



August 29, 2023

Dear Managing Partners, Chairs, and CEOs of American Lawyer (Am Law) 100 Firms:

We, the undersigned Attorneys General of five States, issue this public letter to remind you of your obligations as an employer under federal and state law. Specifically, you owe a duty to refrain from discriminating on the basis of race, whether under the label of “diversity, equity, and inclusion,” or otherwise. Put simply, differential treatment based on race and skin color, even for purportedly “benign” purposes, is unlawful, divisive, and exposes your firm to serious legal consequences, including potentially fines, damages, and injunctive relief.

As you know, in June 2023, the United States Supreme Court issued a sweeping decision in *Students for Fair Admissions v. President & Fellows of Harvard College*, No. 20-1199 (U.S. June 29, 2023) (“*SFFA*”). In striking down Harvard’s and the University of North Carolina’s race-based admissions policies, the Court issued its most definitive statement on the issue of race discrimination in the United States 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 robust 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 write to ensure that you fully comply with your legal duty to treat all individuals equally—without regard to race, color, or national origin—in your employment and contracting practices.

DEPARTMENT OF JUSTICE

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**A. Disturbing Reports have emerged that Racial Discrimination Is Commonplace Among AM Law 100 Firms and Others.**

Sadly, racial discrimination in employment and contracting may be commonplace among AM Law 100 firms and other large businesses.<sup>1</sup> In an inversion of the odious discriminatory practices of the distant past, some of today’s major law firms adopt explicitly race-based initiatives that are just as illegal as discrimination from generations ago. These discriminatory practices include, among other things, explicit racial quotas and preferences in hiring, recruiting, retention, promotion, and advancement. They also include shocking 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 examples illustrate the pervasiveness and explicit nature of these racial preferences. According to a 2023 Bloomberg report:

- 79% of law firms “require diversity within a pool of candidates for management and leadership roles (and of those, an average of 25% of slated candidates must be diverse)”
- 57% of law firms “tie a component of partner compensation to diversity efforts”
- 48% of law firms “say that Practice Group Leaders have clear diversity and inclusion goals included as part of their annual performance review”
- 31% of law firms “shared a specific, time-bound action plan to increase the representation of diverse groups in leadership positions”

*2023 Bloomberg Law Diversity, Equity, and Inclusion Framework, available at <https://assets.bbhub.io/bna/sites/7/2023/07/DEI-Framework-2023-report.pdf>.*

These statistics are supported by specific examples. Baker McKenzie, for instance, has publicly admitted that it has “adopted targets for underrepresented racial and ethnic groups to comprise 15% of Principals, 20% of Local Partners and 15% of leadership by 2025.” Baker McKenzie, *Inclusion, Diversity & Equity: Annual Report 2022*, Oct. 2022, 9, available at <https://www.bakermckenzie.com/-/media/files/newsroom/2022/10/ide-annual-report-2022.pdf>. Similarly, White & Case has committed to misusing “data-driven techniques and concrete action to help recruit, retain and develop Black and minority ethnic talent.” White & Case, *Racial justice and equality, available at*

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<sup>1</sup> Commissioner Andrea Lucas from the U.S. Equal Employment Opportunity Commission recently noted that “Title VII bars ... a host of increasingly popular race-conscious corporate initiatives: from providing race-restricted access to mentoring, sponsorship, or training programs; to selecting interviewees partially due to diverse candidate slate policies; to tying executive or employee compensation to the company achieving certain demographic targets; to offering race-restricted diversity internship programs or accelerated interview processes, sometimes paired with euphemistic diversity ‘scholarships’ that effectively provide more compensation for ‘diverse’ summer interns.” Andrea R. Lucas, *With Supreme Court affirmative action ruling, it’s time for companies to take a hard look at their corporate diversity programs*, Reuters, June 29, 2023, <https://www.reuters.com/legal/legalindustry/with-supreme-court-affirmative-action-ruling-its-time-companies-take-hard-look-2023-06-29/>.

