

July 13, 2023

Dear Fortune 100 CEOs:

We, the undersigned Attorneys General of 13 States, write to remind you of your obligations as an employer under federal and state law to refrain from discriminating on the basis of race, whether under the label of “diversity, equity, and inclusion” or otherwise. Treating people differently because of the color of their skin, even for benign purposes, is unlawful and wrong. Companies that engage in racial discrimination should and will face serious legal consequences.

Last month, the United States Supreme Court handed down a significant decision in *Students for Fair Admissions v. President & Fellows of Harvard College*, No. 20-1199 (U.S. June 29, 2023) (“*SFFA*”). In that case, the Supreme Court struck down Harvard’s and the University of North Carolina’s race-based admissions policies and reaffirmed “the absolute equality of all citizens of the United States politically and civilly before their own laws.” *SFFA*, slip op., at 10. Notably, the Court also recognized that federal civil-rights statutes prohibiting *private* entities from engaging in race discrimination apply at least as broadly as the prohibition against race discrimination found in the Equal Protection Clause. *See SFFA*, slip op. at 6 n.2. And the Court reiterated that this commitment to racial equality extends to “other areas of life,” such as employment and contracting. *Id.* at 13. In sum, the Court powerfully reinforced the principle that *all* racial discrimination, no matter the motivation, is invidious and unlawful: “***Eliminating racial discrimination means eliminating all of it.***” *Id.* at 15 (emphasis added).

We ask that you comply with these race-neutral principles in your employment and contracting practices.

A. Racial Discrimination Is Commonplace Among Fortune 100 Companies and Others.

Sadly, racial discrimination in employment and contracting is all too common among Fortune 100 companies and other large businesses. In an inversion of the odious discriminatory practices of the distant past, today's major companies adopt explicitly race-based initiatives which are similarly illegal. These discriminatory practices include, among other things, explicit racial quotas and preferences in hiring, recruiting, retention, promotion, and advancement. They also include race-based contracting practices, such as racial preferences and quotas in selecting suppliers, providing overt preferential treatment to customers on the basis of race, and pressuring contractors to adopt the company's racially discriminatory quotas and preferences.

A few cases illustrate the pervasiveness and explicit nature of these racial preferences. In 2020, a group of executives from 27 banks, tech companies, and consulting firms set an explicit racial hiring quota. Matthew Lavietes, *'Watershed Moment': Corporate America Looks to Hire More Black People*, Reuters (Aug. 19, 2020), available at <https://www.reuters.com/article/us-usa-race-hiring-idUSKCN25F2SY/>. Similarly, in 2019, Goldman Sachs set racial quotas for the hiring of new analysts and entry-level associates. Hugh Son, *How JPMorgan Increased the Number of Black Interns in Its Wall Street Program by Nearly Two-Thirds*, CNBC, Apr. 9, 2021, available at <https://www.cnbc.com/2021/04/09/jpmorgan-increased-the-number-of-black-interns-in-its-wall-street-program-by-nearly-two-thirds.html>. Racial quotas and other explicitly race-based practices in recruitment, hiring, promotion, and/or contracting have also been adopted by other major companies, such as Airbnb, Apple, Cisco, Facebook, Google, Intel, Lyft, Microsoft, Netflix, Paypal, Snapchat, TikTok, Uber, and others. Lauren Feiner, *Tech Companies Made Big Pledges to Fight Racism Last Year—Here's How They're Doing So Far*, CNBC (June 6, 2021), available at <https://www.cnbc.com/2021/06/06/tech-industry-2020-anti-racism-commitments-progress-check.html>.

Microsoft announced that it would set a quota for the number of Black-owned approved suppliers over three years and demand annual diversity disclosures from its top 100 suppliers, implying that suppliers that did not adopt their own racially discriminatory policies would suffer consequences. *Id.* Microsoft also announced that over a three-year period, it would set quotas for transaction volumes through Black-owned banks and external managers as well as for the number of Black-owned U.S. partners. *Id.*

B. Race Discrimination Is Illegal Under Federal and State Law.

Such overt and pervasive racial discrimination in the employment and contracting practices of Fortune 100 companies compels us to remind you of the obvious: Racial discrimination is both immoral and illegal. Such race-based employment and contracting violates both state and federal law, and as the chief law enforcement officers of our respective states we intend to enforce the law vigorously.

