Corporate DEI Reexamined

William C. Dix*

* CPA, J.D. Candidate, The University of Iowa College of Law, 2024; B.A. Accounting, Wartburg College, 2021. I would like to thank my family and friends for their support. I would specifically like to thank Hanaa Masalmeh for her instrumental assistance—without her, this Note would not have been possible. Finally, I would like to thank the JCL editorial team, especially Spencer Mitchell, Adam Skendzel, Jena Lisowski, and Samantha Savala for their insightful edits.

I. INTRODUCTION

Companies spend billions each year on diversity, equity, and inclusion (DEI) initiatives.[1] But what if these DEI initiatives do not work? What if these initiatives are not merely ineffective but make discrimination *worse*? New empirical data reveals that most traditional DEI initiatives are ineffective and regressive.[2]

This Note explores that data's legal ramifications[3] by analyzing how that data may alter existing legal frameworks and suggests several ways that businesses can and should respond.[4] In the Title VII framework specifically, this Note posits a novel DEI theory. Additionally, this Note analyzes the corporate DEI landscape in the wake of *Students for Fair Admissions*.[5] While this Note does not offer a "silver bullet" for all DEI and affirmative action-related problems, it does offer general guidelines that may potentially inform corporate action (or inaction). I ultimately conclude that corporate employers should adopt sustainable standards that are result-oriented and maintain necessary business rationales for DEI initiatives while acknowledging their insufficiencies.

This Note explores the new data and its legal ramifications in the following order: it identifies several DEI initiatives and their discriminatory effects;[6] reviews relevant legal doctrines;[7] analyzes how this new data may impact those legal doctrines;[8] and recommends how (and why) employers should respond.[9]

II. BACKGROUND

A. Traditional DEI Initiatives, Their Rationales, and Discriminatory Impact

Following the Civil Rights Act of 1964,[10] companies implemented initiatives to eliminate discrimination, promote diversity, and remain legally compliant.[11] These DEI

1. Evan W. Carr et al., *The Value of Belonging at Work*, HARV. BUS. REV. (Dec. 16, 2019), https://hbr.org/2019/12/the-value-of-belonging-at-work [https://perma.cc/6UZP-GYUQ]. "About $8 billion a year is spent on diversity trainings in the United States alone." Interview by Rick Kirkland with Iris Bohnet, Professor of Public Policy, Harvard Kennedy Sch. of Pub. Pol'y (Apr. 7, 2017), https://www.mckinsey.com/featured-insights/gender-equality/focusing-on-what-works-for-workplace-diversity [https://perma.cc/UE2Y-MALX]; *see also* Kweilin Ellingrud et al., *Diversity, Equity and Inclusion Lighthouses 2023*, MCKINSEY & CO. (Jan. 13, 2023), https://www.mckinsey.com/featured-insights/diversity-and-inclusion/diversity-equity-and-inclusion-lighthouses-2023 [https://perma.cc/9TSZ-AKL3] ("In 2020, the global market for DEI—that is, dollars spent by companies on DEI-related efforts such as employee resource groups (ERGs)—was estimated at $7.5 billion and is projected to more than double to $15.4 billion by 2026.").

2. *Infra* Part II.A.

3. *Infra* Parts III–IV.

4. *Infra* Part IV.

5. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023).

6. *Infra* Part II.A.

7. *Infra* Part II.B–C.

8. *Infra* Part III.

9. *Infra* Part IV.

10. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

11. Sarah Dong, *The History and Growth of the Diversity, Equity, and Inclusion Profession*, GLOB. RSCH. & CONSULTING GRP. (June 2, 2021), https://insights.grcglobalgroup.com/the-history-and-growth-of-the-diversity-equity-and-inclusion-profession/ [https://perma.cc/E6QD-6YXK].

initiatives were an experiment with no track record.[12] DEI initiatives quickly became the corporate status quo,[13] and they remain the status quo today.[14] Nearly all Fortune 500 companies, as well as most small and medium-sized firms, have mandatory DEI initiatives.[15]

But what is DEI? Starting with an explicit definition can help frame the conversation. Diversity is the concept that organizations should construct teams with individuals of varying backgrounds, skills, and perspectives.[16] Theoretically, a diverse group of individuals can solve diverse sets of problems with an adequately diverse set of solutions. A diverse group of individuals will share different strengths and capabilities that will produce efficiencies. These efficiencies will produce value for an organization. Professor Fairfax and others have coined this rationale as the "business rationale" for diversity.[17] In her calculation, all business rationales for diversity can be categorized in five ways: (1) the talent rationale (that diverse individuals will bring uniquely diverse, valuable talents); (2) the market rationale (that diverse individuals will be able to increase market participation that otherwise would be lost); (3) the litigation rationale (that a more diverse group will be able to suppress, reduce, or avoid expensive litigation); (4) the employee relations rationale (that with each additional individual from a particular demographic, morale and enthusiasm will create a snowball effect and improve morale and diversity exponentially); and (5) the governance rationale (that a diverse group of people is empirically better at running corporate structures).[18] As a part of these rationales, firms hope to obtain the following benefits from DEI initiatives: retain "winning talent," "improv[e] the quality of decision making," "increase[e] customer insight and innovation," and present a positive "global image."[19]

It is difficult to cumulatively assess an individual's skillset and problem-solving background. For that reason, companies and researchers often use demographics—including race, ethnicity, and gender—as proxies for these skills, backgrounds, and perspectives.[20] As Professor Fairfax did in her 2005 Article, I gladly step aside to allow other scholars to debate the efficacy and morality of these proxies.[21]

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12. FRANK DOBBIN & ALEXANDRA KALEV, GETTING TO DIVERSITY: WHAT WORKS AND WHAT DOESN'T 9 (2022) ("Our reliance on data makes this a very unusual book about workplace diversity.").

13. Frank Dobbin & Alexandra Kalev, *Why Doesn't Diversity Training Work?: The Challenge for Industry and Academia*, 10 ANTHROPOLOGY NOW, no. 2, 2018, at 48, 48; DOBBIN & KALEV, *supra* note 12, at 14.

14. DOBBIN & KALEV, *supra* note 12, at 13–14.

15. Dobbin & Kalev, *supra* note 13, at 48; *see also* Frank Dobbin & Alexandra Kalev, *Why Diversity Programs Fail: and What Works Better*, HARV. BUS. REV., July–Aug. 2016, at 52, 56, (reporting that half of midsize companies have traditional diversity training, more than 90% use annual performance ratings, and roughly half have traditional grievance procedures).

16. *What Is Diversity, Equity, and Inclusion?*, MCKINSEY & CO. (Aug. 17, 2022), https://www.mckinsey.com/featured-insights/mckinsey-explainers/what-is-diversity-equity-and-inclusion#/ [https://perma.cc/K9KP-H3G2] ("*Diversity* refers to who is represented in the workforce.").

17. Lisa M. Fairfax, *The Bottom Line on Board Diversity: A Cost-Benefit Analysis of the Business Rationales for Diversity on Corporate Boards*, 2005 WIS. L. REV. 795, 811–47.

18. *Id.*

19. *What Is Diversity, Equity, and Inclusion?*, *supra* note 16.

20. Fairfax, *supra* note 17, at 833.

21. *Id.* at 833 ("While this Article does not seek to further [the proxy] debate, it is worth noting that the observation about the inappropriateness of using race as a proxy for viewpoint or experience may be particularly salient in the context of corporate boards.").

Despite its logical soundness, the jury is still out on whether a diverse group is more productive.[22] Some studies conclusively show that a diverse group outperforms a nondiverse group, yet many experts question these studies' methodological sufficiency.[23] The theory that demographic proxies lead to a diverse group can also be flawed and imperfect. Proxies can be deceitful because that is all they are—proxies. One particular demographic, or set of demographics, does not truly capture an entire person's skillset, background, or perspective. For these reasons, DEI supporters rarely argue with diversity business rationales alone without mentioning equity or inclusion.

Equity is the concept that corporate actors can cure inequality and that, if corporations increase equality, the resulting equality will create value.[24] Implicit in this logical conclusion is the recognition that historical circumstances have caused certain inequalities that corporations can remedy at present.[25] Consequently, organizations should not merely treat all individuals "equally," but should "take[] into consideration a person's unique circumstances, adjusting treatment accordingly so that the end result is equal."[26] It is difficult to determine which individuals have suffered from these inequalities and deserve assistance, so companies again use proxies (similar to the ones above). Unlike diversity, the link from "equity" to firm value is far more attenuated. Even so, the equity prong of DEI covers more affected individuals—in fact, equity often refers to entire communities of historically affected individuals. While diversity focuses on singular individuals and their impact on an organization, equity focuses on larger stakeholder groups that a firm interacts with. Therefore, it logically makes sense that the two concepts offer different, yet separately valuable and complementary, rationales at both a macro- and micro-level.

Finally, inclusion is the glue that makes diversity and equity possible and enhances their value creation. The concept "refers to how the workforce experiences the workplace and the degree to which organizations embrace all employees and enable them to make meaningful contributions."[27] Inclusion is the concept that organizations should create an inviting and welcoming culture for as many individuals as possible.[28] An organization that successfully builds this cultural glue is more likely to attract and retain diverse individuals and achieve the desired value from that diverse set of people. Ultimately, inclusion gives DEI enduring and staying power, yet corporations have generally struggled to create enduring DEI success.[29]

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22. *See* Alex Edmans, *Is There Really a Business Case for Diversity*, MEDIUM (Oct. 30, 2021), https://medium.com/@alex.edmans/is-there-really-a-business-case-for-diversity-c58ef67ebffa (on file with the *Journal of Corporation Law*) (reporting on conflicting studies about whether a diverse team improves performance and provides value).

23. *Id.* ("The McKinsey and FRC studies have been widely quoted despite being deeply flawed."). Edmans then explained why the two studies are methodologically flawed. *Id.*

24. *See What Is Diversity, Equity, and Inclusion?*, *supra* note 16 ("*Equity* refers to fair treatment for all people, so that the norms, practices, and policies in place ensure identity is not predictive of opportunities or workplace outcomes.").

25. *Id.*

26. Kiara Alfonseca, *DEI: What Does It Mean and What Is Its Purpose?*, ABC NEWS (Feb. 10, 2023), https://abcnews.go.com/US/dei-programs/story?id=97004455 [https://perma.cc/XZ7B-YJWP].

27. *What Is Diversity, Equity, and Inclusion?*, *supra* note 16.

28. *Id.*

29. *See* DOBBIN & KALEV, *supra* note 12 (describing—in numerous ways—how corporate advances in diversity results have slowed to a standstill).

Beyond the business rationale, scholars cite social and moral justifications. These justifications historically preceded business justifications, yet they eventually gave way to business rationales. Professor Fairfax found this historical shift troubling. "[G]iven the historically negative treatment of [protected classes] within our nation, relying on rationales that encourage corporations and society to view people of color as commodities is not only morally troublesome, but may also have the practical impact of encouraging the devaluation of such people."[30] Still, as Professor Fairfax pointed out and as I discuss below in Part IV.B, purely moral or social justifications are likely violative of corporate fiduciary duties.

