January 5, 2024

SUBMITTED ELECTRONICALLY
VIA REGULATIONS.GOV

Ms. Brandee Anderson
Senior Advisor to the Deputy Secretary
U.S. Department of Commerce
1401 Constitution Ave NW
Washington, DC 20230

RE: U.S. Department of Commerce Notice Entitled *Business Diversity Principles*, 88 Fed. Reg. 83,380 (Nov. 29, 2023), DOC-2023-0003

Dear Ms. Anderson:

The Attorneys General of Kansas, Montana, and Tennessee, joined by 16 co-signing States, welcome the chance to comment on the U.S. Department of Commerce's draft "Business Diversity Principles," through which the Department ostensibly seeks to advance "best practices related to diversity, equity, inclusion, and accessibility (DEIA) in the private sector."[1] The proposed Business Diversity Principles would incorporate a host of race-based DEIA measures and goals, including by pushing businesses to:

- implement "clear strategies to increase diversity among the organization[s'] executive ranks" and "strive to meet diversity targets in their long-term workforce plans";
- ensure that leaders "model equitable and inclusive behavior" and heed "DEIA professionals";
- hold executives accountable for failing to meet DEIA goals through "performance evaluations and compensation"; and
- assess DEIA performance using "demographic data across all levels and departments."[2]

This proposal, the Department asserts, helps carry out early-2021 Executive Orders outlining the Biden-Harris Administration's "ambitious, whole-of-government approach to racial equity" and directive to "continuously embed[] equity into all aspects of Federal decision-making."[3]

We endorse the value of promoting meaningful diversity of experience, thought, and background among the public- and private-sector workforce. But race is both a poor and unlawful proxy for achieving that end. As we previously warned employers in prior letters, attached as Exhibit A and incorporated by reference, "discriminating on the basis of race" is illegal and wrong, "whether

[1] *See* 88 Fed. Reg. 83,380, 83,380 (Nov. 29, 2023).
[2] *Id.* at 83,381; McKinsey & Company, *Diversity Wins: How Inclusion Matters* (2020) (cited at 88 Fed. Reg. 83,380 n.1).
[3] 88 Fed. Reg. at 83,380 (quoting Executive Orders 13985 & 14091).

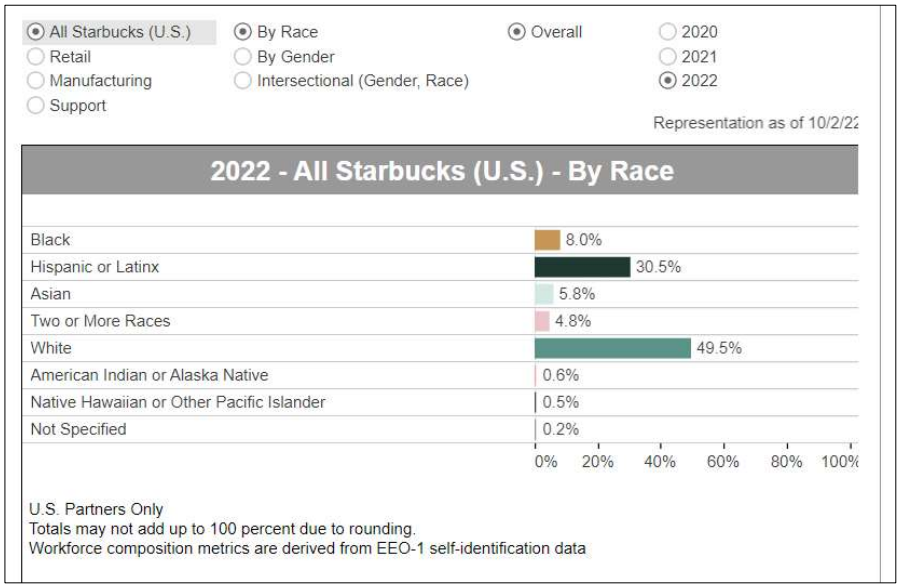
under the label of 'diversity, equity, and inclusion' or otherwise." That same critique applies to the Department's proposed Business Diversity Principles, which appear to advocate for explicitly race-based employment quotas and decision-making. We write to briefly reiterate the significant legal defects with the Department's proposal to push race-based discrimination to advance the Department's DEIA agenda.

***First*, the Department's proposed race-based employment policies violate the U.S. Constitution's Equal Protection Clause.** In exclusively citing early-2021 Executive Orders regarding racial equity, the Department omits a landmark constitutional development: The Supreme Court's 2023 decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 143 S. Ct. 2141 (2023) (*SFFA)*, which invalidated the use of race in educational affirmative-action programs. *SFFA* noted that the "daunting" strict-scrutiny standard applies to *all* racial classifications—whether benign or malevolent in motive—because "[d]istinctions 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."[4] And the Court emphasized that this commitment to racial equality extends "to other areas of life" such as employment.[5]

In its rush to advance race-based decision-making, the Department's notice fails to acknowledge these core constitutional limits on the government's use of race. The result is a stark disconnect between the Department's proposed Business Diversity Principles and governing equal-protection law as set out by *SFFA*. To ensure *SFFA*'s constitutional limits on the use of race have not slipped under the Department's radar, we have enclosed the opinion as Exhibit B for review.

