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Dear Fortune 100 CEOs,

We recently reviewed a letter sent to you by 13 state attorneys general, purporting to remind you of your obligations as an employer under federal and state law to refrain from discriminating on the basis of race. While we agree with our colleagues that “companies that engage in racial discrimination should and will face serious legal consequences,” we are focused on actual unlawful discrimination, not the baseless assertion that any attempts to address racial disparity are by their very nature unlawful. We condemn the letter’s tone of intimidation, which purposefully seeks to undermine efforts to reduce racial inequities in corporate America. As the chief legal officers of our states, we recognize the many benefits of a diverse population, business community, and workforce, and share a commitment to expanding opportunity for all.

We applaud the Fortune 100 for your collective efforts to address historic inequities, increase workplace diversity, and create inclusive environments.<sup>1</sup> These programs and policies are ethically responsible, good for business, and good for building America’s workforce.<sup>2</sup> Importantly, these programs also comply with the spirit and the letter of state and federal law.

The letter you received from the 13 state attorneys general is intended to intimidate you into rolling back the progress many of you have made. We write to reassure you that corporate efforts to recruit diverse workforces and create inclusive work environments are legal and reduce corporate risk for claims of discrimination.<sup>3</sup> In fact, businesses should

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<sup>1</sup> Cision PR Newswire, “New Data From Deloitte and the Alliance for Board Diversity (ABD) Reveals Continued Focus is Necessary for Fortune 500 Boards to be More Representative of the US Population,” June 15, 2023, available at <https://www.prnewswire.com/news-releases/new-data-from-deloitte-and-the-alliance-for-board-diversity-abd-reveals-continued-focus-is-necessary-for-fortune-500-boards-to-be-more-representative-of-the-us-population-301851560.html>.

<sup>2</sup> Forbes, “Harnessing The Power Of Diversity For Profitability,” March 3, 2022, available at <https://www.forbes.com/sites/forbesbusinesscouncil/2022/03/03/harnessing-the-power-of-diversity-for-profitability/>

<sup>3</sup> The U.S. Equal Employment Opportunity Commission advises that to reduce the risk of employment discrimination claims, businesses should, “[r]ecruit, hire, and promote with EEO principles in mind, by implementing practices designed to widen and diversify the pool of candidates considered for employment openings, including openings in upper level management.” See U.S. Equal Employment Opportunity Commission, “*Best practices for employers and human resources/eo professionals*,” available at <https://www.eeoc.gov/initiatives/e-race/best-practices-employers-and-human-resources/eo-professionals>.

double-down on diversity-focused programs because there is still much more work to be done.

## **I. Corporate Diversity Programs are Lawful and Serve Important Public and Business Purposes.**

Many of your companies engage in a wide variety of programs meant to provide opportunities for success for historically underrepresented communities, including women, Black/African Americans, Latinos/Hispanics, Asian Americans and Pacific Islanders, Native Americans, people who identify as LGBTQ+, and others. These programs take on many forms, but all meet important business and workforce needs.

Efforts by private sector employers to foster and support diversity and address racial inequities are even more important in the aftermath of the United States Supreme Court's recent opinion in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, Case Nos. 20-1199, 21-707 (June 29, 2023) ("*SFFA*"). As recognized in *SFFA*, our nation's history is replete with instances of discrimination against disfavored minorities. And racial inequity is not only a problem of our country's distant past. Justice Thomas acknowledges in *SFFA* that he is "painfully aware of the social and economic ravages which have befallen my race and all who suffer discrimination[.]" *SFFA*, slip op. at 58 (Thomas, J., concurring). Justice Kavanaugh underscores that "racial discrimination still occurs and the effects of past racial discrimination still persist." *Id.* at 8 (Kavanaugh, J., concurring). Justice Jackson details historical and current racial disparities, emphasizing that "[g]ulf-sized race-based gaps exist with respect to the health, wealth, and well-being of American citizens. They were created in the distant past but have indisputably been passed down to the present day through the generations." *Id.* at 1 (Jackson, J., dissenting). Racial inequity is sadly both a problem from our nation's distant past and, as the above Justices recognize, a persistent problem today.