In 2022, professors Frank Dobbin[31] and Alexandra Kalev[32] published their research on the efficacy and regressivity of traditional DEI initiatives.[33] Their dataset[34] included more than 30 years of government-collected and voluntary statistical inputs from over 800 organizations.[35] They included firms from varying industries and sizes, Fortune 500 companies, and mid-size firms alike.[36] These organizations implemented various combinations of DEI initiatives.[37] Dobbin and Kalev documented those initiatives' successes (and failures) in their 2022 book, *Getting to Diversity: What Works and What Doesn't*.[38] As their title suggests, the book discusses which initiatives work, which do not work, and those that cause more harm than good.[39] When describing their book, Dobbin and Kalev claimed, "There are no better data [than their book] on workforce composition that span companies, industries and decades."[40]

Dobbin and Kalev (among other experts) revealed that traditional DEI initiatives are ineffective and often regressive.[41] After a generation of DEI implementation, women and

30. Fairfax, *supra* note 17, at 799 (footnote omitted).

31. Henry Ford II Professor of the Social Sciences, Sociology Department Chair, Harvard University.

32. Associate Professor and Chair of the Department of Sociology and Anthropology, Tel Aviv University.

33. FRANK DOBBIN & ALEXANDRA KALEV, GETTING TO DIVERSITY: WHAT WORKS AND WHAT DOESN'T Online Methodological Appendix 8–11 (2022), https://scholar.harvard.edu/dobbin/home/HUP2022Supplement [https://perma.cc/QKH7-R7RF] (describing their research method and general conclusions that are described in depth throughout the book).

34. *See id.* at 1 ("The data come from two main sources: EEO-1 reports from 1971 to 2015 . . . submitted annually by medium and large employers to the U.S. Equal Employment Opportunity Commission (EE0C) [sic], and a retrospective survey on the work structures and personnel policies of over 800 establishments . . . from the EEO-1 database. We obtained additional data . . . from the Current Population Survey and Bureau of Labor Statistics."). Additionally, Dobbin and Kalev conducted a supplementary survey: "Data on employer practices come from our own retrospective survey . . . . Data on other organizational features also come from our survey." *Id.* at 2. They drew a random sample of employers from the EEOC dataset, conducted interviews, held phone surveys, wrote to HR directors, and collected data throughout. *Id.* at 1. In total, their data "included 806 cases and 18,291 establishment-year observations, with a median of 25 years of data per establishment . . . ." *Id.* at 4, 8–11.

35. DOBBIN & KALEV, *supra* note 33, at 4 ("We supplemented the dataset with state and industry employment data . . . from the Bureau of Labor Statistics.").

36. *Id.* at 1–3.

37. *Id.* at 1–4.

38. DOBBIN & KALEV, *supra* note 12; *see also* DOBBIN & KALEV, *supra* note 33 (documenting further information on the study's underlying data, analysis, and interpretation).

39. *See* DOBBIN & KALEV, *supra* note 12, at 8–11 (describing the book's general structure).

40. DOBBIN & KALEV, *supra* note 33, at 2.

41. *See infra* Part II.A.3 (recounting Dobbin & Kalev's results); *see, e.g.*, Theresa Agovino, *New Approach to Diversity, Equity and Inclusion: Honest Conversations*, SOC'Y FOR HUM. RES. MGMT. (Aug. 28, 2020), https://www.shrm.org/hr-today/news/hr-magazine/fall2020/pages/a-new-approach-to-diversity-and-

minorities remain vastly underrepresented[42] and underpaid,[43] and their representative growth in managerial roles[44] has remained stagnant.[45]

This Note's background addresses three DEI initiatives that Dobbin and Kalev found were regressive: (1) mandatory and legalistic training;[46] (2) standardized tests and performance evaluations;[47] and (3) grievance systems.[48] This Note acknowledges that DEI studies until now have varied: Some studies have found that some of the DEI initiatives discussed below are actually effective—i.e., they increase diversity and promote positive retention for protected classes.[49] This Note generally disregards these studies under the belief that Dobbin and Kalev's dataset and methodology is the most thorough and supported study to date.

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inclusion.aspx [https://perma.cc/Y7RJ-5KRY] ("For years, organizations have spent billions of dollars on DE&I programs that have largely failed.").

42. DOBBIN & KALEV, *supra* note 12, at 5.

43. Michael Z. Green, *(A)Woke Workplaces*, 2023 WIS. L. REV. 811, 848 (discussing reports of wage gaps between Black employees and their White counterparts).

44. While companies may boast about diverse C-suite executives, a more accurate analysis requires analyzing the rate that diverse candidates advance *managerially*. DOBBIN & KALEV, *supra* note 12, at 5. It is true that there are more minority and female managers than ever before, but that growth generally reflects how widespread corporate structure changed in the 1970s. *Id.* at 4. This change caused a large overall increase in the number of managers in each company. *Id.*; *see also* Carolina Aragão, *Gender Pay Gap in U.S. Hasn't Changed Much in Two Decades*, PEW RSCH. CTR. (Mar. 1, 2023), https://www.pewresearch.org/fact-tank/2023/03/01/gender-pay-gap-facts [https://perma.cc/LMX2-RZ38] (analyzing gender pay gap statistics in the United States). An alarming trend has been the rapid exit of many diverse individuals in C-suite and management. Interview by Scott Tong with Shaun Harper, Professor, Univ. S. Cal., at WBUR studios (Sept. 6, 2023), https://www.wbur.org/hereandnow/2023/09/06/dei-corporate-america [https://perma.cc/8VNQ-PPEN].

45. Quantitative data shows that proportionate management equality across demographics will take hundreds of years at the current pace and may never reach proportionality. DOBBIN & KALEV, *supra* note 12, at 1–6. The rate at which proportionate management equality has improved varies depending on race and gender. *Id.* Managerial growth is not the only statistic that has remained stagnant. *See, e.g.*, Aragão, *supra* note 44 (analyzing gender pay gap statistics in the United States). Overall, fighting inequality has been a downhill battle. *See* Marcia L. McCormick, *Promoting Change in the Face of Retrenchment*, 17 FIU L. REV. 807, (2023) ("In the meantime, through everything, inequality remains. It remains in the form of wage gaps, achievement gaps, wealth gaps, vertical and horizontal labor market segregation, housing segregation, lack of educational opportunity, access to credit, harassment, a culture that centers only some of us, and more.").

46. *See infra* Part II.A.1.

47. *See infra* Part II.A.2.

48. *See infra* Part II.A.3.

49. *See* Green, *supra* note 43, at 819, 820 n.25, 826, 861, 863 (discussing various studies and findings relating to affirmative action hiring and DEI practices); VIVIAN HUNT ET AL., MCKINSEY & CO., DIVERSITY WINS: HOW INCLUSION MATTERS 41 (2020), https://www.mckinsey.com/~/media/mckinsey/featured%20insights/diversity%20and%20inclusion/diversity%20wins%20how%20inclusion%20matters/diversity-wins-how-inclusion-matters-vf.pdf?shouldIndex=false [https://perma.cc/VQW5-EMNL] ("As we have shown, the business case for diversity is growing stronger and clearer—yet too many companies appear unable to overcome significant obstacles in their efforts to make tangible and sustained progress. The experience of the diversity winners we have studied suggests that it's time to be bold . . . .").

1. Legalistic Training

Diversity training curricula range from defining acceptable (and unacceptable) behavior to promoting the benefits of a diverse and inclusive workplace.[50] Consequently, "diversity training" is a term that encompasses many different training experiences and "does not refer to any one specific activity."[51] Training sessions can be experiential—such as role-playing or discussing personal experiences—or resemble a formal educational lecture.[52] Diversity training can be mandatory or voluntary.[53] Training sessions can occur at any time, but companies often implement these trainings annually, during onboarding, or after an allegation or lawsuit.[54] Importantly, diversity training is the "most expensive, and least effective, diversity program around."[55]

Three-quarters of organizations implement mandatory training that is "legalistic."[56] Legalistic training primarily focuses on preventing lawsuits by informing trainees how to "stay out of hot water" legally.[57] These trainings often include targeted lectures on bias, both conscious and unconscious (implicit).[58] "It is hard to find a Fortune 500 company without diversity and harassment training these days. . . . Most diversity training programs cover unconscious bias, . . . the legal repercussions of permitting discrimination to persist, the firm's commitment to cultural inclusion, or [a combination of all three]."[59]

"Trainers frequently explain how workers can protect themselves from being accused" and some begin "with a discussion of high-profile suits."[60] "Trainings often include an exam on what the law forbids—a further signal that the law is at the bottom of things."[61] Experts and conventual wisdom agree that legalistic training is the "gold standard" for DEI initiatives.[62]

Despite training's popularity among DEI experts, Dobbin and Kalev's data show that legalistic training is regressive and often only serves as a legal veil for discriminatory outcomes.[63] General diversity and harassment training is mostly ineffective.[64] Alternatively, legalistic training results in dangerous, long-term discrimination.[65]

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50. *See generally* Sandra M. Fowler & Judith M. Blohm, *An Analysis of Methods for Intercultural Training*, *in* HANDBOOK OF INTERCULTURAL TRAINING (Dan Landis & Dharm P.S. Bhawuk eds., 4th ed. 2020) (describing how numerous intercultural training methods operate and how to perform them).

51. *Id.*

52. *See id.* (expressing numerous mediums and forms that training can come in).

53. *See* DOBBIN & KALEV, *supra* note 12, at 12–24 (describing and discussing diversity and harassment training).

54. *Id.* at 23.

55. Dobbin & Kalev, *supra* note 13, at 48.

56. DOBBIN & KALEV, *supra* note 12, at 21 (describing the focus of legalistic training as "what the law forbids managers to do, and how firms can avoid litigation").

57. *Id.* at 21–24.

58. *Id.*

59. *Id.* at 13.

60. *Id.* at 17, 22.

61. DOBBIN & KALEV, *supra* note 12, at 23.

62. *Id.* at 15.

63. *Id.* at 20–21 (discussing various statistical results and discriminatory effects).

64. *Id.*

65. *Id.* at 20–25 (discussing various statistical results and discriminatory effects).

2. Standardized Tests and Performance Evaluations

Standardized tests are assessments intended to eliminate decision-making bias and discrimination.[66] Companies often implement tests based on academic ability, similar to tests that schools administer.[67] Consequently, most "job-related" tests mimic academic environments rather than predict job performance.[68] In a similar way, standardized performance evaluations aim to eliminate bias and discrimination in managerial decision-making.[69] Most performance evaluations, ironically, resemble a subjective report card rather than an objective performance review.[70]

Dobbin and Kalev's data show that standardized testing and performance evaluations are regressive, hurting minorities and women, and often only serve as a legal veil for discriminatory outcomes.[71] For standardized testing, a statistically significant discriminatory effect existed for *every* minority class.[72] The regressive effect cannot be attributed to better test-taking performance, alone.[73]

> Generally, people with more education do better on the popular standardized tests. White women are slightly better educated on average than white men, but employers that introduce testing see reductions in numbers of white women managers but not white men. Asian American men and women are the best educated groups on the whole, but management tests harmed both groups.[74]

Comparatively, performance evaluations are more ineffective than regressive, but several groups still experience a regressive effect.[75] Much like legalistic training, firms that adopt performance evaluations will likely harm minority populations.[76] Interestingly, even automated systems using advanced data computation may still carry inherent biases.[77]

3. Grievance Systems

Grievance systems are internal (and external) mechanisms designed to expedite employee grievances and resolve claims.[78] Often based on the Wagner Act,[79] grievance

66. DOBBIN & KALEV, *supra* note 12, at 38–40.

67. *Id.* at 39.

