



ESG Foes Will Find Reinforcement in Affirmative Action Decision

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The US Supreme Court's June 29 decision in [Students for Fair Admissions v. Harvard College](#), which effectively ends race-conscious admissions programs in higher education, raises questions about the appropriateness of diversity initiatives in environmental, social, and governance efforts.

Students for Fair Admissions focused on college admissions, and the court offered little guidance on the permissiveness of affirmative action in other contexts. However, the majority's reasoning that the central purpose of the Equal Protection Clause is "doing away with all governmentally imposed discrimination based on race" has implications for companies' ESG efforts, especially those efforts within the "S" of ESG. Indeed, litigation concerning diversity-conscious initiatives is already in full swing.

Multiple states require companies to report on their board demographics or have a minimum number of diverse directors. California, for instance, mandated a minimum number of diverse board members for publicly-held companies domiciled in the state. [State](#) and [federal courts](#) ruled these efforts unconstitutional under the state and federal constitutions' Equal Protection Clauses.

Appeals are pending in both cases, so it remains to be seen what the final assessment will be of those efforts. That said, *Students for Fair Admissions* will likely play a role in that assessment.

In addition, in 2021, the Securities and Exchange Commission approved an exchange listing rule requiring certain operating companies to have at least one female board member and one director who is an underrepresented minority or LGBTQ+—or explain why they cannot satisfy the requirement. The rule also mandates public disclosure of board-level diversity statistics.

The SEC is currently defending the rule against a legal challenge. The National Center for Public Policy Research and the Alliance for Fair Board Recruitment, the same organization that challenged

California's board diversity mandates, challenged the rule, claiming it violates the Fifth Amendment's Equal Protection Clause and the First Amendment's Free Speech Clause. They argue the rule forces companies to discriminate against qualified board member candidates on the basis of race and sex.

The US Court of Appeals for the Fifth Circuit Court heard arguments in this [case](#) on Aug. 29, 2022, but hasn't issued a ruling thus far—presumably waiting for a decision in *Students for Fair Admissions*. The Supreme Court could ultimately decide the outcome of this lawsuit in yet another challenge to diversity-conscious programs.

In addition, several companies are implementing board diversity policies as part of their ESG efforts, in part driven by institutional investors. *Students for Fair Admissions*—combined with the pending challenges to other board diversity initiatives—suggests companies may face challenges to these policies.

Indeed, opponents of diversity initiatives have raised challenges against several companies, including [Anheuser-Busch](#), for promoting diversity, equity, and inclusion. These challenges allege the corporate DEI initiatives violate federal anti-discrimination employment laws by considering race, ethnicity, and gender in hiring, promotion, and training practices.

Although the college admissions process falls within Title VI of the Civil Rights Act, DEI initiatives and board diversity policies are governed by Title VII. Nevertheless, both statutes prohibit discrimination based on characteristics like race and gender, and thus *Students for Fair Admissions* may pose problems for certain "S"-related initiatives in the ESG sector.

In fact, Justice Neil Gorsuch's concurrence in *Students for Fair Admissions* noted this similarity, indicating the court's amenability to striking down corporate DEI initiatives such as board diversity requirements in the coming years.

"The words of the Civil Rights Act of 1964 are not like mood rings; they do not change their message from one moment to the next," Gorsuch wrote. Those challenging diversity initiatives will likely take note of that comment as they continue to litigate board diversity requirements and corporate DEI initiatives.

The case is [Students for Fair Admissions, Inc. v. President and Fellows of Harvard College](#), US, No. 20-1199, 6/29/23.

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