Russell 3000 board members, the clear pipeline to board membership is as an Active CEO (13.6% of new directors in 2022) or a Former CEO (16.1% of new directors in 2022).⁶⁵

⁶⁵ <https://conferenceboard.esgauge.org/> (New Director Data – Qualifications and Skills).

IV. There Have Been Recent Efforts To Advance Diversity On Corporate Boards Through Legislation And Regulation.

The data is clear and simply stated, "There are too few women at the table in America's corporate boardrooms. There are also too few ethnic minorities."⁶⁶ For this reason, several states have introduced legislation with diversity mandates and board composition disclosure requirements for companies headquartered within their borders.⁶⁷ The legal landscape is changing with states leading the charge towards progress; however, it is a piecemeal effort, with some states having mandates on gender diversity, some on gender and racial diversity, while still others are simply "advisory" requirements that don't have any penalties and thus aren't enforceable.⁶⁸

States are not alone in their calls for change. For example, the Securities and Exchange Commission ("SEC") recently approved board diversity disclosure rules for companies listed on the Nasdaq.⁶⁹ Institutional investors like BlackRock⁷⁰ and State Street Global Advisors⁷¹ have also called for diversity on the boards of companies they invest in. Additionally, federal legislation

⁶⁶ Joseph A. Grudfest, *Mandating Gender Diversity in the Corporate Boardroom: The Inevitable Failure of California's SB 826*, Stanford L. Sch. And The Rock Center for Corp. Governance (Sept. 12, 2018).

⁶⁷ SB 826, Section 2, adding Cal. Corp. Code §301.3(f)(2); S.B. 6037, 66th Leg., Reg. Sess. (Wash. 2020); WBCA §23B.01.400(28); H.B. 3394, 101st Gen. Assemb., Reg. Sess. (Il. 2019) (codified as amended at 805 Ill. Comp. Stat. Ann 5/8.12(c))(amends the Business Corporation Act of 1983 to require, no later than the close of the 2020 calendar year, all publicly held domestic or foreign corporation whose principal executive offices are located in Illinois shall have a minimum of one female director and one African American director on its board of directors. Bill subsequently amended to remove requirement for minority and female directors and replaced it with a diversity disclosure requirement.); H.B. 1116, 2019 Leg., 440th Sess. (Md. 2019); S.B. 911, 439th Gen. Assemb., Reg. Sess. (Md. 2019)(requiring all nonprofit, privately held and publicly traded institutions and companies doing business in the state to have a minimum of 30 percent of female directors on their boards by Dec. 31, 2022); Assemb. 6330, 2019 Leg., Reg. Sess. (N.Y. 2019); S. 4278, 2019 Leg., Reg. Sess. (N.Y. 2019); H.R. J. Res. 17-1017, 70th Gen. Assemb., Reg. Sess. (Colo. 2017); H.R. Res. 273, Gen. Assemb., 2017 Sess. (Pa. 2017); S. 3469, 218th Leg., Reg. Sess. (NJ. 2019)(requiring public companies based in New Jersey have at least three women board members by 2021); S.B. 3789, 220th Leg., Reg. Sess. (NJ. 2022)(requiring that any publicly held domestic or foreign corporation whose principal executive office is located in this State would be required to have a minimum of one female director on its board by December 31, 2023); S.B. 115, 100th Leg., Reg. Sess. (MI. 2019)(requiring all publicly held corporations with principal offices in Michigan to have at least one board member by 2021. After January 1, 2023, the requirements change to at least three women on boards of six directors or more, two women on a board with five directors, and one woman on boards with four or fewer directors); S. 1879, 191st Gen. Ct. Reg. Sess. (MA. 2019)(requiring by the end 2021 all publicly held domestic or foreign corporation with principal executive offices located in the Commonwealth shall have at least one female director on its board. By the end of 2023, the requirements change to at least three women on boards of six directors or more, and two women on a board with five directors or fewer).

⁶⁸ Stewart M. Landefeld, Evelyn Cruz Sroufe, Allison C. Handy, and Christopher Wassman, *Accelerating Gender Diversity on Boards: Reviewing Legislative Action*, Corp. Governance Advisor, Volume 28, No. 4 at p. 2-7(July/August 2020)(noting California and Washington as states with diversity mandates; Illinois, Maryland and New York as states with disclosure mandates; and Colorado, Illinois, Maryland, Massachusetts, and Pennsylvania as states with advisory resolutions).

⁶⁹ Order Approving NASDAQ Proposed Rule Changes Relating to Board Diversity, Exchange Act Release No. 34-92,590, 86 Fed. Reg. 44,424 (Aug. 6, 2021) (approving Nasdaq's Board Diversity Proposal).

⁷⁰ See, e.g., BlackRock Investment Stewardship: Corporate Governance and Proxy Voting Guidelines for U.S. Securities, BlackRock 5, (Jan. 2020).

⁷¹ See, e.g., State Street Global Advisors. 2017 Global Proxy Voting and Engagement Guidelines (Mar. 18. 2017) (State Street Corporation issued proxy voting guidelines to diversify the boards of companies it invests in). See also Summary of Material Changes to State Street Global Advisors' 2020 Proxy Voting and Engagement Guidelines, State Street Global Advisors 2 (March 2020), <https://www.ssga.com/library-content/pdfs/globalproxy-voting-and-engagement-guidelines.pdf>.

has been introduced to compel board diversity.⁷² Not complying with these mandates, requirements or suggestions poses a reputational risk for companies because no one wants to be a company that doesn't want women or racially diverse people on their board. No one wants that to be their brand and risk alienating employee groups or customers. Even if their efforts fail, state and federal legislators, institutional investors, and federal regulators have brought the issue to light and companies need to diversify their boards.

A. State Efforts To Increase Board Diversity – A Look At California And Where We Are Now.

In 2018, California's Governor signed into law a gender diversity mandate requiring companies with principal executive offices in the state of California to have women on their boards.⁷³ By the end of 2019, each company was required to have 1 woman on the board; and by the end of 2021, each company with 5 board members was required to have at least 2 women on their board, and each company with 6 or more board members would need to have at least 3 women on their board.⁷⁴ The board composition was also required to be included in the company's annual report.⁷⁵ The penalties for not meeting these requirements were: \$100,000 for not filing on time, \$100,000 for the first violation of the mandatory minimum number of women directors, and \$300,00 for each subsequent violation.⁷⁶ The bill did not come without opposition. The California Chamber of Commerce took the position that the bill created a gender classification that would result in reverse discrimination against men which would be a violation of the U.S. and California Constitutions.⁷⁷ Despite these claims and the litigation that followed, a report by KPMG found that 96% of California publicly held companies were complying with the Senate Bill 826 mandate to have at least one woman on the board.⁷⁸ Still, the California Secretary of State noted that 295 of the 625 corporations falling under the statute did not even report on board diversity, as required; and of those that did report, 6.9% reported having no women on their boards in 2020.⁷⁹

Building on the gender mandate in Senate Bill 826, California enacted Assembly Bill 979 in 2020 to require public companies with headquarters in California to have at least one board member from an underrepresented community, with similar minimum requirements for boards

⁷² See e.g., H.R. 3279, 116th Cong. (2019) and S. 3367, 116th Cong. (2020)(requiring the SEC to create a Diversity Advisory Group to make recommendations on improving board diversity).