“It must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons.” *Peña-Rodriguez v. Colorado*, 137 S.Ct. 855, 867 (2017). As the multitude of state and federal statutes prohibiting race discrimination by private parties attests, this “commitment to the equal dignity of persons” extends to the private sector as well as the government.

Title VII of the Civil Rights Act of 1964 prohibits racial discrimination in employment. It provides that “[i]t shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin;” or “(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. 2000e-2(a).

Furthermore, 42 U.S.C. § 1981 prohibits race discrimination in contracting. It provides that “[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.” 42 U.S.C. § 1981(a). This extends to “the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.” *Id.* § 1981(b). Further, “[t]he rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.” *Id.* § 1981(c).

The Supreme Court has repeatedly and emphatically condemned racial quotas and preferences. As the Court held in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 746 (2007):

[Racial] classifications promote “notions of racial inferiority and lead to a politics of racial hostility,” “reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin,” and “endorse race-based reasoning and the conception of a Nation

divided into racial blocs, thus contributing to an escalation of racial hostility and conflict.”

Id. at 746 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989); *Shaw*, 509 U.S. at 657; *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 603 (O’Connor, J., dissenting)). “One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.” *Rice v. Cayetano*, 528 U.S. 495, 517 (2000).

Well-intentioned racial discrimination is just as illegal as invidious discrimination. The “argument that different rules should govern racial classifications designed to include rather than exclude is not new; it has been repeatedly pressed in the past, and has been repeatedly rejected.” *Parents Involved*, 551 U.S. at 742.

Last month, the Supreme Court stated definitively that racial discrimination under the guise of affirmative action must end: “Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.” *SFFA*, slip op. at 16 (internal quotes omitted). “[R]acial discrimination is invidious in all contexts.” *Id.* at 22 (internal quotes omitted). Racial preferences are a “perilous remedy.” *Id.* at 23. The Court previously allowed a narrow exception for race-conscious college admissions to further student body diversity, but we have known for decades that that exception would be expiring soon—as indeed it did on June 29. *See generally Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (“We expect that 25 years from now, the use of racial preferences will no longer be necessary . . .”).

And the Court took pains to emphasize that the supposedly benign nature of racial preferences cannot save them. Despite the universities’ claims in *SFFA* that they were actually helping people, not hurting them, the Court rightly noted that that argument itself “rest[ed] on [a] pernicious stereotype.” Slip op. at 29. Likewise, when an employer makes employment or contracting decisions “on the basis of race, it engages in the offensive and demeaning assumption that [applicants] of a particular race, because of their race, think alike.” *Id.* (internal quotes omitted). Further, racial preferences “stamp” the preferred races “with a badge of inferiority” and “taint the accomplishments of all those who are admitted as a result of racial discrimination.” *SFFA*, slip op. at 41 (Thomas, J., concurring); *see also id.* (“The question itself is the stigma.”).

And, of course, every racial preference necessarily imposes an equivalent harm on individuals outside of the preferred racial groups, solely on the basis of their skin color. “[I]t is not even theoretically possible to ‘help’ a certain racial group without causing harm to members of other racial groups. It should be obvious that every racial classification helps, in a narrow sense, some races and hurts others.” *Id.* at 42 (quotation omitted). Thus, “whether a law relying upon racial taxonomy is ‘benign’ or ‘malign’ either turns on ‘whose ox is gored’ or on distinctions found only in the eye of the beholder.” *Id.*

Racial discrimination inevitably “provokes resentment among those who believe they have been wronged by the . . . use of race.” *Id.* at 46.

Attempting to defend such racial hiring in the name of seeking racial diversity is unavailing. Regarding Harvard’s unlawful admissions program, the Supreme Court noted that it was a quota system in all but name—as all race-conscious practices inevitably are. “For all the talk of holistic and contextual judgments, the racial preferences at issue here in fact operate like clockwork.” *Id.* at 32 n.7. Playing this “numbers game” is flagrantly illegal: “[O]utright racial balancing” is “patently unconstitutional.” *Id.* at 32.