To be clear, *SFFA* does not directly address or govern the behavior or the initiatives of private sector businesses. *SFFA* held that two universities' admissions systems, which the Court characterized as "race-based," violated the Equal Protection Clause and Title VI of the Civil Rights Act of 1964, 42 U.S.C. sec. 2000d et seq. *SFFA*, slip op. at 8, 21. Private sector employers continue to be subject to the requirements of Title VII of the Civil Rights Act of 1964, 42 U.S.C. sec. 2000e et seq., and 42 U.S.C. sec. 1981, as they always have been.<sup>4</sup> It is irresponsible and misleading to suggest that *SFFA* imposes additional prohibitions on the diversity, equity, and inclusion initiatives of private employers. In fact, following *SFFA*, the U.S. Equal Employment Opportunity Commission issued a statement clarifying that, "[i]t remains lawful for employers to implement diversity, equity, inclusion,

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<sup>4</sup> Congress, in Title VI, 42 U.S.C. § 2000d-3, ensured that merely receiving federal financial assistance would not incidentally render an employer subject to the commands of Title VI rather than Title VII.

and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace.”<sup>5</sup>

**A. Diversity, Equity, and Inclusion Efforts Remain Vital to the Well-being of Our Society, both Socially and Economically.**

As state attorneys general, we are responsible for protecting the well-being of our residents, especially those who face inequitable treatment and discrimination. Promoting diversity, equity, and inclusion is thus a top priority in our states. We also recognize that, for private sector employers, diversity is an important, legitimate, and valid business interest, as well established by decades of research.<sup>6</sup> Affirmative efforts by private sector businesses to diversify their workforces remain vital both morally—to address past and present discrimination—and economically—to achieve a healthy economy and productive workforce.

“[S]egregation by race was declared unconstitutional almost a century ago, but its vestiges remain . . . intertwined with the country’s economic and social life.” *Texas Dep’t of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 528 (2015). As Justice Jackson explains in her dissent in *SFFA*, “[a]lthough formal race-linked legal barriers are gone, race still matters to the lived experiences of all Americans in innumerable ways.” *SFFA*, slip op. at 25 (Jackson, J., dissenting). Indeed, race and racism continue to play a role in exacerbating inequities in health, housing, employment and business, and other areas of life.

Diversity initiatives in the workplace help combat these inequities. As a result of these efforts, corporate America has grown more diverse and more representative of American society. The economies of our states have likewise benefited from diversity and inclusion, as workers share their diverse beliefs, experiences, and ideas, becoming better informed, more creative, and ultimately, more productive. Diversity initiatives raise awareness of the value of collaborating with people of different cultures, backgrounds, perspectives, experiences, races, and ethnicities. They build diverse teams and a workforce that understands its customers—a business imperative. Companies’ efforts to foster diversity in the workplace also help to expand markets and attract diverse talent to our states. Now more than ever, private sector employers play a crucial role in establishing and maintaining the societal and economic benefits of diversity. These are critically important business interests that help our economies thrive.

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<sup>5</sup> U.S. Equal Employment Opportunity Commission, “Statement from EEOC Chair Charlotte A. Burrows on Supreme Court Ruling on College Affirmative Action Programs,” June 29, 2023, available at <https://www.eeoc.gov/newsroom/statement-eeoc-chair-charlotte-burrows-supreme-court-ruling-college-affirmative-action>.

<sup>6</sup> See, e.g., *Global Parity Alliance: Diversity, Equity and Inclusion Lighthouses 2023*, World Economic Forum, [https://www3.weforum.org/docs/WEF\\_Global\\_Parity\\_Alliance\\_2023.pdf](https://www3.weforum.org/docs/WEF_Global_Parity_Alliance_2023.pdf).

