

Ground-Breaking SCOTUS Affirmative Action Ruling: A Boardroom Discussion Guide

In late June 2023, the Supreme Court of the United States (SCOTUS) ruled that colleges and universities can no longer consider race as a factor in their admissions processes.¹ More specifically, SCOTUS ruled that affirmative action programs violate the Equal Protection Clause in the Constitution; thus, these programs are now considered unlawful. Businesses and boards alike are preparing for any ripple effects resulting from the ruling. Currently, there is no direct impact on employment law. However, direct challenges to voluntary diversity efforts under [Title VII](#) are on the horizon. This discussion guide is intended to spark conversation among the board on diversity, equity, and inclusion (DE&I) governance and oversight in light of the SCOTUS decision. The most likely immediate effects that businesses will need to address are these:

1. The need to review the legality of existing DE&I policies
2. The potential surge in claims of “reverse discrimination” that assert DE&I initiatives are proof of bias against Caucasian or male candidates and staff members²

Prepare For Discussion

Put the ruling on the board meeting agenda as a discussion topic. Provide pre-reads that outline the potential impacts to the organization. Although the SCOTUS decision only affects colleges and universities, their decision on affirmative action may set a precedent for future challenges to employer DE&I programs.³ Boards will need to be proactive about reviewing board and organizational DE&I programs and policies.

In advance of the meeting, send out a list of questions to be discussed. The outline below lists key considerations for the conversation.

Assess Existing DE&I Policies

Understand any potential challenges by evaluating existing DE&I initiatives through a self-assessment with your General Counsel. Consider:

Do we have a clear summary of the DE&I goals to which the board and organization have publicly committed?

What impact will this SCOTUS decision have on the board and the organization's diversity goals? Do they align with the recent court case?

Will diversity policies need to be reconsidered or rewritten (or renamed) to safeguard against potential future litigation?

Do your due diligence to determine which DE&I or environmental, social, and governance (ESG) programs at the board level and within your organization present the highest risks. These could include programs that implement diversity targets for your organization's hiring and promotion as well as board recruitment.

Once you have audited your programs, consult with your legal counsel to determine how to mitigate risk.

Gauge Stakeholder Expectations

Consider the ruling and the engagement and expectations of stakeholders. Does your board understand the shifting expectations of its



most important stakeholders regarding diversity? Stakeholders—including employees, customers, investors, and advocacy groups—have put pressure on companies to prioritize DE&I and hold them accountable for progress. Since then, heightened scrutiny has encouraged organizations to take meaningful steps toward diversity and inclusion, recognizing that it is not only the right thing to do but also vital for sustainable business success.

According to a [Pew Research Center study](#) on DE&I in the workplace, a majority of workers say DE&I-related policies and resources have had a positive impact at their workplace. Due to the uncertainty caused by the SCOTUS ruling, some employees may be concerned about the organization's commitment to DE&I and/or workplace culture should political discussions proliferate among employees following the controversial SCOTUS decision.

Consider conducting a stakeholder analysis to identify external stakeholders' interests. Consider having management send out a survey to get a pulse on employees' perception of the organization's initiatives and reaffirm the organization's commitment to DE&I. Use this analysis to determine which customers, investors, advocacy groups, and other stakeholders are most important for the long-term sustainability of the business. After creating the analysis, develop an engagement plan that outlines which stakeholder voices are prioritized and how you will engage with them.

Review DE&I Reporting and Communication Plans

The [Edelman Trust Barometer 2022](#) found that 58 percent of respondents buy or advocate for brands based on their beliefs and values, and 64 percent invest based on their beliefs and values (p. 26). The data also show that individuals want more, not less, business engagement on societal issues. As a result, leaders are currently being urged to offer more detailed information that allows stakeholders to assess whether an organization has a workforce aligned to present and future business goals.

Discuss whether your board will change the way it reports on DE&I and/or ESG to the broader community. Looking wider, the board can work with

management to determine how the organization should engage in taking a public position on controversial SCOTUS ruling.

Examine the company's track record for related issues, including past actions (e.g., political contributions)—and inactions.

Reinforce The DE&I Mission

To ensure the right balance of experience, a high-performing board balances and matches the various skill sets of its members to the organization's needs, while ensuring that its directors reflect the rich tapestry of the organization, employees, investors, and other stakeholders. Promoting diversity for the organization and boardroom alike remains an important and ongoing effort. DE&I efforts should not waver as a result of the ruling, but risk analysis and mitigation may be warranted.

Associated NACD Resources

- ▶ [NACD Center for Inclusive Governance](#)[®]
- ▶ [CEO Activism: What's the Board's Role?](#)
- ▶ [Future of the American Board Report: A Framework for Governing into the Future](#)
- ▶ [Winning DE&I Practices: Lessons from the 2022 DE&I Awards](#)



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¹ See the Supreme Court of the United States, *Syllabus, Students for Fair Admissions Inc. v. President and Fellows of Harvard College*. https://www.supremecourt.gov/opinions/22pdf/20-1199_l6gn.pdf

² Paul Hastings LLP, “What Employers Need to Know about the SCOTUS Affirmative Action Decision,” posted on jdsupra.com on July 6, 2023. <https://www.jdsupra.com/legalnews/what-employers-need-to-know-about-the-9099326/#:~:text=Federal%20law%20governing%20affirmative%20action,decision%20published%20June%2029%2C%202023>

³ See George Anderson, Tessa Bamford, and Katherine Moos, “Stakeholder Voices in the Boardroom: Today's boards must ensure that stakeholder interests are factored into decision-making,” posted on spencerstuart.com in July 2021. <https://www.spencerstuart.com/research-and-insight/stakeholder-voices-in-the-boardroom>