⁷³ Michael Hatcher, Weldon Latham, *States Are Leading the Charge to Corporate Boards: Diversify!*, Harv. L. Sch. F. on Corp. Governance (May 12, 2020)(summarizing California requirements and penalties and noting Hawaii, Michigan, and New Jersey are also considering mandatory board diversity legislation mirroring California).

⁷⁴ *Id.* at p. 1.

⁷⁵ *Id.* at p. 2.

⁷⁶ *Id.*

⁷⁷ Landefeld et al., *supra* note 67, at p. 3.

⁷⁸ *Id.* at n. 23 (citing J. Jennings Moss, *How California Public Companies Have Done on Board Diversity*, Silicon Valley Bus. J. (Feb. 20, 2020)(By the end of 2019, 96% of companies had at least one woman on the board), <https://www.bizjournals.com/sanjose/news/2020/02/20/california-public-companies-women-on-boards-kpmg.html>).

⁷⁹ California Secretary of State, *Women on Boards: March 2020 Report 3*, <https://bpd.cdn.sos.ca.gov/women-on-boards/WOB-Report-04.pdf>.

dependent on size.⁸⁰ On April 1, 2022, a Los Angeles Superior Court judge struck down the law as unconstitutional in violation of the Equal Protection Clause of the California Constitution.⁸¹

Despite these legal challenges, the states persist in their efforts to diversify boards headquartered within their borders and some improvements have been seen.⁸² One author notes, "State legislatures will continue to seek ways to encourage greater diversity on corporate boards" calling it a "clear trend" that compels companies "to ensure their boards of directors are more reflective of their shareholders and customers."⁸³ One might add, the trend should be extended to encourage racial and ethnic diversity as well.

B. Other Efforts To Increase Board Diversity.

While states have taken huge steps to mandate progress in corporate board diversity, they are not alone in their efforts. The SEC and Nasdaq have also put a spotlight on corporate boards that lacked diversity. First, at the Council of Institutional Investors Fall 2020 Conference, SEC Commissioner Allison Herren Lee cited research that showed the correlation between diversity and enhanced performance and called for the SEC to take the following steps to increase board diversity: have the SEC's Division of Economic and Risk Analysis assess how SEC rules would impact underrepresented communities, better integrate SEC's Office of Minority and Women Inclusion in SEC's rulemaking process, and partner with other agencies, such as the Small Business Association, to combat discrimination and support minority and women owned businesses.⁸⁴ Stressing the need for diversity, Commissioner Lee stated, "we have an equally pressing national concern over racial injustice", that "the value of diversity for our nation and for our capital markets is clear" and that "we are not where we need to be when diversity levels fall so far short of representation in the population, when too often women and minority executives and board members are the only ones of their type in the room."⁸⁵ Less than three months after these comments were made, the Nasdaq sent a proposal to the SEC that would require companies listed on the Nasdaq to disclose the board composition demographics and any company not having at least two diverse directors (one identifying as a woman and one from an underrepresented minority group) would be required to publicly disclose its reason for not meeting this requirement.⁸⁶ Eight

⁸⁰ AB 979, Cal. Corp. Code §301.4 (underrepresented community is defined as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian or Alaska Native, or LGBTQ+).

⁸¹ *Crest v. Padilla*, 2022 Cal. Super. LEXIS 5531, 52 (April 1, 2022)("Because Section 301.4 treats similarly situated individuals differently based on race, sexual orientation, and gender identity, because that use of suspect categories is not justified by any compelling interest, and because the statute is not narrowly tailored to serve the interests offered, Section 301.4 violates the Equal Protection Clause of the California Constitution.").

⁸² Broome, *supra* note 19, at 128 (Despite the legal challenges to the California mandate progress has been made: the number of public company board seats held by women increased 93.6% since 2018 and the number of California's smallest public companies having at least one board member, went up from 47% in 2018 to 93% in 2021).

⁸³ Hatcher, et al., *supra* note 69, at p. 5.

⁸⁴ Allison Herren Lee, Comm'r, U.S. Secs. And Exch. Comm'n, *Remarks at the Council of Institutional Investors Fall 2020 Conference: Diversity Matters, Disclosure Works, and the SEC Can Do More* (Sep. 22, 2020)(citing research that found "companies with the greatest ethnic diversity on executive teams outperformed those with the least by 36 percent in profitability" and "companies with higher than average diversity on management teams report higher revenue from new products and services"), <https://www.sec.gov/news/speech/lee-cii-2020-conference-20200922>.

⁸⁵ *Id.*

⁸⁶ *See Nasdaq Proposes New Board Diversity Rules*, GIBSON, DUNN & CRUTCHER LLP (Dec. 4, 2020)(Beginning with corporate filings for calendar year 2022, companies listed on the Nasdaq Global Select Market or the Nasdaq Global Market must have one diverse director by August 7, 2023, and two diverse directors by August 6, 2025, or

months later, the SEC approved the Nasdaq proposal.⁸⁷ As with the states mandates, there was push-back when the SEC approved the Nasdaq diversity disclosure rules. A conservative think-tank called the National Center for Public Policy Research, and the Alliance for Fair Board Recruitment both challenged the Nasdaq rule in court.⁸⁸ Recently, the Fifth Circuit Court of Appeals heard oral arguments, but as of the time of this writing, the Nasdaq rule stands.⁸⁹

Other high-profile efforts from institutional investors are placing the onus on companies they invest in to step up their board diversity. Larry Fink, CEO of BlackRock, stated, "I cannot recall a time...where it has been more important for companies to respond to the needs of their stakeholders."⁹⁰ To that end, BlackRock encourages its portfolio companies to include at least 2 women directors and disclose board demographic data.⁹¹ Moreover, if a company does not comply, BlackRock "may vote against members of the nominating/governance committee for an apparent lack of commitment to board effectiveness."⁹² Similarly, Vanguard Asset Management, another large institutional investor, believes that good governance practices include "thoughtful board composition."⁹³ For this reason, Vanguard will also vote against members of nominating or governance committees of boards where there is a lack of progress in diversity.⁹⁴ This means that if companies in BlackRock or Vanguard's portfolios don't make significant efforts to add diverse board members, current board members could see these investors vote against them and potentially lose their board seats. Some say the threat from institutional investors is perhaps the greatest impetus for increasing board diversity.⁹⁵ Because of their large ownership in capital markets, BlackRock and Vanguard have the power to influence boards in a meaningful way.