**B. *SFFA* Does Not Prohibit, or Even Impose New Limits on, the Ability of Private Employers to Pursue Diversity, Equity, and Inclusion Initiatives.**

Properly read, *SFFA* provides no basis to conclude that a company's efforts to reach and recruit from a broad and diverse applicant pool is now prohibited. Private companies remain free to expand access to employment and contracting opportunities, subject to the same limitations under Title VII and Section 1981 that have applied to them for over half a century.

Leading companies have long set diversity-related goals and operated successful and lawful diversity, equity, and inclusion programs under the guidance of Title VII. Properly formulated and administered programs are not unconstitutional. *See, e.g., Iadimarco v. Runyon*, 190 F.3d 151, 164 (3d Cir. 1999) (finding that a memo outlining diversity goals is not prima facie evidence of discrimination and recognizing that “[a]n employer has every right to be concerned with the diversity of its workforce, and the work environment”); *Reed v. Agilent Techs, Inc.*, 174 F. Supp. 2d 176, 185-86 (D. Del. 2001) (rejecting plaintiff's contention that the defendant company's diversity policy was prima facie evidence of discrimination and stating that “evidence regarding the aspirational purpose of an employer's diversity policy, and its intent to ameliorate any underutilization of certain groups, is not sufficient” to establish a violation of Title VII). Private sector employers should continue to be aware of the demographics of their workforce and their contracting partners, and make efforts to recruit, attract, and retain diverse workforces, consistent with the strictures of Title VII and Section 1981.

**C. Private Employers Retain Many Tools to Continue the Important Work of Diversifying Their Workforces.**

Irrespective of *SFFA*, hiring decisions made on the basis of race are prohibited under Title VII and have been for decades. Of course, consistent with Title VII, private employers can, should — and in some circumstances, *must* — identify arbitrary and unnecessary barriers to diversity, equity, and inclusion in the workplace and develop solutions to address those issues. Removing barriers does not constitute an act of racial discrimination. Companies remain free to remedy historic inequities by: (a) adjusting recruiting practices, (b) developing better retention and promotion strategies, and/or (c) furthering leadership development and accountability. Companies need not don a veil of ignorance and pretend that racial inequities do not exist.

No organization should hire an employee solely based on the individual's race. Private sector employers can and should, however, identify problems that have created racial and other disparities in the past and develop solutions to address them. Likewise, businesses can, consistent with the law, identify barriers to advancement in the employment and contracting pipelines and adjust recruiting, retention, and leadership accordingly. Such efforts are not only legal but constitute an appropriate moral and ethical response to the ongoing problem of racial inequity in our society. In short, businesses can

improve their own bottom line and the experiences of their employees through mentoring, training, and leadership programs that include diversity, equity, and inclusion as goals. Such race-neutral programs—that improve outcomes for all—do not run afoul of the law.

In pursuing diversity efforts, we encourage businesses not to ignore the specific challenges that Black workers have faced and continue to face as the result of decades of past discrimination in many industries. Given that reality, race-neutral inclusion efforts are not properly characterized as improper “racial quotas” merely because they may lead to some benefit for Black workers. *SFFA* acknowledges that our society has a compelling interest in “remediating specific, identified instances of past discrimination that violated the Constitution or a statute.” *SFFA*, slip op. at 15. Decades of discrimination in the labor market, as well as in other areas of society, have led to a massive and persistent racial wealth gap between Black and white Americans, one that remains roughly the same today as it was two years before the Civil Rights Act was passed in 1964. *See* Fed. Reserve Bank of Cleveland, “What is Behind the Persistence of the Racial Wealth Gap?” (Feb. 28, 2019).<sup>7</sup> Given this large and persistent wealth and income gap, race-neutral efforts to address industry barriers are likely to enhance diversity, particularly among those who have been most marginalized in the past.

#### **D. Improving Diversity Makes Good Business Sense.**

The diversity efforts of private sector employers remain vital to a healthy economy and productive workforce. *See, e.g.*, “The Other Diversity Dividend,” *Harvard Business Review*, July–August 2018; “Why Diverse Teams Are Smarter,” *Harvard Business Review*, November 4, 2016; “Diverse Teams Feel Less Comfortable—and That’s Why They Perform Better,” *Harvard Business Review*, September 22, 2016. Diverse teams are not just for appearances; they make bottom-line sense for businesses. In the venture-capital world, for example, research shows that “[d]iversity significantly improves financial performance on measures such as profitable investments at the individual portfolio-company level and overall fund returns.” *See id.*, “The Other Diversity Dividend.”