Let there be no confusion: These principles apply equally to Title VII and other laws restricting race-based discrimination in employment and contracting. Courts routinely interpret Title VI and Title VII in conjunction with each other, adopting the same principles and interpretation for both statutes. *See, e.g., SFFA* slip op. at 4 (J. Gorsuch concurring), *Maisha v. Univ. of N. Carolina*, 641 F. App’x 246, 250 (4th Cir. 2016) (applying “familiar” Title VII standards to “claims of discrimination under Title VI”); *Rashdan v. Geissberger*, 764 F.3d 1179, 1182 (9th Cir. 2014) (“We now join the other circuits in concluding that [the Title VII standard] also applies to Title VI disparate treatment claims.”).

Race discrimination in employment and contracting, of course, also violates state law. And State courts frequently look to Title VII to interpret their own prohibitions against race discrimination in employment practices. *See, e.g., Montana State University-Northern v. Bachmeier*, 480 P.3d 233, 246 (Mont. 2021) (“Reference to federal case law is appropriate in employment discrimination cases filed under the [Montana Human Right Act]’ because of the MHRA’s similarity to Title VII of the Civil Rights Act of 1964.”); *Texas Dep’t of State Health Servs. v. Kerr*, 643 S.W.3d 719, 729 (Tex. Ct. App. 2022) (“The Texas Legislature modeled the TCHRA after federal law ‘for the express purpose of carrying out the policies of Title VII of the Civil Rights Act of 1964 and its subsequent amendments.’”); *see also McCabe v. Johnson Cty. Bd. of Cty. Comm’rs*, 615 P.2d 780, 783 (Kan. 1980) (“Federal court decisions under [Title VII], although not controlling, are of persuasive precedential value [in construing the Kansas Act Against Discrimination].”). Likewise, refusing to deal with a customer or supplier or otherwise penalizing them on the basis of race is illegal under the laws of many states. *See, e.g., J.T.’s Tire Service, Inc. v. United Rentals of North America, Inc.*, 985 A.2d 211, 240 (N.J. App. 2010) (holding that New Jersey law “prohibits discriminatory refusals to do business” with any person on the basis of race); *Reese v. Wal-Mart Stores, Inc.*, 73 Cal. App. 4th 1225, 1231 (Cal. Ct. App. 1999) (noting that California law prohibits any “business establishment” from “discriminat[ing] against” or “refus[ing] to buy from, sell to, or trade with any person” because of race); *Mehtani v. New York Life Ins. Co.*, 145 A.D.2d 90, 94 (N.Y. 1989) (noting that New York law defines “unlawful discriminatory practice(s)” to include “discriminat[ing] against,” “refus[ing] to buy from, sell to or trade with, any person” because of race).

Accordingly, the Supreme Court's recent decision should place every employer and contractor on notice of the illegality of racial quotas and race-based preferences in employment and contracting practices. As Attorneys General, it is incumbent upon us to remind *all* entities operating within our respective jurisdictions of the binding nature of American anti-discrimination laws. If your company previously resorted to racial preferences or naked quotas to offset its bigotry, that discriminatory path is now definitively closed. Your company must overcome its underlying bias and treat *all* employees, *all* applicants, and *all* contractors equally, without regard for race.

Social mobility is essential for the long-term viability of a democracy, and our leading institutions should continue to provide opportunities to underprivileged Americans. Race, though, is a poor proxy for what is fundamentally a class distinction. Responsible corporations interested in supporting underprivileged individuals and communities can find many lawful outlets to do so. But drawing crude lines based on skin color is not a lawful outlet, and it hurts more than it helps.

We urge you to immediately cease any unlawful race-based quotas or preferences your company has adopted for its employment and contracting practices. If you choose not to do so, know that you will be held accountable—sooner rather than later—for your decision to continue treating people differently because of the color of their skin.

Sincerely,



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Kansas Attorney General



Jonathan Skrmetti
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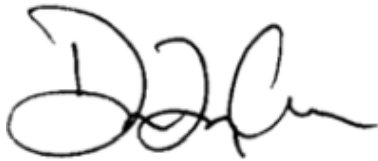
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