Lastly, efforts made in Congress have attempted to create change for corporate boards although these efforts have all stalled. Worth noting are the following Congressional efforts by Federal Legislators: Rep. Carolyn Maloney, Chair of the U.S. House Subcommittee on Investor Protection, Entrepreneurship, and Capital Markets, introduced the Diversity in Corporate

explain why they do not; companies listed on the Nasdaq Capital Market must have one diverse director by August 7, 2023, and two by August 6, 2026, or explain why they do not; and companies with boards that have five or less directors regardless of their listing tier must have one diverse director by August 7, 2023, or explain why they do not. If a company does not comply with these rules and does not explain why it does not have the diverse board members, the company will be subject to delisting if it does not cure the deficiency by meeting the objective and adding the board members or by explaining why it has not done so by the later of the next annual meeting or 180 days from the event that caused the deficiency.), <https://www.gibsondunn.com/nasdaq-proposes-new-board-diversity-rules/>.

⁸⁷ Order, *supra* note 69.

⁸⁸ Jody Godoy, *Showdown over Nasdaq board diversity rule heads to 5th Circuit*, REUTERS (Aug. 29, 2022), <https://www.reuters.com/legal/government/showdown-over-nasdaq-board-diversity-rule-heads-5th-circuit-2022-08-29/>.

⁸⁹ Andrew Ramonas, *Nasdaq Diversity Rule Challenge Puts Conservatives on Defense*, BLOOMBERG LAW (Aug. 29, 2022), <https://news.bloomberglaw.com/securities-law/nasdaq-diversity-rules-challenge-puts-conservatives-on-defense>.

⁹⁰ Shill, *supra* note 4, at 257.

⁹¹ Broome, *supra* note 19, at 130.

⁹² *Id.*

⁹³ Tim Buckley, Introduction from Chairman and CEO, Vanguard Annual Report Investment Stewardship (2019), https://www.wlrk.com/files/2019/Vanguard_2019_Annual_Report_Investment_Stewardship.pdf.

⁹⁴ Broome, *supra* note 19, at 130.

⁹⁵ Martinez, *supra* note 34 ("[I]nstitutional investors are uniquely situated to incentivize corporations to adopt equality metrics to ensure that they implement specific and measurable objectives aimed at ending systemic racism and promoting greater racial diversity and justice.").

Leadership Act of 2019;⁹⁶ Rep. Gregory Meeks' Corporate Governance Improvement and Investor Protection Act passed out of the House of Representatives but has not yet passed in the Senate;⁹⁷ Rep. Joyce Beatty's Ensuring Diverse Leadership Act of 2019 passed out of the House of Representatives but not yet in the Senate;⁹⁸ and Rep. Juan Vargas introduced the ESG Disclosure Simplification Act of 2019 aimed at requiring the SEC to require public companies disclose ESG metrics.⁹⁹ While these efforts have not become laws, they do represent a substantial effort on the part of these legislators to move the ball forward on corporate diversity.

Each of these efforts separately has numerous challengers and they may all fail. But when taken together, they paint a picture - Americans are dissatisfied with the status quo. Companies can no longer simply make lofty and aspirational statements about their commitment to diversity and inclusion without making the effort to achieve parity on corporate boards. As one author states, "To ensure parity is achieved, companies need to challenge the traditional mindset and enhance board diversity beyond quotas set by law. The current dynamic economic and social environment poses new risks which demand diverse skillsets and experiences. A diverse board can be a key asset to respond to challenging times."¹⁰⁰ These are challenging times, indeed; and the next section of this paper discusses why racial diversity on corporate boards, specifically for healthcare companies, is the key.

V. There Is A Need For Diversity In Healthcare.

The Institute of Medicine ("IOM") first put a national spotlight on racial and ethnic disparities in healthcare in 2002 with its report called *Unequal Treatment*.¹⁰¹ This report was instrumental in making the case that racial and ethnic minorities often receive lower quality care than Whites, even after accounting for factors like insurance, socioeconomic status, comorbidities, and stage of presentation.¹⁰² Since this report, many others have researched the differences in health outcomes for minority people.¹⁰³ With all the research and knowledge we've gained, twenty years after the IOM's seminal report, the disparities have continued to exist and the gaps in care have continued to grow. Unfortunately, the truth is, "An enormous body of well-designed scientific research demonstrates that minorities, particularly African Americans, experience a

⁹⁶ See H.R. 3279, *supra* note 72, <https://www.congress.gov/bill/116th-congress/house-bill/3279/all-actions?r=2&overview=closed&s=1#tabs>.

⁹⁷ H.R. 1187, 117th Cong. (2021-2022) (which includes portions of H.R. 1277 Improving Corporate Governance Through Diversity Act), <https://www.congress.gov/bill/117th-congress/house-bill/1187>.

⁹⁸ H.R. 281, 116th Cong. (2019), <https://www.congress.gov/bill/116th-congress/house-bill/281/actions?q=%7B%22search%22%3A%5B%22hr281%22%2C%22hr281%22%5D%7D&r=2&s=2>.

⁹⁹ H.R. 4329, 116th Cong. (2020) <https://www.congress.gov/bill/116th-congress/house-bill/4329/actions?q=%7B%22search%22%3A%5B%22hr4329%22%2C%22hr4329%22%5D%7D&r=2&s=1>.

¹⁰⁰ Joshi, *supra* note 7, at 5.

¹⁰¹ Institute of Medicine, *Unequal Treatment: Confirming Racial and Ethnic Disparities in Healthcare*, Nat'l Acad. Press (2002).

¹⁰² *Id.*

¹⁰³ Darci L. Graves et al., *Journal of Healthcare Law & Policy's Tenth Anniversary Issue: Legislation as Intervention: A Survey of Cultural Competence Policy in Healthcare*, 10 J. Healthcare L. & Pol'y 339,341-2 (2007) ("The research regarding racial and cultural health disparities in the United States is mounting. The issue of disparities is related to both (a) health and (b) healthcare. Health disparities, also called health inequities, refer to the differences in health outcomes. Healthcare disparities refer to 'differences in the preventive, diagnostic and treatment services offered to people with similar health conditions.'") (quoting National Business Group on Health, *Why Companies are Making Health Disparities Their Business: The Business Case and Practical Strategies*, 3 (2003)).

statistically higher likelihood of poorer health, earlier disability, and earlier death, compared to White Americans."¹⁰⁴ Alarminglly, these disparities exist even when insurance, income, and health problems are the same.¹⁰⁵ For this reason, we must consider how to address racial disparities in health outcomes across the entire healthcare system. I propose through this paper increasing diversity on corporate boards of healthcare companies as a way of making system-wide strategic changes toward caring for and treating minorities.