68. *Id.*

69. *Id.* at 43–45.

70. *Id*.

71. *See generally* Michael Rothschild & Gregory J. Werden, *Title VII and the Use of Employment Tests: An Illustration of the Limits of the Judicial Process*, 11 J. LEGAL STUD. 261 (1982) (outlining early judicial limitations on employer testing and judicial response)*; see also* DOBBIN & KALEV, *supra* note 12, at 39–40 (outlining the history of workplace testing, judicial response, and current testing implementation).

72. *See* DOBBIN & KALEV, *supra* note 12, at 41–43 (reporting on data concerning standardized testing).

73. *Id*

74. *Id.*

75. *See id.* at 45–47 (discussing various statistical results and discriminatory effects).

76. *See supra* notes 72–76 and accompanying text.

77. *See* Jena N. Lisowski, Note, *California Data Privacy and Automated Decision-Making*, 49 J. CORP. L. 701, 720 (2024) ("Algorithms are vulnerable to similar biases that face human decision-makers due to the machine learning process. While the algorithm itself cannot discriminate against a person in the same manner that a human could, it nonetheless carries similar biases and errors based on the information it uses to train." (footnote omitted)).

78. DOBBIN & KALEV, *supra* note 12, at 48–49 (describing the nature and history of discrimination and harassment grievance procedures).

79. National Labor Relations Act of 1935, 74 Pub. L. 198, 49 Stat. 449.

systems seek to afford an employee due process for their claims or allegations.[80] "Workers who thought they'd been mistreated . . . could appeal to a quasi-judicial tribunal that would hear their complaint and render judgment."[81] Ultimately, these systems "are intended to provide 'peaceful' means for resolving [workplace] conflict."[82] Seventy-five percent of medium- and large-sized companies "have grievance procedures for civil rights complaints."[83]

Take, for example, an employee who believes they have experienced racial discrimination. Their employer likely allows the employee to "bring their claim" internally to human resources.[84] Human resource employees are incentivized to eliminate employee complaints before reaching the later stages of the grievance process.[85] If the claim proceeds, the internal grievance system may include an external arbitration process. These arbitration procedures often include third-party arbitrators the employer usually works with.[86]

Once again, Dobbin and Kalev's data shows that grievance systems are regressive.[87] The regressive effect varies depending on the type of grievance system and claim.[88]

B. The Disparate Impact Theory Under Title VII

Knowing what legal tests—specifically which ones are available (even theoretically) and what remedies each afford—is as important for both litigants and policy decision-makers as Dobbin and Kalev's data. This Part reviews Title VII's disparate *impact* theory in the DEI context. The next Part reviews Title VII's disparate *treatment* theory in a similar context.

To win a disparate impact claim, an employee must first prove that an employer's policy had a disparate impact (a discriminatory effect) on a protected group and show a nexus between the employer's policy and the discriminatory effect.[89] To do this, an employee must prove several things simultaneously. First, the employee must point to a specific policy causing the disparate impact.[90] A racial disparity alone will not win the case. Second, the employee must show that the policy had a discriminatory effect.[91] "[T]he 'employee is responsible for isolating and identifying specific employment practices that are allegedly responsible for any observed statistical disparities.'"[92] Statistics about a particular group will suffice—for example, applicants and those seeking a raise or

80. DOBBIN & KALEV, *supra* note 12, at 48–49 (analyzing the origins and nature of grievance systems).
81. *Id.* at 49.
82. Lawrence Nurse & Dwayne Devonish, *Grievance Management and Its Links to Workplace Justice*, 29 EMP. RELATIONS 89, 90 (2007).
83. DOBBIN & KALEV, *supra* note 12, at 49.
84. *Id.*
85. *Id.* at 49–50.
86. *Id.* at 49.
87. *Id.* at 55–57.
88. DOBBIN & KALEV, *supra* note 12, at 55–57.
89. Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 545 (1999).
90. Smith v. City of Jackson, Mississippi, 544 U.S. 228, 241 (2005).
91. *Id.*
92. *Id.* (quoting Wards Cove Packing Co. v. Antonio, 490 U.S. 642, 656 (1989)).

promotion.[93] The employee also must procedurally prove that they are part of the protected group the employer's policy harms.[94] The employee need not show everything—employees do not need to show that the employer intended to discriminate by implementing the discriminatory policy.

Not surprisingly, employees often lack "smoking gun" statistics for a specific company or industry.[95] If employees are unable to obtain labor statistics specific to the company or industry, they may offer qualifying alternative statistics to support their claim.[96] These statistics must show that the specific practice has a universally discriminatory effect and may derive from a broader, more national dataset.[97] "There is no requirement, however, that a statistical showing of disproportionate impact must always be based on analysis of the characteristics of actual applicants."[98] These national statistics still must show that the employer's practice caused the discriminatory effect.[99]

Even if the employee successfully proves their *prima facie* case above, then the employer can still win the case by (a) rebutting the employee's statistical evidence[100] or (b) arguing the "business necessity" defense.[101] The employer only needs to provide one business-related reason for the discriminatory policy. What will qualify as a valid purpose is within the court's discretion, although the term "necessity" implies that the purpose must be critical.

An example of this occurred in *New York City Transit v. Beazer*.[102] In that case, an employer's drug policy statistically favored White applicants over Black and Hispanic applicants because the Black and Hispanic applicants were less likely to pass the drug policy.[103] The employer argued that having drug-free employees was a business necessity.[104] The Court agreed and ruled for the employer.[105]

If the employer successfully proves a business necessity, the burden shifts back to the employee. The employee then has one last opportunity. The employee will prevail only if they prove that the employer should have used an alternative policy—one without a

93. *See* Dothard v. Rawlinson, 433 U.S. 321, 330–31 (1977) (holding that national statistics can be used in place of applicant-pool-specific statistics).

94. *Id.*

95. *See, e.g.*, *Dothard*, 433 U.S. at 321–31 (reporting that plaintiffs lacked direct statistical evidence, but that alternative statistics may acceptably take their place).

96. *Wards Cove Packing Co.*, 490 U.S. at 650–51; N.Y.C. Transit v. Beazer, 440 U.S. 568, 585 (1979). This dataset, however, can only be used to prove the demographic nature of the claim, *not* the discriminatory impact itself. Plaintiffs must also provide that data.

97. *See Dothard*, 433 U.S. at 330–31 (holding that national statistics can be used in place of applicant-pool-specific statistics). "[R]eliance on general population demographic data [is] not misplaced where there [is] no reason to suppose that [the individual or individuals'] characteristics . . . differ markedly from those of the national population." *Id.* at 330.

98. *Id.* at 330.

99. *Id.*

100. Griggs v. Duke Power Co., 401 U.S. 424, 431–32 (1971); *Beazer*, 440 U.S. at 592.

101. *Griggs*, 401 U.S. at 431–32; *Beazer*, 440 U.S. at 592 (holding that the TSA's policy excluding methadone users was not "broader than necessary"). Other case law refers to this defense as the "business purpose" defense. *E.g.*, Dayton v. Oakton Cmty. Coll., 907 F.3d 460, 465 (7th Cir. 2018).

102. *Beazer*, 440 U.S. at 568.

103. *Id.* at 579.

104. *Id.* at 584–87.

105. *Id.*

discriminatory effect.[106] If an employee overcomes this heavy burden, the court may award them equitable relief.[107]

The employee's "disparate impact" case depends on "statistical evidence." The statistical evidence must outweigh any "job-related" purpose an employer's policy may have.[108] Additionally, the employee's statistics must focus on demographic proportionality—not merely disproportionate numbers.[109] In other words, the disproportionate impact must reflect a disproportionate effect on *qualified* applicants. This is more than proving that the employer lacks a diverse workforce. A "bare assertion of racial imbalances in the workforce is not enough to establish a Title VII disparate impact claim."[110]

But the employer may "lose" even if they "win" the case. Disparate impact and disparate treatment claims[111] are expensive for employers to defend. While the Civil Rights Act of 1991 bars employees from recovering compensatory and punitive damages,[112] employers still must *defend* against these claims.[113] Additionally, employees can seek back pay and emotional distress damages from their employer.[114] Litigating discrimination claims requires incurring substantial legal fees that an employer may only recover if they prevail *and* the court determines that granting attorney's fees is equitable.[115] These legal fees can cost millions of dollars.[116]

The expenses extend beyond legal and settlement costs; "reputational costs average $169.4 million" among publicly traded companies,[117] and companies experience "negative

106. *See* Washington v. Davis, 426 U.S. 229, 250–51 (1976) (holding that *Griggs* must be followed if plaintiffs can show an alternative non-discriminatory policy that is feasible); *see also* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761–63 (1998) ("When a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation. . . . As a general proposition, only a supervisor, or other person acting with the authority of the company, can cause this sort of injury.").

107. *See* 42 U.S.C. § 1981a(a)(1) (stating that a plaintiff may not recover compensatory or punitive damages); *but see* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 361 n.47 (1977) ("The federal courts have freely exercised their broad equitable discretion to devise prospective relief designed to assure that employers . . . eliminate their discriminatory practices and the effects therefrom.").

108. N.Y.C. Transit v. Beazer, 440 U.S. 568, 587 (1979).

109. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 651–52 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (discussing that the question must reflect "the pool of *qualified* job applicants" and not merely question a non-diverse labor force or labor market).

110. Bennet v. Nucor Corp., 656 F.3d 802, 818 (8th Cir. 2011).

111. *See infra* Part II.C (discussing disparate treatment claims).

112. *See supra* note 109 (discussing the Civil Rights Act of 1991 and relevant case law).

113. Equitable relief under Title VII also includes back pay or reinstatement. *See* 42 U.S.C. § 2000e-5(g)(1) (providing remedial options including "reinstatement or hiring of employees, with or without backpay . . . or any other equitable relief as the court deems appropriate").

114. 42 U.S.C. § 1981a(a)(1).

115. *See* 42 U.S.C. § 2000e-5(k) (stating that it is within a court's discretion to award attorney fees to the prevailing party).

116. *See, e.g.*, Jim Giuliano, *What's a Discrimination Suit Cost an Employer?*, HRMORNING (Mar. 12, 2010), https://www.hrmorning.com/articles/whats-a-discrimination-suit-cost-an-employer [https://perma.cc/43CA-H9S6] (reporting that "median legal costs to a defendant/employer through trial are $150,000. Even if the case goes to summary judgment . . . the employer's legal costs are about $75,000").

117. William D. Bradford, Discrimination, Legal Costs and Reputational Costs 2 (Nov. 30, 2004) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=679622 [https://perma.cc/73F9-SX3A]; *accord* Casey Dougal, Thomas P. Griffin & Irena Hutton, A Culture of Discrimination: Evidence From Civil Rights Litigation Against U.S. Corporations 25 (Feb. 7, 2024) (unpublished manuscript),

price reactions to the announcement of gender discrimination lawsuits, private (non-EEOC) class-actions lawsuits, and lawsuits filed after [the Civil Rights Act of 1991] became effective."[118] "The average two-day loss in the market value of the firm's stock is $173.6 million, upon the announcement of a racial or gender discrimination lawsuit."[119]

C. Disparate Treatment: Offense and Defense

DEI implementation is, for all intents and purposes, legally required. This is because courts hold employers liable for their actions *and* for their agent's actions.[120] An employer is liable for an agent's conduct if that agent discriminates with explicit or apparent authority.[121] "[A]ction taken by the supervisor becomes for Title VII purposes the act of the employer."[122] Courts have held that a company that implements traditional DEI initiatives limits that authority—and, thus, can eliminate certain liability in *respondeat superior* cases.[123] The next two Subparts explore how employers have used their DEI initiatives as an affirmative defense and how employees have used those same DEI initiatives in their *prima facie* case (offense).