<https://www.whitecase.com/diversity/racial-justice-and-equality>. Another firm, Winston & Strawn, concedes that it is “firmly embedding diversity, equity, and inclusion into the firm’s cultural DNA” and

“back[ing] this up with measurable, high-impact goals and numerous recruitment, retention and advancement initiatives for . . . racial/ethnic minorit[ies].” Winston & Strawn, *Law Firm Diversity and Inclusion*, available at <https://www.winston.com/en/who-we-are/firm-profile/diversity/index.html>.<sup>2</sup>

Some large law firms also sponsor race-based fellowships and programs. Perkins Coie, for example, has an Entrepreneurship Program “to support Black and Latinx [sic] founders and entrepreneurs,” a 1L “Diversity Fellows” Program, a “Supplier Diversity” Program, and acknowledges that it is considering the race of its employers in working to “[i]ncrease diversity in leadership positions and in our equity partner ranks.” Perkins Coie, *Our Commitment to Racial Equality*, available at <https://www.perkinscoie.com/en/about-us/firm/commitment-to-racial-equality/our-commitment-to-racial-equality.html>. Another firm, Shook, Hardy & Bacon, similarly sponsors a “diversity fellowship” program, “diversity scholarships,” and a “diversity retreat.” Shook, Hardy & Bacon, *Diversity and Inclusion*, available at <https://www.shb.com/about/diversity>. Separately, Husch Blackwell prepares an “Inclusion Index” that quantifies the number of its attorneys who are non-Caucasian and/or have specific sexual orientations or gender identities. Based on these characteristics, the firm acknowledges that it seeks to staff certain attorneys on client matters, and that data “is reported to attorneys managing those accounts to assist them with assessing their utilization of diverse attorneys on their matters and in comparison with the firm’s percentage of diverse attorneys.” Husch Blackwell, *Diversity | Inclusion Advancement & Retention*, available at <https://www.huschblackwell.com/ourfirm/advancement-and-retention>.

Hundreds of law firms, including many of you, have sought and achieved a certification under the so-called Mansfield Rule, which asserts that its goal is to correct the perceived “imbalance” of law firm leadership not “reflect[ing] the diversity of the workforce or society.” *Mansfield Overview*, Diversity Lab, available at <https://www.diversitylab.com/pilot-projects/mansfield-overview/>. To obtain Mansfield Certification, law firms engage in a process in which they are required to consider a minimum of 30% “diverse” candidates—defined as women, non-Caucasians, individuals who identify as gay, lesbian, bisexual, transgender, queer, or questioning, or individuals with disabilities—in a hiring pool, and meet periodic

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<sup>2</sup> As the Civil Rights Division of the Justice Department noted during a recent en banc oral argument at the Fifth Circuit, “if ‘a law firm is having a lunch to do CLEs and you have a policy that says we’re only going to invite women but not men to this CLE lunch, that’s of course actionable, and that’s of course a term, condition, or privilege of employment’ under Title VII.” *Hamilton v. Dallas County*, No. 21-10133, slip. op. at 25 (Aug. 18, 2023) (Ho, J., concurring) (quoting Audio of Oral Arg. 23:00–23:29). Moreover, “[t]he Justice Department agreed that ‘a lot of law firms do that.’” *Id.* (quoting Audio of Oral Arg. 23:00–23:29 25:35.). CLE programs or other firm events that exclude individuals on the basis of race are likewise actionable under Title VII.

data collection and reporting milestones.<sup>3</sup> “Mansfield Plus” Certification is awarded to firms that maintain at least 30% “diverse” lawyer representation in their leadership roles.<sup>4</sup>