A. There Are Reported Racial Disparities In Healthcare.

In this section of this paper, I will briefly discuss the research on a few health disparities. There are several similar definitions for healthcare disparities; however, in this paper, healthcare disparities are defined as "differences in healthcare quality, access, and outcomes adversely affecting members of racial and ethnic minority groups and other socially disadvantaged populations."¹⁰⁶ Moreover, while disparities exist for several different racial and ethnic minority populations, the research is clear that some of the greatest reported disparities exist between White and Black people.¹⁰⁷

1. Diagnosis And Treatment Of Depression Disparities

Earlier this year, the Blue Cross Blue Shield Association ("BCBSA") published a Health of America report entitled, Racial Disparities in Diagnosis and Treatment of Major Depression.¹⁰⁸ Research shows that despite the fact that rates of depression are likely the same, "The prevalence of diagnosed major depression is 31% lower for majority Black communities and 39% lower for majority Hispanic communities than for White communities." Thus, depression is not being diagnosed for a significant number of minority patients. Undiagnosed depression could lead to

¹⁰⁴ Barbara A. Noah, Article, *A Prescription for Racial Equality in Medicine*, 40 Conn. L. Rev. 675, 683 (2008) (citing "Christopher J. L. Murray et al., *Eight Americas: Investigating Mortality Disparities Across Races, Counties, and Race-Counties in the United States*, 3 PLOS Med. 1513, 1524 (2006)("health inequities in the U.S. are large and are showing no sign of reducing"), and Morehouse Med. Treatment & Effectiveness Center, Morehouse School of Medicine, *A Synthesis of the Literature: Racial and Ethnic Differences in Access to Medical Care* (1999)(summarizing 180 studies from 1985 to 1999 that provide evidence of racial disparities)).

¹⁰⁵ Rene Bowser, *The Affordable Care Act and Beyond: Opportunities for Advancing Health Equity and Social Justice*, 10 Hastings Race & Poverty L. J. 69, 77 (2013)(Minorities "receive a lower quality and intensity of healthcare than White patients, even when they are insured at the same levels, have similar incomes, and present with the same types of health problems.").

¹⁰⁶ National Quality Forum, Technical Report, *Healthcare Disparities and Cultural Competency Consensus Standards*, pg. 45 (2012), <file:///C:/Users/mylyn/Downloads/DisparitiesFinalReport.pdf>.

¹⁰⁷ See, e.g., Camille M. Davison, Article, *My Aging Minority Rural Grandparents: Disparities in the Health and Healthcare of the Rural Elderly Minority Population and the Need for Culturally Competent Healthcare Providers*, 21 Am. U.J. Gender Soc. Pol'y & L. 57, 66-7 (2012)("Despite the almost identical human makeup, health studies show that African Americans are sicker and have shorter lives than Caucasians. African Americans have disproportionately higher rates of diseases, mortality, and survival than the majority population."), see also, Frank Griffin, Article, *Addressing Racial Disparities in Healthcare One Inequality at a Time: Total Knee Replacement*, 7 Ind. J.L. & Soc. Equality, 1 (2019) (discussing the disparities that exist between Black and White utilization of total knee replacements that exist independent of socioeconomic status, patient demographics and biology, concluding, "Independent of income or insurance status, racial disparities in utilization of beneficial medical procedures are well documented, and the largest disparity in the United States is between African Americans and Caucasians.").

¹⁰⁸ Blue Cross Blue Shield Association, Health of America Report, Racial Disparities in Diagnosis and Treatment of Major Depression (May 31, 2022), <https://www.bcbs.com/the-health-of-america/reports/racial-disparities-diagnosis-and-treatment-of-major-depression>.

substance abuse problems, loss of employment, and homelessness; affecting not only the patient's household but their community at large.

The report noted that the presence of mental and behavioral health providers greatly impacted the diagnosis rates for major depression suggesting "that the underdiagnosis of major depression in Black and Hispanic communities could be mitigated through improved access."¹⁰⁹ Access is a known cause of health disparities.¹¹⁰ It is clear, "access to physician care has been worse for Black and Latino individuals, especially those who live in segregated areas" creating an "impediment to getting access to healthcare."¹¹¹ A previous study noted over a decade ago that minority patients have less access to mental health services, are less likely to receive the mental health and depression care needed, and are more likely to receive poor quality care when treated.¹¹²

Furthermore, it is not just access and diagnosis that are issues for minorities, the rates of mental health treatment are as well. The BCBSA report also found prescription drug and counseling utilization differences among race and ethnicity data segments.¹¹³ Specifically, "rates of prescription treatment for diagnosed major depression are 13% lower for Black communities and 33% lower for Hispanic communities than for White communities."¹¹⁴ Additionally, "rates of counseling for diagnosed major depression are 21% lower for Hispanic communities than White communities."¹¹⁵ The report notes that distrust in the healthcare system might be partially to blame for some of these disparities and suggested that creating a more diverse healthcare workforce might help.¹¹⁶ The Call to Action concludes, "We recognize that collaboration is essential to transforming mental health. Change must be a collective effort. It will require business leaders, policymakers, researchers, and community leaders to act with a sense of urgency. If we collaborate to solve the hardest problems, we can meaningfully improve outcomes for millions of Americans and reverse the mental health crisis we face today." I agree. Collaboration across the entire healthcare system, a sense of urgency, and an increase in diversity among healthcare leaders at the

¹⁰⁹ *Id.* at p. 3.

¹¹⁰ *See, e.g.*, U.S. Dept. of Health and Human Svcs. Substance Abuse and Mental Health Svcs. Admin., Center for Mental Health Svcs., National Institutes of Health, National Institute of Mental Health, *Mental Health: A Report of the Surgeon General* (1999), and U.S. Dept. of Health and Human Svcs., Substance Abuse and Mental Health Svcs. Admin., Center for Mental Health Svcs., *Mental Health: Culture, Race, and Ethnicity: A Supplement to Mental Health: A Report of the Surgeon General* (2001).

¹¹¹ Ruqaiyah Yearby, Seema Mohapatra, Article, *Systemic Racism, the Government's Pandemic Response, and Racial Inequities in Covid-19*, 70 *Emory L.J.* 1419, 1468 (2021) ("The reality is that many people of color have unequal access to healthcare, which has led to inequalities in access to treatment, infections, and deaths during the Covid-19 pandemic."); *see also*, Darrell J. Gaskin, Gniesha Y. Dinwiddie, Kitty S. Chan & Rachael R. McCleary, *Residential Segregation and the Availability of Primary Care Physicians*, 47 *Health Servs. Rsch.* 2353, 2356, 2368-69 (2012)(a 2012 study showed that segregated areas where minorities lived lacked adequate primary care physicians).