1. DEI as an Affirmative Defense

In *Burlington Industries*, the Supreme Court held that DEI was an affirmative defense against certain punitive liability.[124] "Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms."[125] Employers who could successfully raise the defense were thus off the hook from the sharpest teeth that Title VII could offer: Punitive damages.

> The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any [harmful] behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.[126]

"[E]mployers are encouraged to adopt antidiscrimination policies and to *educate* their personnel on Title VII's prohibitions."[127] Thus, "an employer may not be vicariously liable [if the employer makes] '*good-faith* efforts to comply with Title VII.'"[128]

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https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3967456 [https://perma.cc/R7KQ-W8B3] (finding that the "[a]verage 5-day market model CARs and Fama-French 3 Factor CARs equal -0.041% and -0.059%, respectively, equivalent to about a $25 million drop in value for the average corporate defendant").

118. Bradford, *supra* note 117, at 5.

119. *Id.* at 6.

120. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 758 (1998).

121. *Id.*

122. *Id.* at 762.

123. *See infra* Part IV.A (discussing the universe of effective initiatives).

124. *Burlington Indus.*, 524 U.S. at 764.

125. *Id.*

126. *Id.* at 765.

127. Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 545 (1999) (emphasis added).

128. *Id.* at 546 (emphasis added). The DEI affirmative defense is not available where there is "a tangible employment action, such as discharge, demotion, or undesirable reassignment." *Burlington Indus.*, 524 U.S. at 765.

In *Burlington*, *Faragher*,[129] and *Kolstad*, the Court judicially urged employers to implement anti-discrimination training, anti-harassment training, and grievance systems.[130] Lower courts inferred from these rulings that employers must implement DEI initiatives[131] and that the initiatives must be "reasonably calculated to prevent further harassment."[132] Courts grant the remedial affirmative defense based on the efficacy of the remedial measure.[133] Historically, courts have trusted companies that argue that their traditional DEI initiatives are effective.[134]

Anti-discriminatory policies do not absolve employers from *all* liability, but they do shield employers from some damages.[135] Still, "[e]very court to have addressed this issue thus far has concluded that [a DEI initiative] *is not sufficient in and of itself* to insulate an employer from a punitive damages award."[136]

2. DEI as Evidence of Intent (Offense)

Disparate impact verdicts only award employees certain equitable relief.[137] So, as a litigation strategy, employees also use disparate impact statistics to support a disparate treatment argument.[138] Essentially, employees argue that an employer's policies are discriminatory—and the employer knowingly retained their discriminatory policy despite

129. *See generally* Faragher v. City of Boca Raton, 524 U.S. 775 (1998) (holding that employers are vicariously liable for supervisors' discriminatory actions but under a slightly different analysis than *Burlington Industries*).

130. *See generally Kolstad*, 527 U.S. 526 (holding that DEI can be a sufficient vicarious liability defense); *Burlington Indus.*, 524 U.S. at 742 (same).

131. *See, e.g.*, Mathis v. Phillips Chevrolet, Inc., 269 F.3d 771, 778 (7th Cir. 2001) (holding that antidiscrimination language posted without additional training "appears more harmful to Phillips than helpful, because the jury could easily have concluded that printing this statement on the application but then making no effort to train hiring managers about the ADEA shows that Phillips *knew what the law required* but was indifferent to whether its managers followed that law" (emphasis added)); Williams-Boldware v. Denton Cnty., 741 F.3d 635, 642 (5th Cir. 2014) ("Denton County took seriously Williams-Boldware's complaints and its remedial efforts effectively halted the racially harassing conduct of which she complained."); Griffin v. Harrisburg Prop. Servs., Inc., 421 F. App'x 204, 210 (3d Cir. 2011) ("[W]e believe that commencing an investigation immediately, granting [an employee's] transfer, disciplining [an offending employee], and instituting diversity training was adequate remedial action.").

132. *Griffin*, 421 F. App'x at 209.

133. *See Burlington Indus.*, 524 U.S. at 756–57, 65 (holding that a company can shield liability by exercising effective remedial measures where it otherwise would have been liable if "the employer exercised *reasonable care* to prevent and correct promptly any [adverse] behavior" (emphasis added)).

134. *See generally* Faragher v. City of Boca Raton, 524 U.S. 775 (1998) (trusting the employer that the remedial measure is effective); *Kolstad*, 527 U.S. 526 (same); *Burlington Indus.*, 524 U.S. 742 (same).

135. *See, e.g.*, Sayger v. Riceland Foods, Inc., 735 F.3d 1025 (8th Cir. 2013) (holding that offering "no [remedial action] other than diversity training" did not absolve the employer from vicarious liability).

136. Bruso v. United Airlines, Inc., 239 F.3d 848, 858 (7th Cir. 2001) (emphasis added).

137. *See Kolstad*, 527 U.S. at 545 (discussing equitable relief).

138. *See, e.g.*, Plaintiff's Complaint and Jury Demand at 16, Yarbrough v. Glow Networks, Inc., 2022 WL 1441356 (E.D. Tex. Dec. 10, 2019) (No. 19-cv-905) (utilizing disparate impact language to supplement a disparate treatment claim).

its discriminatory effect.[139] Unlike the limited relief disparate impact verdicts offer, disparate treatment verdicts can return big payouts.[140]

For example, a 2022 Texas jury returned a $70 million verdict in a disparate treatment case.[141] Within six months, another Texas jury returned a similar $366 million verdict against FedEx.[142] These companies are neither outliers or notoriously bad actors. FedEx uses traditional DEI structures such as grievance systems and legalistic diversity training.[143] In fact, Forbes named FedEx one of the "Best Employers for Diversity" and a "Best-of-the-Best Corporation for Inclusion" in 2019.[144]

D. Affirmative Action, Corporate Reactionism, and the U.S. Supreme Court

Now is a tumultuous time for corporate DEI. This Part addresses three key developments that contribute to DEI's uncertainty: the Black Lives Matter (BLM) movement's influence on corporate DEI; Affirmative Action hiring and policies; and how the Supreme Court's most recent cases impact corporate DEI.

First, while corporate DEI has its roots in the civil rights movement, George Floyd's death ignited a new emphasis on the practice. At the height of the COVID-19 pandemic in 2020, passionate protests erupted across the country after George Floyd's death while in police custody.[145] Corporations responded to this outrage by pledging resources to DEI and other measures designed to heal a country plagued with racial unrest.[146]

Second, affirmative action hiring became a focal point for employers of all kinds, most specifically during the 2020 BLM movement. Executives allegedly headhunted for diversity hires at all levels of organizational power—from C-suite executives to entry-level positions.[147] And this headhunting surge may have been fueled, in part, by the lure of

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139. *Id.*

140. *See supra* note 138 (explaining how employees will show disparate impact statistics as a litigation strategy).

141. Verdict of the Jury, *Yarbrough*, 2022 WL 1441352 (No. 19-cv-905).

142. Jury Verdict, Harris v. FedEx Corp., No. 21-cv-01651 (S.D. Tex. Oct. 24, 2022); Plaintiff's First Amended Complaint and Jury Demand, *Harris*, 2021 WL 9721850 (No. 21-cv-1651) (alleging that FedEx failed to train their employees "adequately" on discriminatory matters, arbitrarily and subjectively making adverse employment decisions, employing a grievance system that made the reporting employee an adversary, and more).

143. *See* FEDEX CORP., FEDEX CODE OF CONDUCT 11, 29, 31 (2022), https://www.fedex.com/content/dam/fedex/us-united-states/cic/CodeConduct_English.pdf [https://perma.cc/2XRE-F4MS] (outlining company grievance and reporting policies); *see also* FEDEX CORP., 2022 ESG REPORT 31–32 (2022), https://www.fedex.com/content/dam/fedex/us-united-states/sustainability/gcrs/FedEx_2022_ESG_Report.pdf [https://perma.cc/G94X-4DHQ] (outlining DEI training, education, and other DEI initiatives).

144. *See Diversity, Equity, & Inclusion: Our Values in Action*, FEDEX CORP., https://www.fedex.com/en-us/about/diversity-inclusion.html [https://perma.cc/YPE9-LEKH] (touting company awards for diversity, equity, and inclusion). For a brief discussion on how to best interpret industry diversity awards, see DOBBIN & KALEV, *supra* note 12, at 6–8 (criticizing the use of "best companies for diversity" awards as an ineffective means of measuring DEI efficacy or firm performance).

145. Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES (Nov. 5, 2021), https://www.nytimes.com/article/george-floyd-protests-timeline.html (on file with the *Journal of Corporation Law*).

146. Interview with Shaun Harper, *supra* note 44, at 1:00.

147. *Id.* at 1:30 ("I remember . . . so many eager and, at times desperate, CEOs and other executives . . . asking if [they] should hire a chief diversity officer. Almost unanimously my response to them was 'no I don't think you should, you don't have a plan for this.'").

potential positive media coverage. The media often hail affirmative action hires.[148] As an example, U.S. Presidents of both parties have promised (and eventually selected) Vice Presidents and Supreme Court justices based on diversity qualifications.[149] These appointments garner high-profile media attention.

Third, the U.S. Supreme Court handed down their ruling in *Students for Fair Admissions, Inc. v. Harvard*.[150] In the Court's most recent case addressing collegiate admissions, the majority struck down affirmative action in college admissions.[151] This ended a multi-decade long regime that allowed colleges and universities to use a race-conscious approach for admissions.[152] The decision increased anticipation that the Court may address corporate affirmative action and DEI initiatives.[153] This anticipation has caused corporate executives to reevaluate corporate DEI, albeit not because the initiatives are ineffective—rather, out of fear of frustrating litigation aimed at *all* DEI initiatives.

Unfortunately, this shift has not resulted in positive changes to DEI efforts. Instead, it has caused an all-out retreat from any practice. "Diversity and inclusion experts say the legal backlash is already having a chilling effect over corporate efforts to address workplace inequality at a time when investment and interest in such initiatives have slowed

148. *See, e.g.*, Mike Fisher, *New Hires Make Washington NFL's Most Progressive Team*, SPORTS ILLUSTRATED (Jan. 23, 2021), https://www.si.com/nfl/commanders/news/new-hires-make-washington-nfl-most-progressive-team [https://perma.cc/RW5C-KJAE] (reporting on a diversity hiring and its organizational impact); Jacob Lev, *Las Vegas Raiders Hire Sandra Douglass Morgan as First Black Female President in NFL History*, CNN (July 7, 2022), https://www.cnn.com/2022/07/07/sport/nfl-raiders-president-first-black-woman-spt/index.html [https://perma.cc/2FQ4-GALV] (same); Shaun Harper, *Harvard University's Next President Is a Black Woman*, FORBES (Dec. 15, 2022), https://www.forbes.com/sites/shaunharper/2022/12/15/harvard-universitys-next-president-is-a-black-woman/ [https://perma.cc/4DCU-HNLM] (same).