Efforts to improve diversity, equity and inclusion have been found to further important business objectives. For instance, JPMorgan Chase found that its intern pool became more diverse after it adopted the race-neutral approach of recruiting from a larger pool of schools. The bank found that diversity was a welcome benefit of focusing recruitment on “skills . . . previous experiences . . . [and] ability to articulate . . . competencies for the role, rather than . . . assuming them based upon the school” intern candidates attended. Hugh Son, “How JPMorgan Increased the Number of Black Interns in Its Wall Street Program by Nearly Two-Thirds”, *CNBC*, (April 9, 2021) (quoting Rob Walke, global head of campus recruiting).<sup>8</sup> In short, JP Morgan Chase found that using race-neutral, relevant

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<sup>7</sup> Available at <https://www.clevelandfed.org/newsroom-and-events/publications/economiccommentary/2019-economic-commentaries/ec-201903-what-is-behind-the-persistence-of-the-racialwealth-gap.aspx>.

<sup>8</sup> *CNBC*, “How JPMorgan increased the number of Black interns in its Wall Street program by nearly two-thirds,” April 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>.

criteria to recruit interns led to a remarkable increase in the percentage of Black and female interns selected.

## **II. Hollow Claims of Unlawful Discrimination Against White People at Fortune 100 Companies Do Not Change the Fact that Women and People of Color Continue to Face Barriers in the Workplace.**

The July 13th letter claims that the existence of a few scattered articles evidences “commonplace,” “overt,” and “pervasive” discrimination by Fortune 100 companies against white people. We urge you not to allow these false claims to prevent you from continuing in your lawful efforts to foster diversity. The letter’s attempts to equate these permissible diversity efforts with impermissible hiring quotas is a clear effort to block opportunities for women and people of color—especially Black people. Aspirational diversity goals and concerted recruitment efforts to increase the diversity of a company’s workforce are not hiring quotas, which were already unlawful under Title VII of the Civil Rights Act of 1964, well before *SFFA*.

Since this nation’s inception, racism has been a part of our policies, our institutions, and our communities—and businesses are no exception. Racial preferences are pervasive in both businesses and boardrooms, preferences that unequivocally and overwhelmingly favor white people, particularly white men. A 2021 Washington Post analysis of 50 of the world’s most valuable companies revealed that only 8 percent had Black C-suite executives.<sup>9</sup> A 2023 Harvard Law School study analyzing 1,500+ executives at the 100 largest companies in the S&P 500 showed that only 23% of the C-Suite were Asian, Black, Hispanic, or Latino.<sup>10</sup> For too long, employment and leadership opportunities at many of your companies were reserved for white men. White men continue to dominate leadership roles in Fortune 100 companies. A 2022 report on the diversity of CEOs at Fortune 100 Companies found that only 12% were women, despite women representing more than 50% of the population of the United States; and only 14% were not white, despite more than 40% of the U.S. comprising of individuals who are not white.<sup>11</sup> Only 3% were Black, despite representing 14% of the U.S. population.

The impact this disparity has on women and communities of color cannot be overstated. A 2020 survey indicates that about 1 in 4 Black (24%) and Hispanic employees

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<sup>9</sup> The Washington Post, “The striking race gap in corporate America,” December 15, 2021, available at, <https://www.washingtonpost.com/business/interactive/2021/black-executives-american-companies/>.

<sup>10</sup> Harvard Law School Forum on Corporate Governance, “How To Fix The C-suite Diversity Problem,” February 23, 2023, available at <https://corpgov.law.harvard.edu/2023/02/25/how-to-fix-the-c-suite-diversity-problem/#:~:text=The%20headline%20finding%20is%20that,in%20most%20C%2Dsuite%20positions>.