These programs were already questionable before the Supreme Court’s decision in *SFFA*; now, they are unambiguously in tension with employer legal duties under state and federal law. Indeed, American Bar Association President Mary Smith recognized that “[i]n the wake of the Supreme Court decision in [*SFFA*], the legal profession needs to review its programs and identify ways to comply with the law.”<sup>5</sup> Yet despite employing race-based policies and programs, some law firms have opted to flout the law, and indicated they were preparing to continue their efforts regardless of the Supreme Court’s ruling in *SFFA*. For example, three weeks before the Supreme Court’s decision in *SFFA*, Morrison Foerster’s Chief Diversity and Inclusion Officer incorrectly predicted that “the upcoming SCOTUS verdict will have no bearing on Morrison Foerster’s commitment to DEIA, nor will it impact the work that is being done to increase diversity at the firm.” Morrison Foerster, *Law Firms Must Rise to Challenge if Affirmative Action Ends, DEI Officers Say*, June 8, 2023, available at <https://www.mofo.com/resources/news/230608-law-firms-must-rise>.

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

Such overt and pervasive racial discrimination in the employment and contracting practices of some AM Law 100 firms compels us to remind you of the obvious: Racial discrimination is illegal, divisive, and inconsistent with progress toward colorblindness. Race-based employment and contracting violate both state and federal law, and as the chief law enforcement officers of our respective states, we are committed to vigorously enforcing the law. “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.

Most notably, Title VII of the Civil Rights Act of 1964 prohibits race 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

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<sup>3</sup> Julia DiPrete, *What is Mansfield Certification and Why is it so Important for Law Firms?*, FIRSTHAND, Dec. 9, 2022, available at <https://firsthand.co/blogs/vaults-law-blog-legal-careers-and-industry-news/what-is-mansfield-certification-and-why-is-it-so-important-for-law-firms>.

<sup>4</sup> *Id.*

<sup>5</sup> Statement of ABA President Mary Smith RE: Diversity programs at law firms, American Bar Association (Aug. 25, 2023), <https://www.americanbar.org/news/abanews/aba-news-archives/2023/08/statement-of-aba-president-re-diversity-programs-law-firms/>.

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 said in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 746 (2007) (plurality opinion):

[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).

Race discrimination based on an asserted commitment to "diversity" 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 (plurality opinion).

*SFFA*'s sweeping decision leaves no doubt that the consideration of race is generally illegal: "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. Before *SFFA*, the Court had announced 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 this argument itself “rest[ed] on [a] pernicious stereotype.” *SFFA*, 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 the preferred racial groups, based only on 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.

Some of your law firms have justified racial employment practices by claiming they are “integral to the quality of legal services we provide to our global client base” because they provide “diversity of thought, approach, ability, and knowledge.” *See, e.g.*, Sidley Austin, *Diversity, Equity & Inclusion*, available at <https://www.sidley.com/en/us/diversitylanding/>. This defense is unavailing after *SFFA*. As for Harvard’s unlawful admissions program, the Supreme Court held firmly 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.” *SFFA*, slip op. at 32 n.7 (majority opinion). Playing this “numbers game” is flagrantly illegal: “[O]utright racial balancing” is “patently unconstitutional.” *Id.* at 32.

Beyond the Supreme Court’s renunciation of the same types of “holistic practices,” law firm explanations for racial employment practices are both offensive and illogical. Harvard’s and UNC’s racial categories were incoherent, treating approximately 60% of the global population as fitting within one broad category—“Asian.” And if definitive racial classifications were possible, such classifications would be immaterial in the legal context. Diversity of thought and experience may very well be valid commercial objectives, and they may be shaped by an individual’s unique circumstance. The color of a person’s skin, however, does not determine how well he or she can draft a contract or interpret a statute. Nor do hiring decisions based on a person’s race inherently equate to viewpoint diversity.