149. *E.g.*, Libby Cathey, Allison Pecorin & Molly Nagle, *Biden Stands by Pledge to Nominate Black Woman to Supreme Court, White House Says*, ABC NEWS (Jan. 26, 2022), https://abcnews.go.com/Politics/biden-stands-pledge-nominate-black-woman-supreme-court/story?id=82487044 [https://perma.cc/4W4S-X3EW] (recounting how President Biden pledged to nominate a woman to the land's highest court and noting that Jackson was a notable candidate, as she would go on to become the latest Supreme Court Justice); Charlotte Alter, *Joe Biden Definitively Vows to Pick a Woman Vice President*, TIME (Mar. 15, 2020), https://time.com/5803677/joe-biden-woman-vice-president [https://perma.cc/S35B-EGKY] (discussing how President Biden pledged to pick a woman running mate); Amanda Onion et al., *Sandra Day O'Connor Nominated to Supreme Court*, HISTORY.COM: THIS DAY IN HISTORY (Feb. 9, 2010), https://www.history.com/this-day-in-history/oconnor-nominated-to-supreme-court [https://perma.cc/PJB6-TZDA] (discussing how Reagan pledged to and nominated a woman, Justice O'Connor, to the land's highest court).

150. Students for Fair Admissions, Inc., v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023).

151. *Id.*

152. *Id.* at 223–28 (holding that the *Grutter* framework is no longer authoritative law).

153. *See* Alexandria Olson, Haleluya Hadero & Anne D'innocenzio, *As Diversity, Equity and Inclusion Comes Under Legal Attack, Companies Quietly Alter Their Programs*, ASSOCIATED PRESS (Jan. 14, 2024), https://apnews.com/article/dei-diversity-corporations-affirmative-action-309864f08e6ec63a45d18ca5f25d7540 [https://perma.cc/78NH-DVQ6] ("Dozens of prominent companies have already been targeted [by conservative activists], as well as a wide array of diversity initiatives, including fellowships, hiring goals, anti-bias training and contract programs for minority or women-owned businesses."); Redd Brown, *Executives Go Quiet on Diversity After Affirmative Action Ruling, Conservative Threats*, BLOOMBERG (Sept. 10, 2023), https://www.bloomberg.com/news/articles/2023-09-10/executives-go-quiet-on-diversity-after-affirmative-action-ruling (on file with the Journal of Corporation Law) ("Mentions of diversity, equity and inclusion on earnings calls and at conferences among Russell 3,000 Index companies fell by 54% from a year ago in the third quarter to the lowest since 2018.").

following the post-Floyd surge.[154] More than 60% of minority executives have either left their positions or been let go.[155] Millions of dollars in pledged efforts to improve racial equity and DEI initiatives have stalled.[156] Instead of healing, the policies themselves became a topic of political fodder.[157] Now, the future of DEI is more uncertain than ever, but many companies remain steadfast that DEI policies (even regressive DEI policies) are still vital to their operations.[158]

Thus concludes the historic rollercoaster that corporate DEI has been on for the past few years. It is not over: this is merely the intermission. Now, corporate boards are scrambling to address the unknown territory and appease shareholders;[159] judges are facing novel and interesting arguments;[160] advocates are trying to chart a path into new territory;[161] and the population at large will also face the same decisions with their voices, votes, and dollars.

III. ANALYSIS

Dobbin and Kalev's data leaves a wide range of employers[162] in a Title VII catch-22:[163] Retain traditional DEI structures and risk disparate impact liability? Or replace traditional DEI structures and risk vicarious liability? Before analyzing this catch-22, it is important to first identify the potential plaintiffs for these claims. Additionally, the recent Supreme Court affirmative action brings into question Title VII entirely. Namely, whether Justice Scalia's predicted Title VII "crash course" will come to fruition.[164] Analyzing this potential collision in the context of the new conservative Court is beyond the scope of this Note and is not analyzed here.

A. Reality After Students for Fair Admissions v. Harvard

Up until now, this Note has been relatively inconspicuous as to *who* will bring a claim against an employer for their DEI initiatives. There are two likely categories of plaintiffs.

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154. *Id.*

155. Interview with Shaun Harper, *supra* note 44, at 1:00.

156. *Id.*

157. *See, e.g.*, Green, *supra* note 43 (discussing the Florida Stop WOKE Act that curbed the use of critical race theory in both public and private training).

158. *Id.*

159. H. Mark Adams & Emily Gauthier, *Practical Considerations for Corporate DEI Programs Following the Supreme Court's Affirmative Action Decision*, NAT'L L. REV. (July 10, 2023), https://www.natlawreview.com/article/practical-considerations-corporate-dei-programs-following-supreme-court-s [https://perma.cc/FN5J-SU7S].

160. *See, e.g.*, *supra* notes 142–44 and accompanying text (discussing a Texas discrimination case with a large jury settlement). Logically, judges will need to review new standards, hear novel arguments, and make decisions in uncharted jurisprudence to address these new claims.

161. *Infra* Part III.A.

162. *See supra* note 12–15 and accompanying text ("Nearly all Fortune 500 companies, as well as most small and medium-sized firms, have mandatory DEI initiatives.").

163. *See generally* JOSEPH HELLER, CATCH-22 (1961) (lending its title to the phrase meaning, "a problematic situation for which the only solution is denied by a circumstance inherent in the problem or rule." *Catch-22*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/catch-22 [https://perma.cc/BS9N-457H]).

164. *See* Green, *supra* note 43, at 851 (discussing Scalia's prophecy about a potential *Ricci* collision in the Title VII framework and how that collision has not yet occurred).

First, a protected-class employee who suffers a disparate employment action.[165] This type of plaintiff could claim that DEI initiatives had a discriminatory effect, causing their plight.

The second potential plaintiff type is an activist determined to dismantle DEI. These plaintiffs actively oppose existing DEI initiatives as systematic "reverse discrimination."[166] Notably, these types of "reverse discrimination" claims are already prevalent. For example, a hospital fired a Texas nurse after she refused to participate in mandatory DEI training. The nurse sued the employer using a discrimination claim.[167] She claimed the hospital fired her because "[she] objected to a mandatory course grounded in the idea that [she's] racist . . . ."[168] These "reverse discrimination"[169] plaintiffs could use Dobbin and Kalev's data to bolster their anti-DEI arguments. These types of bolstered claims have "never succeed[ed], although there might be some litigation advantages to asserting a disparate impact claim, perhaps for its settlement value."[170]

The most prominent judicial opponents in this second group have only become more militant after *Students for Fair Admissions*. After the Court's ruling, all eyes turned to broader questions about DEI, corporate practices, affirmative hiring, and federal discrimination law.[171] In "several suits" challenging several law firms' DEI policies, ideologically conservative plaintiffs filed lawsuits under section 1981 of the 1868 Civil Rights Act.[172] Experts in the field doubt whether these claims will ever find legal grounds, but they agree that the claims themselves can, at the very least, "have a chilling effect on company DEI efforts."[173]

With the Court's propensity to take on high-profile cases, this Note finds it more likely than ever that the Court could address DEI-related legal standards. However, only time will tell whether the Court alters precedent and if these standards will stand. The remaining sections of this analysis focus on several novel legal theories regarding Title VII and DEI. This Note does not serve, however, to exhaustively analyze and theorize every potentially

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165. Disparate employment actions include employers denying employees a raise, passing the employee up on a promotion, or turning the employee down for a management position.

166. *See, e.g.*, Complaint & Demand for Jury Trial, DiBenedetto v. AT&T Servs., Inc., 2021 WL 5105502 (N.D. Ga. Nov. 2, 2021) (No. 21-cv-4527) (alleging DEI programs illegally discriminated against white males within the company); *see also, e.g.*, THE LOUIS D. BRANDEIS CTR. FOR HUM. RTS. UNDER L., OVERVIEW OF COMPLAINTS FILED AGAINST STANFORD UNIVERSITY 1 (2021), https://brandeiscenter.com/wp-content/uploads/2021/06/Stanford-Case-Materials-6-15-21.pdf [https://perma.cc/8CCE-2UL2] ("Through its DEI committee, weekly seminars and racially segregated affinity groups, the CAPS DEI program has maligned and marginalized Jews, by castigating them as powerful and privileged perpetrators who contribute to systemic racism.").

167. Jennifer Henderson, *Nurse Protests Her Firing Over Refusal to Take Implicit Bias Training*, MEDPAGETODAY (Oct. 7, 2022), https://www.medpagetoday.com/special-reports/features/101127 [https://perma.cc/E4LP-G5JM].

168. *See id.* (quoting the nurse's opinion piece in the Wall Street Journal).

169. *See Reverse Discrimination*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Preferential treatment of minorities, especially through affirmative-action programs, in a way that adversely affects members of a majority group.").

170. Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 740 (2006).

171. Adams & Gauthier, *supra* note 159.

172. *Id.*

173. *Id.*; *see also* Tina Opie & Ella F. Washington, *Why Companies Can—and Should—Recommit to DEI in the Wake of the SCOTUS Decision*, HARV. BUS. REV. (July 27, 2023), https://hbr.org/2023/07/why-companies-can-and-should-recommit-to-dei-in-the-wake-of-the-scotus-decision [https://perma.cc/X9NB-73LM] ("[I]t's important for organizations to pay attention to the changing landscape [after the affirmative action decision].").

relevant legal argument. For example, this Note does not address theories proffered in other cases such as a lawsuit alleging that several law firms' diversity hiring programs violate the Civil Rights Act of 1866.[174]

B. Disparate Impact Liability and DEI

The idea of a "regressive DEI initiative" presents an intriguing prima facie disparate impact case. An employee can use Dobbin and Kalev's new data to argue that a company implementing regressive DEI initiatives knowingly accepts the initiative's discriminatory impact. By implementing regressive DEI initiatives, companies retain initiatives with a statistically proven discriminatory effect.[175] This statistical proof mimics the *Griggs* case because both policies—the traditional DEI initiatives and the employment tests in the *Griggs*'s case—harm protected individuals even though there is no evidence that the companies intended to discriminate.[176] An employee armed with Dobbin and Kalev's data can now win a discrimination case by showing discriminatory effect and, perhaps, even intent.

But can Dobbin and Kalev's 258-page book survive judicial scrutiny? This Note argues that it can: the Supreme Court has already held that courts can substitute national statistics for case-specific data.[177] Therefore, Dobbin and Kalev's data (with its 30 years of data from hundreds of organizations)[178] should pass judicial muster.[179]

The employee must also prove that the statistics are, in fact, disparate.[180] An employee can argue that the statistics are so widespread and well-founded[181] that their impact is irrefutable. An employer may counter with the Equal Employment Opportunity Commission (EEOC) guidelines. These guidelines suggest that the disparate impact rate when an impact is adverse is 80%.[182] However, this number is not dispositive because the

174. *See* Darreonna Davis, *Two Law Firms Sued Over DEI Programs After Affirmative Action Overturned*, FORBES, https://www.forbes.com/sites/darreonnadavis/2023/08/22/two-law-firms-sued-over-dei-programs-after-affirmative-action-overturned/ (on file with the *Journal of Corporation Law*) (discussing the complaint's factual background); *see also* Paul-Winston Cange, *Defending Diversity in Corporate America*, AM. BAR ASS'N: L. PRAC. TODAY (Feb. 20, 2024), https://www.americanbar.org/groups/law_practice/resources/law-practice-today/2024/february-2024/defending-diversity-in-corporate-america (on file with the *Journal of Corporation Law*) (discussing litigation and managerial fallout after *Students for Fair Admissions*).