<sup>11</sup> Cision PR Newswire, “Diversity Stagnant Among Fortune 100 Leaders Despite Belief That DE&I Is a Key Contributor to Business Success, Reveals Heidrick & Struggles’ Route to the Top 2022,” November 17, 2022, available at [Reporthttps://www.prnewswire.com/news-releases/diversity-stagnant-among-fortune-100-leaders-despite-belief-that-dei-is-a-key-contributor-to-business-success-reveals-heidrick--struggles-route-to-the-top-2022-report-301681143.html](https://www.prnewswire.com/news-releases/diversity-stagnant-among-fortune-100-leaders-despite-belief-that-dei-is-a-key-contributor-to-business-success-reveals-heidrick--struggles-route-to-the-top-2022-report-301681143.html).

(24%) in the U.S. report having been discriminated against at work in the past year.<sup>12</sup> Furthermore, 75% of the Black workers who reported being discriminated against indicated the discrimination they experienced was based on their race or ethnicity.

### **III. The July 13th Letter Is an Attempt to Intimidate the Businesses and Workers of America—And We Will Fight Back.**

The July 13th letter is disguised as providing information regarding anti-discrimination law, but it in fact takes direct aim at efforts to broaden recruitment and address inequities meant to break down historic barriers—efforts that are consistent with controlling law. While the letter asks you to adhere to “race-neutral principles in your employment and contracting practices,” the only employment and contracting practices the letter expresses concern about are those that advance opportunity for people of color. The very fact that many of your companies have expressed support for ending historic disparities through providing opportunities for people of color offends the authors of the July 13th letter. And, the 13 attorneys general reserve their greatest offense for the programs that provide opportunities for Black people.<sup>13</sup> We find this alarming, coming from state attorneys general who should be champions of civil rights and racial progress.

Rest assured that we are committed to fighting against discrimination and to expanding opportunities for all. We will vigorously oppose any attempts to intimidate or harass businesses who engage in vital efforts to advance diversity and expand opportunities for the nation’s workforce.

Sincerely,



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<sup>12</sup> Gallup, “One in Four Black Workers Report Discrimination at Work,” January 12, 2021, available at <https://news.gallup.com/poll/328394/one-four-black-workers-report-discrimination-work.aspx>.

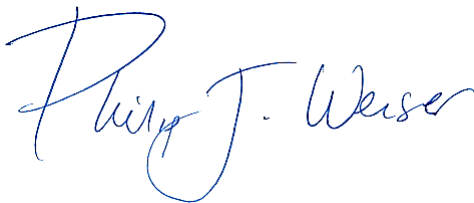
<sup>13</sup> The attorneys general cite news reports that raise such alarm for them, which include the titles, “Corporate America Looks to Hire More Black People” and “How JPMorgan Increased the Number of Black Interns in Its Wall Street Program by Nearly Two-Thirds”; additionally, they call out Microsoft’s program to increase the number of Black-owned approved suppliers.



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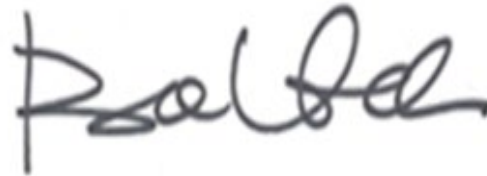
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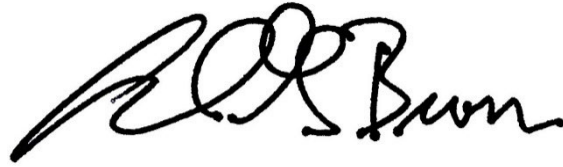


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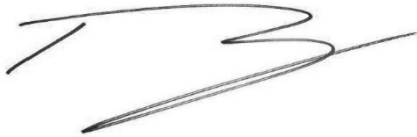
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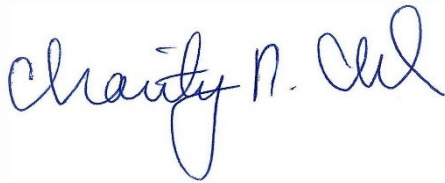
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