¹¹² Thomas G. McGuire and Jeanne Miranda, *New Evidence Regarding Racial and Ethnic Disparities in Mental Health: Policy Implications*, *Health Affairs* vol. 27, no. 2 (2008) ("After entering care, minority patients are less likely than Whites to receive the best available treatments for depression and anxiety. African Americans are more likely than Whites to terminate treatment prematurely. Among adults with a diagnosed-based need for mental health or substance abuse care, 37.6% of Whites, but only 22.4% of Latinos and 25% of African Americans, receive treatment.").

¹¹³ BCBSA Report, *supra* note 108, at p. 3.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at p. 5.

highest level can meaningfully improve disparate health outcomes, not just in mental health, but for many of the issues minority patients face.

2. Maternal Healthcare Disparities

In 2021, BCBSA issued a Health of America report entitled, *Racial Disparities in Maternal Health*.¹¹⁷ This report studied the rates of severe maternal morbidity, or SMM, and found that "Women in majority Black communities have a 63% higher rate of SMM than women in majority White communities. Women in majority Hispanic communities have a 32% higher rate of severe maternal morbidity than women in majority White communities. These rates are higher across all age groups and nearly all indicators."¹¹⁸ The data showed, "Racial disparities in SMM are even more pronounced for women in majority Black communities."¹¹⁹ In fact, women in majority Black communities under the age of 35 had higher severe maternal morbidity rates than White women over the age of 35.¹²⁰ Disturbingly, the data revealed that Black and Hispanic women have higher prevalence rates for nearly all SMM indicators such as kidney failure, sepsis, shock, and eclampsia; and nearly twice the prevalence of risk factors like hypertension and anemia than White women.¹²¹

BCBSA followed up the 2021 report on maternal health with a second report published in September of 2022 entitled, *Racial and Ethnic Disparities in Maternal Health*.¹²² The report revealed shocking truths for Black, Latina, and Asian women. Specifically, "SMM rates are consistently higher among Black, Latina and Asian women compared to White women, regardless of age or type of insurance; While SMM rates for all women rise with age, Black women ages 35-44, especially those with chronic conditions, have a 66% higher risk of experiencing an SMM event than White women; and, Black, Latina and Asian women have higher rates of many risk factors (such as asthma, diabetes or high blood pressure) for SMM than White women."¹²³ Whether Black, Latina, and Asian women had commercial insurance or Medicaid, they had a higher prevalence of SMM than White women.¹²⁴ Women ages 35-44 were more likely to have an SMM event; however Black women in this age range, with either commercial insurance or Medicaid, have 66% higher rates of SMM compared to White women.¹²⁵ The report concluded, "Black women aged 35-44 with multiple risk factors are at the highest risk. In this age range, Black women have a higher prevalence of risk factors than women of other races and ethnicities. Research has shown these risk factors, such as chronic conditions, may be linked to the cumulative effects of systemic racism."¹²⁶

¹¹⁷ Blue Cross Blue Shield Association, Health of America Report, *Racial Disparities in Maternal Health* (May 20, 2021), <https://www.bcbs.com/the-health-of-america/reports/racial-disparities-in-maternal-health>.

¹¹⁸ *Id.* at p. 1.

¹¹⁹ *Id.* at p. 3.

¹²⁰ *Id.* at Exhibit 2.

¹²¹ *Id.* at p. 2.

¹²² Blue Cross Blue Shield Association, Health of America Report, *Racial and Ethnic Disparities in Maternal Health* (Sept. 21, 2022), <https://www.bcbs.com/the-health-of-america/reports/racial-and-ethnic-disparities-maternal-health>.

¹²³ *Id.* at p.2 (emphasis added).

¹²⁴ *Id.* at p.4, Exhibit 2 (For Black women with commercial insurance, SMM rates were 53% higher, and with Medicaid, 73% higher than SMM rates for White women. Latina women with commercial insurance had 22% higher rates and with Medicaid, 28% higher rates of SMM than White women. Asian women with commercial insurance had 15% higher rates and with Medicaid, 38% higher rates of SMM than White women.).

¹²⁵ *Id.* at p.5, Exhibit 3a and 3b.

¹²⁶ *Id.* at p. 6.

3. Asthma Disparities

In 2020, the Asthma and Allergy Foundation of America ("AAFA") published a report entitled, *2020 Asthma Disparities in America: A Roadmap to Reducing Burden on Racial and Ethnic Minorities*.¹²⁷ The report is a part of AAFA's commitment to "drastically reducing the burden of asthma in underserved populations that bear the biggest burden of this disease."¹²⁸ Amazingly, the report found, "Black individuals are nearly three times as likely to die from asthma than White individuals;" and "asthma-related emergency department visits are nearly five times as high for Black patients compared to White patients."¹²⁹ AAFA discussed the root causes of asthma disparities stating, "Research shows that asthma disparities are highly driven by socioenvironmental and economic conditions and that structural injustices over time have led to accumulated disadvantage for specific racial and ethnic populations in the U.S."¹³⁰ AAFA went further, discussing "structural determinants of health" which are a set of forces and systems that are "deeply ingrained in U.S. policies, governance and culture, and have led to systematic disadvantages of Black and Hispanic Americans."¹³¹ The AAFA proposed several strategies aimed at improving asthma health for minorities, many of which included increasing diversity and diverse viewpoints in various aspects of the healthcare system.¹³²

4. Diabetes Disparities

In 2021, the U.S. Department of Health and Human Services, Office of Minority Health, published a summary called *Diabetes and African Americans*, using data from the CDC 2020 and 2021 National Diabetes Surveillance Systems, the CDC 2020 National Diabetes Statistics Report, and the National Healthcare Quality and Disparity Reports.¹³³ The data revealed:

- In 2018, non-Hispanic Blacks were twice as likely as non-Hispanic Whites to die from diabetes.
- African American adults are 60% more likely than non-Hispanic White adults to be diagnosed with diabetes by a physician.
- In 2017, non-Hispanic Blacks were 3.2 times more likely to be diagnosed with end-stage renal disease as compared to non-Hispanic Whites.

¹²⁷ Asthma and Allergy Foundation of America, *2020 Asthma Disparities in America: A Roadmap to Reducing Burden on Racial and Ethnic Minorities*, <https://www.aafa.org/media/2743/asthma-disparities-in-america-burden-on-racial-ethnic-minorities.pdf>.

¹²⁸ Asthma and Allergy Foundation of America, *Executive Summary to 2020 Asthma Disparities in America: A Roadmap to Reducing Burden on Racial and Ethnic Minorities*, <https://www.aafa.org/media/2709/asthma-disparities-in-america-burden-by-race-ethnicity-executive-summary.pdf>.