175. The size of an immediate effect may not necessarily weigh in favor of either party. On the one hand, a smaller impact indicates a less discriminatory effect, and trainers had promised that such programs would be effective. *See* DOBBIN & KALEV, *supra* note 12, at 48. On the other hand, retaining an ineffective and regressive program under the guise of a progressive initiative may be equally, if not more, nefarious of its own uniquely foul nature.

176. *See, e.g.*, Griggs v. Duke Power, 401 U.S. 424 (1971) (applying the disparate impact analysis to a company that implemented a policy with a disparate fact and retained that policy after its discriminatory effect became clear).

177. Dothard v. Rawlinson, 439 U.S. 321, 330 (1977).

178. *Supra* Part II.A.

179. Employers may point to other statistical data that holds otherwise. *See* Green, *supra* note 43, at 861 (collecting various DEI studies).

180. *Supra* Part II.B.

181. *See supra* Part.II.A.2 (reporting on the veracity of Dobbin and Kalev's research and their statistically significant findings).

182. 29 C.F.R. § 1607.4(D) (2024).

EEOC sets this rate as a rough guideline.[183] Ultimately, whether these statistics are legally sufficient may vary depending on the judge or jury.

Why may a judge's personal perspective influence a case so heavily? Assume an employee argues, "Dobbin and Kalev's data shows that Legalistic Training has a disparate impact on employees." Assume also that an employer responds, "that may be true, but the data's statistical impact is insufficient." At this point, the judicial factfinder must determine whether Dobbin and Kalev's data is legally sufficient. This is a subjective decision that may ironically depend on the judge's explicit and implicit biases.

It is unclear how judges may rule on DEI initiatives that have become so mainstream. Would they see the initiatives as so ingrained that they cannot be questioned? Would they feel a political pull to deny or embolden the statistical findings? Would they pass off the statistics as mere managerial advice? All these potential feelings about DEI initiatives may ultimately swing the pendulum in either party's favor.

For the second step of the *Griggs* burden-shifting framework (the employer's rebuttal), an employer shows a "business necessity" or "purpose." Here, an employer may struggle. Most DEI initiatives do not *actually* filter candidates based on job requirements, job performance, or employee efficiency, so they fail to add inherent value to the employment relationship. While standardized tests and performance evaluations may appear tangentially related to a business purpose (selecting a quality candidate), these metrics are statistically flawed and unreliable indicators of future performance.[184] Still, there are several potential "business purpose" arguments for employers. This Note next addresses some of these arguments but ultimately dismisses them all.

First, an employer could argue that DEI initiatives serve a business purpose because they *prevent discrimination*. Preventing discrimination logically serves a business purpose because it drives value. The value that preventing discrimination provides manifests itself in the *absence* of liability.[185] But the business purpose must share a nexus with the employment relationship. For *Griggs*, a "business purpose" arises out of the employment relationship primarily—not out of a tangential financial interest.[186] Preventing liability is more like one of these tangential financial interests and less like a purpose related to the employment relationship.

Second, employers could argue they need DEI initiatives to cultivate a diverse and inclusive (and thus more productive) workplace.[187] The argument here more closely relates to the employment relationship, but it stands apart from the statistical reality. Dobbin and Kalev's data refutes these arguments by finding that traditional DEI initiatives do not

183. *See id.* ("Smaller differences in selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms or where a user's actions have discouraged applicants disproportionately on grounds of race, sex, or ethnic group.").

184. *Supra* Part II.A.2.

185. For the cost of liability and litigation in Title VII litigation, see *supra* Part II.B.

186. *See supra* Part II.B (discussing Title VII Disparate Impact theory).

187. Some studies show that diverse teams empirically outperform their non-diverse counterparts. *See generally* David Rock & Heidi Grant, *Why Diverse Teams Are Smarter*, HARV. BUS. REV. (Nov. 4, 2016), https://hbr.org/2016/11/why-diverse-teams-are-smarter [https://perma.cc/L6FG-NEWH] (explaining why diverse teams perform at a higher level than homogenous counterparts); *see also supra* Part II.A (discussing the debate concerning findings that diverse teams outperform non-diverse teams).

increase workplace diversity and inclusion.[188] Thus, Dobbin and Kalev's data should silence an employer's pleas for inclusion and workplace productivity.

Third, employers could argue that they must implement DEI initiatives to retain positive public relations.[189] It is true that retaining a positive public image may positively impact business opportunities, share price, employee retention, and more. Still, this argument is flawed. On the one hand, business interests and share price rationales fail because, again, they do not relate to the employment relationship. On the other hand, the argument that good public relations stemming from traditional DEI initiatives positively impact employee retention also fails. It fails because DEI initiatives create a more discriminatory workplace, and a more discriminatory workplace increases employee turnover.[190] A policy that increases turnover without additional justification should not qualify as a "business necessity."

Even if an employer can convince a judge they have a business purpose or necessity, this Note concludes that an employee has a strong rebuttal case (the third and final step of the *Griggs* framework). Under *Griggs*, employees can rebut a "business purpose" defense with non-discriminatory alternatives.[191] For example, if an employer rebuts with a liability-based defense or an ESG argument for mandatory legalistic training, an employee can rebut that business purpose by showing an effective alternative that Dobbin and Kalev identify.[192] This Note maintains that those alternatives are effective rebuttals because they are effective non-discriminatory means of achieving the same "business purpose."[193]

C. Disparate Treatment Liability and DEI

1. The DEI Affirmative Defense

Dobbin and Kalev's data complicates employers' application of the *Kolstad*, *Faragher*, and *Burlington* affirmative defense.[194] Historically, employers could argue that remedial DEI initiatives were effective and necessary for the vicarious liability affirmative

188. *See supra* Part II.A (discussing the empirical efficacy and regressivity of traditional DEI initiatives).

189. Many shareholders value DEI as an important part of a broader ESG policy. *See* Yixi Ning, Zhiwen Xiao & Jaesub Lee, *Shareholders and Managers: Who Care More About Corporate Diversity and Employee Benefits?*, 21 J. MGMT. & GOVERNANCE 93, 93, 107–10, 113–15 (2017) (reporting that shareholders desire DEI goals by finding "that publicly-traded companies with strong shareholder rights are more likely to promote women and/or minorities"); *see also, e.g.*, Ben Maiden, *American Express Shareholders Seek DEI Report*, GOVERNANCE INTEL. (May 20, 2021), https://www.corporatesecretary.com/articles/shareholders/32585/american-express-shareholders-seek-dei-report [https://perma.cc/A2KB-45YX] (reporting that nearly 60% of American Express investors supported a "proposal requesting that the company publish a report each year assessing its diversity and inclusion efforts"); Shoshy Ciment, *Nike Shareholders Want More Proof of Diversity and Inclusion Advancements*, FOOTWEAR NEWS (Aug. 11, 2021), https://footwearnews.com/2021/business/retail/nike-sec-diversity-inclusion-shareholder-pressure-1203167378 [https://perma.cc/3BTX-6GBN] ("[S]hareholders requested that Nike publish an annual report assessing its progress on certain DEI initiatives.").

190. *See* Nancy Qablan & Panteha Farmanesh, *Do Organizational Commitment and Perceived Discrimination Matter? Effect of SR-HRM Characteristics on Employee's Turnover Intentions*, 9 MGMT. SCI. LETTERS 1105, 1110–14 (2019) (finding that employee turnover is worse if employees think their employer handles and addresses discrimination poorly).

191. *See supra* Part II.B (discussing Title VII's disparate impact theory in the DEI context).

192. *See infra* Part IV.A (discussing alternative DEI initiatives that are not regressive).

193. *Id.* (discussing alternative DEI initiatives that are more effective).

194. *See supra* Part II.C.1 (discussing DEI as an affirmative defense against certain punitive liability).

defense. This defense, however, necessarily rests upon the assumption that DEI initiatives are *effective*.[195] After Dobbin and Kalev published their data, the universe of *effective* initiatives is much smaller—traditional DEI initiatives may no longer qualify for this affirmative defense.[196] Once advocates show them this new data, courts may be reluctant to continue offering such amnesty for regressive policies.

But whether a judge would rule against DEI initiatives is another question. The judges who could change the legal standard may not politically or personally agree to the change (and thus will remain overtly skeptical). Dobbin and Kalev's data suggests that the entire employment apparatus—from judges to juries to corporate boards to board managers in DEI training sessions—has been completely wrong for most of the last century. For those actors, this Note acknowledges they may not be agreeable to such a drastic policy change in every courtroom and boardroom. Traditional DEI policies are virtually universal, and the defenders of these policies are more likely to implicitly endorse the policies than they are to change their minds. Further, it is unlikely that a DEI industry currently worth billions will take kindly to the suggestion that they not only erred but that they harmed those individuals they were meant to protect.

This Note does, however, believe that courts will stop granting judicial amnesty for the DEI affirmative defense.[197] The defense has always required *efficacy*—not widespread use. Judges are unlikely to overturn the defense entirely. Rather, this Note predicts that courts will shift what policies will qualify for the affirmative defense. After hearing several cases challenging DEI efficacy, judicial eyes will keenly hone in on the *efficacy* of each initiative. Instead of asking what "experts" or "everyone else in the field" thinks about DEI, judges will ask employers to prove that their DEI initiatives are effective.

2. Prima Facie Evidence

Dobbin and Kalev's new empirical data may also strengthen an employee's prima facie evidence in vicarious liability cases. Using practices, procedures, and policies to bolster prima facie evidence of employer intent is a tried-and-true practice.[198] A regressive DEI initiative may provide evidence of a discriminatory pattern and practice.[199] This is done by showing that the employer knows a practice is discriminatory yet chooses to continue the practice anyway. For example, an employer can be aware of Dobbin and Kalev's data. That employer, who has mandatory implicit bias training, can reasonably infer that the training sessions will harm protected individuals. Our hypothetical employer may decide to retain the initiatives anyway. This Note argues that an employee can use the data to show that the employer knew the policy was discriminatory and implemented it

195. *See supra* note 130–37 and accompanying text (discussing the *Kolstad* affirmative defense).

196. *See supra* Part II.A.3 (discussing internal and external grievance mechanism systems).

197. *See supra* Part II.C.1 (discussing the affirmative action defense).

198. *See supra* Part II.C.2 (providing examples of plaintiffs using prima facie evidence of employer intent to secure favorable verdicts with large payouts).

199. *Id.*; *see also* Jenson v. Eveleth Taconite Co., 130 F.3d 1287, 1301 (8th Cir. 1997) (defining systemic discrimination as "[e]mployment policies or practices that serve to differentiate . . . in terms or conditions of employment of applicants or employees because of their status as members of a particular group . . . . Systemic discrimination . . . concerns a recurring practice or continuing policy rather than an isolated act of discrimination").

anyway, to the employee's detriment. In doing so, the plaintiff would prove their *prima facie* case.