Let there be no confusion: The Supreme Court’s principles in *SFFA* apply equally to Title VII and other laws restricting race-based discrimination in employment and contracting. Courts routinely interpret Title VI and Title VII alongside each other, adopting the same principles and interpretation for both statutes.<sup>6</sup> See, e.g., *SFFA*, slip op. at 4 (Gorsuch, J., 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 often look to Title VII to interpret their own prohibitions against race discrimination in employment practices. See, e.g., *Montana State Univ.-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 Am., 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, *SFFA* places every employer and contractor, including law firms, on notice of the illegality of racial quotas and race-based preferences in employment and contracting practices. Failure to stop racially discriminatory employment practices may result in lawsuits by employees or applicants for discrimination under federal or state anti-discrimination laws; investigations by state human rights commissions; injunction proceedings by state human rights commissions or state attorneys general; and/or administrative hearings

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<sup>6</sup> Unlike Title VII, however, Title VI doesn’t impose any disparate impact liability. Compare 42 U.S.C. § 2000e-2(k)(1)(A)(i) with 42 U.S.C. § 2000d *et seq.*; see also, e.g., *Mumid v. Abraham Lincoln High Sch.*, 618 F.3d 789, 794 (8th Cir. 2010) (“Title VI prohibits only intentional discrimination. Proof of disparate impact is not sufficient.”).

before state human rights commissions. In addition, many of our states include non-discrimination clauses in contracts. Failure to comply with the Supreme Court's ruling may impact a law firm's ability to enter into or continue current contracts with states or localities.

Finally, we note that the use of some DEI programming in the workplace may discriminate on the basis of race, color, or national origin in violation of Title VII and state law. Title VII protects an employee's the right to a working environment free of racial discrimination. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (relying on *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971) (race discrimination can consist of an "environment heavily charged with ethnic or racial discrimination"), *cert. denied*, 406 U.S. 957 (1972)); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993) (reiterating *Meritor* standard); *Gray v. Greyhound Lines, E.*, 545 F.2d 169, 176 (D.C. Cir. 1976) (noting with approval that EEOC has consistently held that Title VII gives employees the right to a working environment free of racial intimidation).

Activities that utilize racial segregation, race stereotyping, and race scapegoating may violate civil rights laws because they can create a hostile environment and/or involve activities that result in different treatment on the basis of race.<sup>7</sup> This is particularly true when participation in such exercises is compulsory. This includes exercises that ascribe specific characteristics or qualities to all members of a racial group. Individuals cannot be forced to "reflect," "deconstruct," or "confront" their racial identities or be instructed to be less of any race, ethnicity, or national origin. Trainings may not assign fault, blame, or bias to a race or to members of a race because of their race. This encompasses any claim that, consciously or unconsciously, and because of his or her race, members of any race are inherently racist or are inherently inclined to oppress others. An employer that permits trainings that tell an individual that he or she should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race, likely creates a racially hostile environment. *See, e.g., Gilbert v. Little Rock*, 722 F.2d 1390, 1394 (8th Cir. 1983) (environment "which significantly and adversely affects the psychological well-being of an employee because of his or her race" is enough to constitute Title VII violation); *Bundy v. Jackson*, 641 F.2d 934, 943-45 (D.C. Cir. 1981) (protection against race and sex discrimination extends to "psychological and emotional work environment").

## Conclusion

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 law firm previously resorted to racial preferences or naked quotas, that path is now definitively closed. Employers, including large law firms, are legally obligated to treat *all* employees, *all* applicants, and *all* contractors equally, without regard to an individual's race or skin color.

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<sup>7</sup> *See, e.g.,* 58 Op. Atty Gen. Mont. No. 1; 21 Ark. Att'y Gen Op., No. 042.

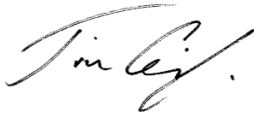


We strongly advise you to immediately terminate any unlawful race-based quotas or preferences that your firm has adopted for its employment and contracting practices. If you choose not to do so, know that you will be held accountable—sooner rather than later—for treating individuals differently because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

Sincerely,



Austin Knudsen  
Attorney General to Montana



Tim Griffin  
Attorney General of Arkansas



Brenna Bird  
Attorney General of Iowa



Kris Kobach  
Attorney General of Kansas



Daniel Cameron  
Attorney General of Kentucky