¹²⁹ *Id.* at p. 5.

¹³⁰ *Id.* at p. 7.

¹³¹ *Id.*

¹³² *Id.* at p. 10-13 ("increasing diversity in the primary and specialty healthcare workforce," "increase racial and ethnic diversity among researchers studying asthma," "increase physicians and researchers from diverse backgrounds on editorial and review boards," and "appoint diverse patients to advisory councils, task forces and project committees").

¹³³ US Dept of Health and Human Services Office of Minority Health, *Diabetes and African Americans*, <https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=4&lvlid=18>.

- In 2017, non-Hispanic Blacks were 2.3 times more likely to be hospitalized for lower limb amputations as compared to non-Hispanic Whites.¹³⁴

Additionally, the data showed Black people were more likely to have a visual impairment in 2018 and were 3.1 times more likely to be admitted to the hospital for uncontrolled diabetes in 2017.¹³⁵

5. There Are Many Disparities For Minority Populations.

The sections above are just short summaries from some of the most recent publications on disparities in health outcomes for minorities. Unfortunately, they aren't the end of the story for minority patients. There is recent evidence that when compared to White patients, Black youth die at significantly higher rates from acute myeloid leukemia (16% vs 3%), had a lower complete remission rate (66% vs 83%), and a decreased overall survival rate (5-year rates: 22% vs 51%).¹³⁶ There's evidence that "Blacks are 1.22 and 1.72 times more likely than Whites to die from heart disease and hypertension, both preventable diseases."¹³⁷ And even with long-standing research on higher rates of heart failure for Black patients, there are disparities in access to treatment and care, even when the patient has adequate insurance.¹³⁸ There is evidence of "over-diagnosis of schizophrenia among African-Americans and the excessive rates of involuntary commitment of African-Americans."¹³⁹ There is evidence that minorities have unequal and ineffective treatments for pain.¹⁴⁰ There is evidence that Black patients are less likely "to receive curative surgery for early-stage lung, colon, or breast cancer" than White patients.¹⁴¹ There is evidence that Black

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Karilyn Larkin, et al., *High Early Death Rates, Treatment Resistance, and Short Survival of Black Adolescents and Young Adults With AML*, Blood Advances, Ash Publications, (July 5, 2022) bloodadvances.2022007544. 5 Jul. 2022, doi:10.1182/bloodadvances.2022007544 (<https://pubmed.ncbi.nlm.nih.gov/35788257/>) (study found Black adolescents and young adults with acute myeloid leukemia had worse outcomes that included a higher early death rate, lower complete remission rate and decreased overall survival compared to White patients of the same age; "Higher early death rates suggest a delay in diagnosis and treatment, calling for systematic changes to patient care.").

¹³⁷ Marilyn S. Nanney, et al., *The Economic Benefits of Reducing Racial Disparities in Health: The Case of Minnesota*, 16(5) Int J Environ Res Public Health 742 (March 1, 2019).

¹³⁸ Thomas M. Cascino et al., *Racial Inequities in Access to Ventricular Assist Device and Transplant Persist After Consideration for Preferences for Care: A Report From the REVIVAL Study* (Oct. 19, 2022)(study conclusion "Among patients receiving care by advanced HF[heart failure] cardiologists at VAD [ventricular assist device] centers, there is less utilization of VAD and transplant for Black patients even after adjusting for HF severity, quality of life, and social determinants of health, despite similar care preferences. This residual inequity may be a consequence of structural racism and discrimination or provider bias impacting decision-making.")(ahead of printing), <https://www.ahajournals.org/doi/epdf/10.1161/CIRCHEARTFAILURE.122.009745>.

¹³⁹ Lisa C. Ikemoto, Symposium, *Racial Disparities in Healthcare and Cultural Competency*, 48 St. Louis L.J. 75, 94 (2003)(attributing this difference in schizophrenia diagnosis to physicians applying different decision rules to African-Americans than to Whites), https://www.ncbi.nlm.nih.gov/books/NBK44243/pdf/Bookshelf_NBK44243.pdf.

¹⁴⁰ Vence L. Bonham, *Race, Ethnicity, and Pain Treatment: Striving to Understand the Causes and Solutions to the Disparities in Pain Treatment*, 29 J.L. Med. & Ethics 52 (2001); see also, Griffin *supra* note 107, at 2-5 (discussing the growing disparity in utilization rates of knee replacement surgery, a pain relieving surgery to enhance quality of life, that grew to 50%, meaning Black patients undergo this treatment 50% less than Whites), Knox H. Todd et al., *Ethnicity and Analgesic Practice*, 35 Annals Emergency Med. 11, 13 (2000)(57% of Blacks vs 75% of Whites received analgesics when presented in the ER with long-bone fractures).

¹⁴¹ Stephen B. Thomas, *The Color Line: Race Matters in the Elimination of Health Disparities*, 91 Am. J. Pub. Health, 1046, 1047 (2001).

people have less access to organ transplants.¹⁴² After reviewing research in a wide variety of medical settings, one author matter-of-factly concludes, "Numerous studies concerning virtually every type of medical care strongly suggest that African American patients do not receive the same care as White patients when they seek medical treatment."¹⁴³ Healthcare disparities for minority patients are real, wide-ranging, and frankly, scary. The research is clear and plentiful, providing decades of data. Whatever we as a country have been doing to address healthcare disparities for underserved populations has not been working, and the time has come to consider how to create system-wide change.

B. Increasing Board Diversity Is Key To Improving Racial Disparities In Healthcare.

In healthcare, with the current state of alarming disparities in health outcomes for minorities, there is no room for the status quo. We know that "research shows that diverse groups are more innovative at solving complex, non-routine problems"¹⁴⁴, which are the exact types of problems facing minorities. Now is the time to bring diverse viewpoints to the table. The idea of increasing diversity in healthcare isn't new – it's reflected in the idea of cultural competence. One author explains, "'Cultural competence' in healthcare entails: understanding the importance of social and cultural influences on patients' health beliefs and behaviors; considering how these factors interact at multiple levels of the healthcare delivery system (e.g., at the level of structural processes of care or clinical decision-making); and, finally, devising interventions that take these issues into account to assure quality healthcare delivery to diverse patient populations."¹⁴⁵ Therefore, we must "acknowledge that healthcare has a culture of its own and that cultural competency requires adjusting that culture to provide care for a diverse population of patients."¹⁴⁶

For years, many have mistakenly suggested adding diversity in the workforce as a way of adjusting healthcare culture to better serve a diverse population.¹⁴⁷ Even the government has suggested increasing diversity as a way to decrease racial and ethnic health disparities.¹⁴⁸ The

¹⁴² Arnold M. Epstein et al., *Racial Disparities in Access to Renal Transplantation: Clinically Appropriate or Due to Underuse or Overuse*, 343 *New Eng. J. Med.* 1537, 1542 (2000)(Black patients have fewer transplants, regardless of clinical indications).