Admittedly, there are several problems with the aforementioned analysis. First, there is the hurdle of showing the employer *knew* their practice(s) were discriminatory. While mostly irrelevant for making a disparate impact case—the employer needs to be aware of their policy's impact under the theory[200]—intent is an element in a disparate treatment case.[201] A plaintiff may, however, have a strong case to make here. It is hard to imagine that the extensive army of HR professionals servicing Fortune 500 companies are not aware of leading statistics being featured in the Harvard Business Review.[202]

Second, plaintiffs must creatively approach the nexus element. The employee must still draw a nexus between a statistically harmed class and a class of adversely affected individuals in the specific case.[203] This Note maintains that the statistics themselves may be exactly what the employee's case needs.

Again, the largest question this Note raises is one it cannot answer: How will judges and juries feel about this evidence? On the one hand, judges may feel sympathetic towards an employer. After all, unless the employer reads Dobbin and Kalev's entire book, how were they to know what to do? On the other hand, employers should now know that certain DEI initiatives are ineffective and regressive. The Harvard Business Review has prominently featured Dobbin and Kalev's findings, and the professors have made a career's worth of work out of DEI awareness.[204]

Ultimately, the legal ramifications of this new data are (1) potentially expensive, (2) organizationally changing, and (3) quite uncertain. This combination of high stakes and uncertainty should prompt businesses and their leaders to reconsider the best strategy to approach this uncertainty. Specifically, this Note argues that this strategy should be aimed toward avoiding liability and meeting shareholder expectations.

IV. RECOMMENDATION

A. Avoiding Liability with Effective DEI Policies

Companies can avoid DEI-related liability by implementing effective DEI policies.[205] Dobbin and Kalev found that certain DEI policies do cause regressive disparate effects. These policies include increasing recruitment efforts at minority institutions and

200. *Supra* Part II.B. There is the additional procedural problem of making a valid legal claim under the *Twiqbal* standard. Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) (holding that a plaintiff must make a sufficient factual pleading of the case beyond mere conclusory legal statements); Ashcroft v. Iqbal, 556 U.S. 662 (2009) (same).

201. *Id.*

202. *E.g.,* Dobbin & Kalev, *supra* note 15, at 52 (sharing preliminary findings that were later published in their book).

203. Dothard v. Rawlinson, 433 U.S. 321, 330–31 (1977); *see also* Evans v. McClain of Ga., Inc., 131 F.3d 957, 963 (11th Cir. 1997) (holding against a plaintiff and deciding that the plaintiff failed to show evidence that the applicants were adversely affected because "[s]tatistics without an analytic foundation are 'virtually meaningless'").

204. *E.g.,* Dobbin & Kalev, *supra* note 15, at 52 (sharing preliminary findings that were later published in their book).

205. *See supra* Parts III.B–C (analyzing claims following the publication of statistical efficacy and regressivity of Traditional DEI initiatives).

institutions not primarily white or male,[206] building formal mentoring relationships "not based on gender, race, or ethnicity but on shared workplace interests,"[207] structuring referral systems to incentivize diverse hires,[208] implementing self-managed work teams,[209] cross training,[210] introducing flexible hours or "flextime,"[211] and instituting parental leave and childcare policies.[212] More aggressive, yet effective methods include appointing a diversity manager,[213] implementing a diversity task force,[214] and "setting explicit workforce diversity goals" publicly.[215] These DEI policies deflect disparate impact and systemic treatment claims because they operate effectively to promote Title VII and its ultimate goal of eliminating discriminatory actions and policies.[216] The more aggressive the DEI policy, however, the more likely the policy will expose the employer to conservative activist litigation or legislation.

From an organizational perspective, hiring DEI and ESG experts may also increase an organization's DEI efficacy tenfold. Their expertise and insight can guide and lead a company, but DEI experts also have incentives to continue implementing ineffective DEI policies (for example, DEI experts can profit from extensive legalistic training modules and anti-bias sessions). So, companies should continue to research and read empirical data concerning DEI methods and not solely trust one individual's opinion.

The above options—regardless of how many and to what extent a company utilizes them—should include a holistic, honest approach. Corporate executives need to do more than state their diversity goals (which many companies never achieve[217]): companies need to listen to their employees' needs,[218] improve HR skills,[219] actively implement DEI awareness policies at every level and phase of the employment relationship,[220] and *sincerely* adopt the practices from the top-down.[221] What a company can (and should)

206. *See* DOBBIN & KALEV, *supra* note 12, at 64–72, 183 (finding that "democratizing recruitment" is an effective DEI strategy and that "only about one in six companies has [a targeted recruitment program]").

207. *Id.* at 185.

208. *Id.* at 75–80.

209. *Id.* at 97–101.

210. *Id.* at 122–29 ("Cross-training is the real secret to promoting diversity using training. It gives women and people of color a chance to try out jobs that they had never thought of, and that managers had never thought of placing them in.").

211. DOBBIN & KALEV, *supra* note 12, at 135–43.

212. *Id.* at 143–53.

213. *Id.* at 154–62.

214. *Id.* at 162–69.

215. *Id.* at 169–74.

216. *See* Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 545 (1999) ("The purposes underlying Title VII are similarly advanced where employers are encouraged to adopt antidiscrimination policies and to educate their personnel on Title VII's prohibitions.").

217. JOSH BERSIN CO., ELEVATING EQUITY: THE REAL STORY OF DIVERSITY AND INCLUSION 8 (2022) ("80% of companies are just going through the motions and not holding themselves accountable [to their DEI goals].").

218. *Id.* at 9 ("[The] one practice [that] was by far the best predictor of excellence: listening to employees and acting on results."). Listening to employees is important "[b]ecause it switches DEI from a compliance program to one focused on performance and growth." *Id.*

219. *Id.* at 12.

220. *Id.* at 13. "DEI must permeate the talent supply chain—from hire, to promotion, to growth" because failing to make DEI a continuous effort makes the effort more effective and allows employees to feel that the practices are commonplace, sincere, and noncombative. JOSH BERSIN CO., *supra* note 217, at 13.

221. *Id.* at 15–16.

spend on DEI initiatives will vary, and the extent that each company should invest in DEI initiatives is an important budgeting question to entertain.

As to avoiding systemic adverse impact and vicarious liability, companies have several options.[222] The EEOC lists several alternative methods, including oral or written warnings, reprimands, transfers or reassignments, demotion, reduction of wages, suspension, discharge, and monitoring.[223] The ultimate question courts ask when addressing the remedial action affirmative defense is whether the policy is effective.[224] Consequently, employers should only employ policies that effectively offer relief and change, not merely condemnation and remedial training. Ultimately, avoiding liability should be a primary goal of companies because litigation itself is expensive,[225] let alone potential compensatory or punitive damages.[226] Avoiding liability, however, is not the only calculus to consider for corporations that have fiduciary duties.

B. Meeting Shareholder Expectations and Fulfilling Fiduciary Duties

Corporations should implement effective DEI initiatives because shareholders expect (and value) responsible ESG initiatives.[227] No board or shareholder wants their firm to be an example of discrimination—this is evident as shareholder value diminishes after each discrimination claim.[228] If shareholders feel that an ESG policy harms them, shareholders will likely respond.[229] In terms of race and gender discrimination, shareholders do not want

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222. *See supra* notes 206–17 (discussing several effective alternatives that various experts, including Dobbin and Kalev, discovered).

223. U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-1999-2, ENFORCEMENT GUIDANCE: VICARIOUS LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS (1999).

224. *See supra* Part II.C.1 (citing Sayger v. Riceland Foods, Inc., 735 F.3d 1025 (8th Cir. 2013)) ("Anti-discriminatory policies do not absolve employers from all liability, but they do shield employers from punitive damages.").

225. *See supra* notes 112–20 and accompanying text.

226. *See, e.g.*, *supra* Parts II.B–C (discussing litigation costs, including the potential for compensatory and punitive damages). This Note acknowledges that other statutory or common law remedies may offer similar value to plaintiffs—they are not discussed here, however.

227. *See* Ning, Xiao & Lee, *supra* note 189, at 93, 107–10, 113–15 (discovering that shareholders desire DEI goals in finding "that publicly-traded companies with strong shareholder rights are more likely to promote women and/or minorities"); *see, e.g.*, Maiden, *supra* note 189 (reporting that nearly 60% of American Express shareholders supported a "proposal requesting that the company publish a report each year assessing its diversity and inclusion efforts"); *see also, e.g.*, Ciment, *supra* note 189 (reporting that "shareholders requested that Nike publish an annual report assessing its progress on certain DEI initiatives); Katia Savchuk, *Do Investors Really Care About Gender Diversity?*, STANFORD GRADUATE SCH. BUS. (Sept. 17, 2019), https://www.gsb.stanford.edu/insights/do-investors-really-care-about-gender-diversity [https://perma.cc/62Y2-9S54].

228. *See* Dougal, Griffin & Hutton, *supra* note 117, at 23–28 (finding that the average shareholder value declines by millions after a discrimination claim).

229. For ways that shareholders respond to negative DEI-related developments in several ways, see *supra* note 189; *see also, e.g.*, Tyler Sonnemaker, *Pinterest Shareholders Are Suing the Company Over Allegations of Discrimination Against Women and Employees of Color*, BUS. INSIDER (Dec. 2, 2020), https://www.businessinsider.com/pinterest-lawsuit-shareholders-allege-racial-sex-discrimination-toxic-culture-2020-12 [https://perma.cc/DZ7B-DURX] (reporting on a shareholder suit alleging management and the board "breached their fiduciary duty to investors by failing to address claims of illegal workplace bias *even when presented with evidence*" (emphasis added)).

management to implement discriminatory policies.[230] Shareholders unsurprisingly prefer *effective* policies.[231]

Shareholder expectations often drive corporate policy, and the marketplace is often the vehicle for effecting changes to corporate ESG policies.[232] The most militant ESG investors—institutional investors—often lead the charge.[233] Even if Congress or judicial actors do not react—and employees' litigious claims prove unsuccessful—negative media coverage may influence shareholders to pressure management either through the market or through shareholder action. The media may report on Dobbin and Kalev's data (and how companies fail to react) or may resemble traditional media stories like discriminatory events and legal filings.

Perhaps the most important debate companies must address is the assertion that "organizations focusing on the right DEI practices have superior business performance and results."[234] For this to be true, three logical conclusions must also be true.

First, DEI initiatives must produce actual diversity. Traditional DEI initiatives fail to pass this logical step because they are regressive, reducing diversity and harming minority individuals.[235] Effective DEI initiatives,[236] however, pass muster here. Dobbin and Kalev's data prove that effective DEI initiatives do produce diversity.[237]

Second, diversity proxies must accurately represent desirable "diversity traits" that produce value. This is harder to quantify: "Diversity," after all, is a vague and malleable term. At its core, though, diversity proxies (race, gender, ethnicity, etc.) are mere indicators of diverse individual traits.[238] An individual's gender, financial upbringing, race, or any other demographic do not fully reveal the totality of an individual's skills, strengths, weaknesses, or perspective. These proxies can still inform companies about a person's

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230. *See supra* note 189 and accompanying text (discussing shareholder desires). Additionally, shareholders and the market do not look fondly upon added litigation expenses. *See supra* notes 112–20 and accompanying text (detailing the cost of litigation).

