# DESPITE CALIFORNIA COURT RULING, BOARD DIVERSITY REMAINS CENTER STAGE

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Despite a California superior court's recent ruling against a 2020 California law (AB 979), the move toward increasing board diversity is alive and well, as proxy advisory firms, institutional investors, Nasdaq and others continue the rally cry for more diverse boards.

The California law had required public companies headquartered in California to have at least one director from an "underrepresented community" by the end of 2021 and, depending on board size, to have at least two or three such directors by the end of 2022. The law defined a director to be from an "underrepresented community" if such director self-identified as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, Alaska Native, gay, lesbian, bisexual or transgender.

**Court's Decision**. Judicial Watch, an advocacy group acting on behalf of a group of California taxpayers, filed the lawsuit against the State of California, and sought to enjoin the use of taxpayer funds to enforce the law. The plaintiff argued that in the absence of any compelling state interest, the law imposed quotas based on race and ethnicity and therefore violated the Equal Protection Clause of the California Constitution. The court, finding the law to be unconstitutional, granted summary judgment in favor of the plaintiff.

**Pending Challenge to California Gender Diversity Law**. Judicial Watch currently has a similar lawsuit pending against the State of California with respect to California's earlier 2018 law (SB 826) that imposes gender-based membership requirements on boards of directors of public companies headquartered in California.

**Overview**. While the recent decision is likely to be appealed and the ultimate outcome of the challenges to the California diversity laws remains uncertain, many others continue the push for board diversity. For example:

- ISS and Glass Lewis, in their respective 2022 policy updates, identified gender diversity requirements for certain public companies (e.g., Russell 3000 companies) that, if not met, could result in a recommendation against the chair of the nominating committee (see our January 18, 2022 post).

- Under recently enacted Nasdaq Rule 5606, Nasdaq will soon require that listed companies annually disclose in their SEC filings specified diversity information regarding their directors and, if the companies do not have at least two "diverse" directors (as defined by Nasdaq), they will be required to explain why their boards lack such diversity (see our August 6, 2021 post).
- As set out in BlackRock's Investment Stewardship Proxy Voting Guidelines for U.S. Securities Effective as of January 2022, BlackRock believes boards should aspire to 30% diversity of membership and encourages companies to have at least two directors on their boards who identify as female and at least one who identifies as a member of an underrepresented group.
- New York and Illinois encourage diversity by requiring companies to disclose diversity information regarding their directors in certain reports they file with the states (i.e., Biennial Statements required to be filed with the New York Department of State and Annual Reports required to be filed with the Illinois Secretary of State).

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## MEET THE TEAM

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