¹⁴³ Noah, *supra* note 104, at 685-6.

¹⁴⁴ Malepati, *supra* note 31, at 521.

¹⁴⁵ Joseph R. Betancourt et al., *Defining Cultural Competence: A Practical Framework for Addressing Racial/Ethnic Disparities in Health and Healthcare*, 118 *Pub. Health Rep.* 293, 297 (2003).

¹⁴⁶ Ikemoto, *supra* note 139, at 98.

¹⁴⁷ *See e.g.*, Yearby et al., *supra* note 111, at 1468 ("One study showed that increasing the workforce of Black doctors could protect Black people from dying of heart-related ailments and reduce death by 19%."), Griffin *supra* note 107, p. 25 ("Increasing the diversity of the orthopedic surgeon workforce can also improve the TKA disparity"), McGuire et al., *supra* note 112 ("a diverse mental health workforce, as well as provider and patient education, are important to eliminating mental healthcare disparities.") and Cahn *supra* note 6, at 143 (citing studies that showed increases in racial workforce diversity showed a positive correlation with several economic indicators, including increases in market share and sales revenues).

¹⁴⁸ U.S. Dept. of Health and Human Svcs. *HHS Action Plan to Reduce Racial and Ethnic Health Disparities: A Nation Free of Disparities in Health and Healthcare*, (2011), https://www.minorityhealth.hhs.gov/assets/pdf/hhs/HHS_Plan_complete.pdf; *see also*, U.S. Dept. of Health and Human Services, Office of Minority Health, *National Standards for Culturally and Linguistically Appropriate Services in Healthcare: Final Report* 4, 8 2001(According to Standard 2, "healthcare organizations should

truth is, there could be dozens of ways a single healthcare company could adjust its operations, marketing, research, etc. to better serve a diverse population. Moreover, there are a number of frameworks with the desired goal of reducing racial health inequities.¹⁴⁹ Simply adding a more diverse workforce won't cut it, although it is a good start. Likewise, a number of culturally competent "activities" done to combat inequities, such as education and cross-cultural training won't cut it either. This is because healthcare disparities are the result of systemic practices that have existed for centuries.¹⁵⁰ As stated by the CDC, "To build a healthier America for all, we must confront the systems and policies that have resulted in the generational injustice that has given rise to racial and ethnic health inequities."¹⁵¹

One author correctly noted that cultural competency efforts will encounter resistance which requires those "efforts to be backed with strong top-down support and encouragement from senior officers" and he suggested a task force be created of the healthcare organization leaders, members from an institutional ethics committee and representatives from diverse groups of the community.¹⁵² While a diverse workforce, frameworks, culturally competent activities, and task forces can chip away at the problem, they fail because they do not assign ownership of the desired goal to the one group that can insist on and oversee the necessary changes, the board. The only way to fight back against these systemic practices is by institutional changes led by more diverse boards of healthcare companies across the entire industry. Top-down support should start at the highest level – the board itself.¹⁵³

[R]acial and ethnic minorities must be engaged and empowered to take the lead in developing interventions to achieve health equity, which helps ensure that the design and implementation of interventions intended to benefit them are actually tailored to their needs. Blacks, Latinos, Native Americans, people with disabilities, and other communities who have suffered disproportionately...must be empowered and engaged to develop and implement broad systemic change."¹⁵⁴ Moreover, "[T]he movement for health justice must come from the communities impacted by health inequities."¹⁵⁵ This is all to say, minorities must be given a seat

implement strategies to recruit, retain, and promote at all levels of the organization a diverse staff and leadership that are representative of the demographic characteristics of the service area.").

¹⁴⁹ Ikemoto, *supra* note 130, at 100.

¹⁵⁰ *Id.* at 80 ("A close examination of healthcare's culture reveals how its systemic practices express racist, nativist, and ethnocentric beliefs and values that, in turn, produce racially disparate health outcomes."); *see also*, Yearby et al., *supra* note 111, at 1456 ("Equal access to quality healthcare is also limited by systemic racism, particularly structural and interpersonal racism.") and Christian Weller, *Systemic Racism Makes Covid-19 Much More Deadly for African-Americans*, *Forbes* (June 18, 2020) (systemic racism in housing, education, healthcare, and employment have resulted in minority communities that suffer from disproportionately higher rates of chronic illnesses and preexisting conditions that predominantly White communities, which are often risk factors for infections and death), <https://www.forbes.com/sites/christianweller/2020/06/18/systemic-racism-makes-covid-19-much-more-deadly-for-african-americans/?sh=40a9d1c47feb>.

¹⁵¹ CDC's Commitment to Addressing Racism as an Obstacle to Health Equity, Racism and Health Hub, www.cdc.gov/minorityhealth/racism-disparities/index.html.

¹⁵² Michael C. Brannigan, *Connecting the Dots in Cultural Competency: Institutional Strategies and Conceptual Caveats*, *Cambridge Quarterly of Healthcare Ethics*, Vol. 17, Issue 2, 173-184 (2008).

¹⁵³ Carol Stewart, *How Diverse Is Your Pipeline? Developing the Talent Pipeline for Women and Black and Ethnic Minority Employees*, 48 *INDUST. & COM. TRAINING* 61, 65 (2016) (highlighting the importance of the board's role in establishing the 'tone from the top' of the company in terms of its culture and values.).

¹⁵⁴ Yearby et al., *supra* note 111, at 1471.

¹⁵⁵ *Id.* at 1472.

at the very tables where organization efforts are created in order to drive the change needed in healthcare.

By having the appropriate representation of minorities on their boards, healthcare companies will see substantial impacts. First, the board will have more insight into how to address the systematic racism that has helped create the healthcare disparities people of color experience.¹⁵⁶ Diverse board members will have different networks and will help establish relationships and partnerships with healthcare organizations that could address community-level inequities.¹⁵⁷ Diverse board members will have diverse viewpoints that will lead to more constructive debate and problem-solving.¹⁵⁸ Additionally, diverse board members signal to the stakeholders of healthcare companies, i.e., the employees, community leaders, community organizations, local businesses and the people and patients being served, that their voices are being heard, which is the first step to rebuilding trust¹⁵⁹ between underserved communities of color and the healthcare companies there to serve them.¹⁶⁰ This is because, "Board diversity can also serve as a signal to a corporation's customers, employees, and other stakeholders that the board represents everyone with whom the corporation interacts."¹⁶¹ As one article notes in favor of increased gender diversity on corporate boards, "[W]hen monumental decisions will impact all of us, all of us should feel represented. Why, then, would representation on corporate boards not be equally important? A corporation's board votes to make decisions about the company's direction, which ultimately impacts citizens."¹⁶² The same holds true for racial diversity on boards; and stresses the need for everyone to be adequately represented on healthcare company boards because the decisions they make impact the health of us all.