231. *See* Ron S. Berenblat & Elizabeth R. Gonzalez-Sussman, *Racial Equity Audits: A New ESG Initiative*, HARVARD L. SCH. F. ON CORP. GOVERNANCE (Oct. 30, 2021), https://corpgov.law.harvard.edu/2021/10/30/racial-equity-audits-a-new-esg-initiative [https://perma.cc/E6YV-AEMF] (explaining ESG activism and the recent push for racial equity audits as a vehicle to review a corporate actor's effectiveness regarding DEI initiatives).

232. The effectiveness of investor activism is evident in recent successes. *See* Kai H.E. Liekefett, Holly J. Gregory & Leonard Wood, *Shareholder Activism and ESG: What Comes Next, and How to Prepare*, HARVARD L. SCH. F. ON CORP. GOVERNANCE (May 29, 2021), https://corpgov.law.harvard.edu/2021/05/29/shareholder-activism-and-esg-what-comes-next-and-how-to-prepare [https://perma.cc/6VNA-BAC4] (discussing institutional investors, the ESG issues investors care most about, several recent activist successes, and practical guidance for public companies concerning ESG issues). These institutional investors develop specific "ESG-themed funds" that have seen a recent influx of capital interest from investors, indicating increased investor desire for successful ESG results ranging from environmental issues to DEI initiatives. *Id.*

233. *See* Bernard S. Sharfman, *Opportunism in the Shareholder Voting and Engagement of the "Big Three" Investment Advisers to Index Funds*, 48 J. CORP. L. 463, 489–90 (2023) ("Despite the Big Three's . . . big push to market higher-cost ESG funds to investors, our country's and the world's problems continue unabated.").

234. JOSH BERSIN CO., *supra* note 217, at 20.

235. *See supra* Part II.A (discussing Dobbin and Kalev's research showing the regressive nature of traditional DEI initiatives).

236. *See supra* Part IV.A (discussing and listing effective DEI initiatives).

237. *Supra* Part II.A.

238. *See* Fairfax, *supra* note 17, at 834–35 (discussing the merits and debate concerning the controversial perspective that demographics are mere proxies for "viewpoint or experience").

experience and perspective to an extent because the modern employee does not live in a vacuum. The ramifications of historical influence, systemic institutional strengths and weaknesses, and a multitude of environmental factors still make some of these demographic proxies at least somewhat useful.

The preceding conclusions on proxies warrant caution: companies should not heavily weigh any one particular demographic. Organizations should still strive to understand each individual as a holistic person, not nearly their demographics. Additionally, proxies may not prove to be reliable in every case in terms of delivering intended diversity, and relying on any one proxy alone could lead an organization to make decisions based on incomplete stereotypes. Companies should not consider diverse candidates as mere demographic placeholders to increase value—this perspective is demeaning and is likely to undermine many DEI efforts.[239]

Third and finally, diverse teams must outperform non-diverse teams. Conventional wisdom and some statistical studies find that this is true.[240] However, this last logical prong has been at the center of a heated, statistical debate. Some scholars have taken issue with DEI-positive statistical studies for their methodologies and conclusions.[241] Given the soundness of the premises' argument, it is probably safe to assume that diversity in a team (or company) will produce some value or efficiencies, but it is unclear how much value the same diversity will produce.[242]

If the above three logical premises are true, then a company devoted to delivering value to its shareholders would inherently desire a successful DEI regime. Whether diversity drives value is a flawed assumption (statistically and morally) that this Note relies upon. Scholars should continue analyzing the veracity of all three logical conclusions discussed above.

A brief explanation of corporate fiduciary duties reveals that, as difficult as the above business rationales may be to prove (or morally stomach), they are the only viable justifications. Professor Fairfax argues that traditional, moral justifications for organizational diversity are preferable to the imperfect, demeaning nature of "business rationales."[243] Professor Fairfax is correct in her critiques of business rationales for DEI—boiling an individual down solely to their potential value added is uncomfortably dehumanizing and demeaning. Unfortunately, the ugly truth is—as Professor Fairfax recognizes[244]—that corporations *must* justify their DEI initiatives with value-added (business) rationales.

A corporation *must* prioritize the interests of shareholders. Corporations exist and act solely for the purpose of generating shareholder wealth.[245] This is the "Shareholder Wealth

239. *See id.* at 844–50 ("[I]t may be more problematic to view directors of color as commodities as opposed to other directors whose market value will not be assessed against this historical backdrop. In this way, economic-based justifications for diversity appear problematic.").

240. Edmans, *supra* note 22.

241. *Id.*

242. *Id.*

243. Fairfax, *supra* note 17, at 834–35.

244. *Id.* at 841.

245. Robert T. Miller, Response, *Delaware Law Requires Directors to Manage the Corporation for the Benefit of Its Stockholders and the Absurdity of Denying It: Reflections on Professor Bainbridge's Why We Should Keep Teaching* Dodge v. Ford Motor Co., 48 J. CORP. L. DIGIT. 32, 33 (2023) ("The law is so clear . . . that any

Maximization" principle.[246] Corporate law does not dictate how directors achieve this goal, so both short- and long-term activities are valid.[247] So long as corporate directors and agents act to maximize their shareholders' wealth, the business judgment rule likely protects their actions.[248] Unfortunately, solely moral and social justifications violate this principle because those justifications are devoid of any short- or long-term wealth creation potential. It is for these reasons that corporate directors *must* root their DEI justifications at least partly in business rationales (not solely moral and social justifications).

The political interests of shareholders may also manifest in varying shareholder priorities. Two competing political interests emerge. Liberal activist shareholders have targeted companies and called for corporate DEI initiatives and corporate transparency.[249] Meanwhile, conservative shareholders have levied challenges to DEI programs,[250] and several large conservative consumer protests have proved successful.[251] This Note acknowledges the difficulty companies face on such a divisive issue—it may be impossible to please every shareholder, client, and consumer. Companies should strive to weigh competing concerns—to fend off claims while delivering shareholder value. The next Part of this Note, however, argues that companies should not base their ultimate decision on their fear of market or shareholder retribution. This argument may prove to be the boldest contribution this Note has to offer.

Given the lengthy managerial and legal precedent traditional DEI initiatives have, companies may feel that their DEI policies are effectively required—even if they are neither effective nor required. Additionally, companies may think their DEI problems are irrelevant because they have diverse board members or diverse high-level management.[252] Diverse organizations, however, cause the same DEI-initiative-related regressivity and inefficacy implementing traditional DEI initiatives as non-diverse organizations.[253] So what may prompt companies to change their DEI policies? Perhaps widespread change will only occur after negative media coverage, shareholder action, successful litigation, or congressional action. Management, however, can and should beat these trends by abandoning ineffective DEI initiatives and implementing effective alternatives that shield companies against liability.

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attorney who advised a client that directors . . . are not always required to manage the corporation for the purpose of benefiting the stockholders would undoubtedly commit malpractice.").

246. *Id.*

247. Stephen M. Bainbridge, Response, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1423 (1993).

248. *Id.* at 1441 ("[T]he business judgment rule would not protect the directors' decision unless they could show that it also benefitted the shareholders.").

249. *Caught in the Middle—Growing Challenges by Activist Shareholders to DEI Programs*, 8 Fed. Emp. L. Insider (WL) 3, No. 20 (2023).

250. *Id.*

251. Emily Stewart, *The Conservative Boycott Playbook Is Kind of Working*, VOX (Aug. 31, 2023), https://www.vox.com/money/23851108/bud-light-target-boycott-success-trans-issues-woke-capitalism [https://perma.cc/5RGP-K7YM] (discussing the success conservative boycotts to "woke" corporate policies have found "[f]rom Bud Light to Target").

252. While a more diverse organization does beget diversity, DOBBIN & KALEV, *supra* note 12, at 2, the DEI practices themselves are still discriminatory in effect. *Id.* at 19–22, 41–44.

253. *See id.* at 4–6.

C. The Final Calculus: To Boldy Go or to Live Long and Prosper?

Neither companies nor scholars possess the requisite foresight to chart a single, perfect path into the uncertainties related to DEI. This Note suggests that companies take a careful, meticulous approach that eliminates harmful DEI initiatives, shields themselves from liability, and remains steadfast in the added shareholder value a more diverse team provides. So far, however, we have not seen a radical shift to this thoughtful, logical approach. It appears that companies are choosing the status quo initiatives rather than altering course to a more effective DEI policy structure.[254]

The dichotomy between two Star Trek phrases exemplifies this stagnation. On the one hand, Captain James Tiberius Kirk iconically recorded frequently about "the final frontier . . . to boldly go where no one has gone before" in his captain's log.[255] Kirk represents effective leadership that attempts to solve problems with bold, innovative solutions. On the other hand, Kirk's Chief Science Officer, Spock's motto was "Live long and prosper."[256] Spock represents a slower, less adaptive approach that relies on practices of the past. Companies have chosen Spock's wisdom over Kirk's. The common corporate board yearns to fit in with their shareholders and customers—to stay on the beaten path. Even where they "mark new territory," they rarely act counterculturally and move slowly and carefully—this is especially true for politically charged topics like DEI. Corporate DEI initiatives seem to evolve and retreat with the changing tides of political pressure—virtually without fail. In 2022, "roughly 80% of companies [we]re just going through the motions and not holding themselves accountable [to stated DEI goals]."[257] This approach explains why, when massive outrage arose over societal indifference to police brutality, corporate boards sprang into action with new pledges and directives. Woefully, it also explains why corporate boards are so willing to abandon DEI initiatives when the storm clouds gather.

Companies should adopt Kirk's perspective and enact effective DEI initiatives as soon as possible. This Note urges corporate boards to embrace "the final frontier . . . to boldly go where no one has gone before!"[258]—rather than simply surviving.[259] What does this look like, beyond the specifics addressed earlier?[260] This Note's tone—advising corporations to only enact initiatives that are effective and drive value and growth—matches the tone Professor Edmans has offered.[261] Professor Edmans suggests that corporations should focus on the ESG activities that produce long-term value instead of "ticking of[f] ESG boxes."[262] This Note agrees in the DEI context even though doing so in the DEI initiative industry is a bold departure. But a bold departure may be the only way

254. Olson, Hadero & D'innocenzio, *supra* note 153.

255. *Star Trek* (NBC television broadcast 1966–69)

256. *Id.*

257. JOSH BERSIN CO., *supra* note 217, at 8.

258. *Star Trek* (NBC television broadcast 1966–69).

259. Spock's "live long and prosper" is often salient advice. *Id.* However, strategic survival (especially in a corporate setting) often means being risk-tolerant rather than being risk-adverse.

260. *See supra* Part IV.A (offering effective DEI alternatives).

261. Alex Edmans, Rational Sustainability (Feb. 14, 2024) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4701143 [https://perma.cc/ZSC6-JKBV].

262. *Id.* at 1.

to ensure that corporations implement and retain effective DEI measures: DEI measures that just so happen to best serve both shareholders and employees.

V. CONCLUSION

Companies spend $8 billion annually to meet shareholder expectations, fulfill their fiduciary duties, and avoid DEI-related liability.[263] Unfortunately, that money is currently spent in the wrong place on regressive initiatives. Companies should take an appropriate and measured approach. The influx of new information that Dobbin and Kalev provide—combined with potential legal developments—should spark change. Corporations should embrace this change and choose rationally sustainable DEI initiatives that drive growth and value.

263. Interview with Iris Bohnet, *supra* note 1.