VI. CONCLUSION, RECOMMENDATIONS, AND SUGGESTIONS

According to the CDC, "Health equity is achieved when every person has the opportunity to 'attain his or her full health potential and no one is disadvantaged from achieving this potential because of social position or other socially determined circumstances.'"¹⁶³ However, it has been established that "Race adversely affects the quantity and quality of healthcare provided to minority

¹⁵⁶ Louis W. Sullivan, From the Secretary of Health and Human Services, 266 J. Am. Med. Ass'n 2674, 2674 (1991)("I contend that there is clear, demonstrable, undeniable evidence of discrimination and racism in our healthcare system. For example, each year since 1984, while the health status of the general population has increased, Black health status has actually declined.").

¹⁵⁷ Amy J. Hillman, et al., *Women and Racial Minorities in the Boardroom: How Do Directors Differ?*, 28 J. Mgmt. 747, 759 (2002) ("Female and racial minority directors bring more resources than the additional perspectives and legitimacy provided by their gender and/or race. They bring a variety of occupational expertise and knowledge, advanced education, and accelerated ties to other organizations.").

¹⁵⁸ Stewart, *supra* note 154, at 63 (The "key to the effective functioning of any board is a dialogue which is both constructive and challenging. One of the ways in which such debate can be encouraged is through having sufficient diversity on the board, including gender and race.").

¹⁵⁹ BCBSA Report *supra* note 108, at p.5 (The data "suggests a lack of trust in the health system. Creating a more diverse healthcare workforce and using culturally informed language could help improve levels of trust."); *see also* Davison *supra* note 107, at 59(discussing how her elderly, minority grandparents, the subjects of the article, do not have an effective relationship with their healthcare providers because they do not trust them).

¹⁶⁰ Shill, *supra* note 4, at 318 ("A diverse board is a more credible and legitimate board in the eyes of stakeholders.").

¹⁶¹ *Id.* at 307.

¹⁶² Sporrer, *supra* note 11, at 176.

¹⁶³ CDC website, <https://www.cdc.gov/chronicdisease/healthequity/index.htm>.

patients."¹⁶⁴ How then can we ever hope to have health equity in this country? We can hope to achieve health equity through wide-scale organizational and systematic changes across the entire healthcare industry.¹⁶⁵ Companies must begin *earnestly* to increase efforts for diversity on their boards.¹⁶⁶ And the more companies that do this, the more we will begin to create a more equitable society for all. Healthcare companies, in particular, must take actionable steps to effect change for the people they serve. Importantly, healthcare companies must act now because lives are at stake. Tens of thousands of minority people are dying every year unnecessarily because of reported inequities in both access and treatment of numerous diseases.¹⁶⁷

My recommendations may seem a bit dramatic and drastic to some, especially as it pertains to mandating board diversity. But dramatic and drastic are called for in order to effectively address systemic racial disparities in health outcomes that minorities have been plagued with for generations.¹⁶⁸ Changing boards is the way we will see change elsewhere in our culture. That is because "The corporate sector divers our lives, economies, political leadership, environment, and even cultural norms."¹⁶⁹ Healthcare company boards can determine long-term strategic and organizational planning to better address their minority customers, patients, employees, and communities; can oversee compliance with policies and procedures geared towards increasing health equity; can monitor the company's performance over time;¹⁷⁰ and can track efforts against reported disparities.¹⁷¹ Thus, changing the way corporate boards look across the healthcare industry will change the way healthcare companies operate at every level. It follows then that changing the way healthcare companies operate will improve the way we see and treat people of

¹⁶⁴ Noah, *supra* note 104, at 677.

¹⁶⁵ Graves, *supra* note 103, at 344 ("Recognition of health and healthcare disparities has contributed to greater awareness that organizational and systemic interventions may be necessary to induce change.").

¹⁶⁶ Earnest effort is not one and done. Boards need a "critical mass" so the diverse board members are supported enough to express their viewpoints in a meaningful way. *See e.g.*, Fairfax, *supra* note 13, at 593; *see also*, Cheng, *supra* note 57, at 10 ("Promoting diversity cannot stop when a single Black director is appointed to the board; continuous and conscious effort is needed to ensure people of color represent a meaningful segment of the board and to sustain an environment in which different perspectives are actively elicited."); Adia Harvey Wingfield, How Organizations Are Failing Black Workers - and How to Do Better, HARV. BUS. REV. p. 5 (Jan. 16, 2019) ("Organizations have to go beyond the 'add one and stir' approach" because the result can be where the only person who represents an identity group experiences "higher rates of mistrust, skepticism, and doubt about the organizations' goals, motivations, and the ability to support people like them.").

¹⁶⁷ *See e.g.*, Graves, *supra* note 103, at 344 (research from 2004 that concluded "reducing the mortality rate of African-Americans to the rate of Caucasians is the equivalent of saving five lives for each one currently saved by medical advances."); and Bowser, *supra* note 105, at 90-1 ("The disparities in medical treatment between Blacks and Whites have been estimated to result in at least 60,000 excess deaths in the Black population annually.").

¹⁶⁸ Sporrer, *supra* note 11, at 172 ("Quotas have problems, but quotas are sometimes necessary to compensate for historical wrongs with lingering consequences.").

¹⁶⁹ Beck et al., *supra* note 18, at 455.

¹⁷⁰ *Id.*

¹⁷¹ Jonathan Neilan, Peter Reilly & Glenn Fitzpatrick *Time to Rethink the S in ESG*, Harv. L. Sch. F. on Corp. Governance, p. 5- 6 (June 28, 2020)(discussing the idea of measuring a company's impact rather than their activities). If a company increases board diversity as a part of a new ESG initiative, they can track the effects of diversity on healthcare disparities, focusing on the impact of their changes rather than the changes themselves as the metric to observe.

color in this country.¹⁷² Health disparities can't be rectified overnight.¹⁷³ But, if current board members meet the moment and accept the urgency and importance of changing health outcomes for minority populations by adding diverse voices and viewpoints to their boards, change will come.

About the Author

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¹⁷² Alison Cook and Christy Glass, *Do Minority Leaders Affect Corporate Practice? Analyzing the Effect of Leadership Composition on Governance and Product Development*, 13:2STRATEGIC ORGANIZATION, 117, 118 (2015)("[B]oard diversity is paramount for achieving diversity-related benefits.").

¹⁷³ BCBSA Report, *supra* note 117, at p. 8 ("Health disparities are the result of a complex fabric of social, racial and economic injustice – a fabric we can't unravel overnight.").