***Second*, race-based employment decision-making violates Title VII and related civil-rights laws.** *SFFA* makes clear that Title VII of the Civil Rights Act of 1964 and other federal civil-rights statutes bar private-sector race discrimination to at least the same extent as the Equal Protection Clause.[6] Yet under the rubric of DEIA, racial discrimination in employment is all too common among Fortune 100 companies and other large businesses. Employers from Airbnb, to Google, to Netflix, to Uber have championed fine-tuned racial tracking in recruitment, hiring, and promotion, among other areas. Some, like Starbucks, even report their fulfilment of racial and other "[i]ntersectional" quotas using interactive tools and charts[7]:

[4] *Id.* at 2160, 2162 (quotation omitted).
[5] *Id.* at 2160.
[6] *See SFFA*, 143 S. Ct. at 2156 n.2.
[7] *See* Starbucks, *Workforce Diversity at Starbucks* (Apr. 2, 2023), https://stories.starbucks.com/stories/2023/workforce-diversity-at-starbucks/.



Make no mistake: Express racial quotas have *never* been lawful, even in the legal landscape prior to *SFFA*.[8] Nor is there any affirmative "DEIA defense" under Title VII or 42 U.S.C. § 1981 for race-based decision-making or contracting. The U.S. Solicitor General's Office recently reiterated as much, noting that Title VII's "bona fide occupational qualification" defense excludes race-based employment decisions.[9] As such, any race-based decision—even with the aim of "diversifying the workforce" consistent with DEIA dictates—would violate the "clear text" of Title VII.[10] It is no surprise, then, that in a series of recent lawsuits, law firms and other employers have quickly folded or altered race-based employment programs rather than defend their legality.[11] That not even some of the nation's leading law firms can craft a colorable defense to race-based DEIA efforts speaks volumes about their lack of legal footing.

In short, federal law makes clear that well-intentioned racial discrimination is just as illegal as invidious discrimination.[12] One thus might have hoped the Department would pivot away from illegal racial measures and towards diversity efforts that are consistent with current equal-protection and statutory limits on private-sector employers' use of race. But the proposed Business Diversity Principles instead double down on discrimination. The Department for instance encourages the setting of "diversity targets"—*i.e.*, racial quotas—for all manner of employment positions, as well as tracking such targets using "demographic data across all levels and departments" and DEIA

[8] *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 742 (2007) (plurality op.) ("This 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." (citation omitted)).

[9] Transcript of Oral Argument at 44, *Muldrow v. St. Louis*, No. 22-193 (U.S. Dec. 6, 2023) (discussing 42 U.S.C. § 2000e-2(e)).

[10] *Id.* at 44-45.

[11] *See, e.g.*, Tatyana Monnay, *Blum's Group Drops DEI Lawsuit Against Morrison Foerster* (Oct. 6, 2023), http://tinyurl.com/bce7prmk (lawsuit dropped after Morrison Foerster "changed the eligibility criteria for its diversity, equity and inclusion fellowship" to be "race and gender neutral"); Tatyana Monnay, *Blum Says He's Done Suing Law Firms as Winston Yields on DEI* (Dec. 6, 2023), http://tinyurl.com/yduabk3u (same, for Perkins Coie and Winston & Strawn).

[12] *See Parents Involved in Cmty. Sch.*, 551 U.S. at 742; *see also SFFA*, 143 S. Ct. at 2166.

"toolkits."[13] If, as it appears, the Department's proposed Business Diversity Principles advocate express race-based measures in the employment or contracting space, those principles would plainly violate federal law. The Department's final Business Diversity Principles should therefore clarify that employers must at a minimum use non-race-based measures of diversity like socioeconomic status, educational background, and geography. To do otherwise propagates harmful racial stereotypes and detrimentally directs businesses into a cycle of unlawful behavior and unnecessary litigation.

***Third*, the discrimination that "cannot be done directly" under governing law also "cannot be done indirectly" through end-run means consciously aimed at satisfying racial targets.**[14] Strict scrutiny generally applies "to a classification that is ostensibly neutral but is a[] . . . pretext for racial discrimination."[15] Thus, the Department also should not endorse superficially race-neutral measures that have the purpose of influencing the racial makeup of employers' workforces or supplier bases.

To sum up in the Supreme Court's words, "[e]liminating racial discrimination means eliminating all of it."[16] That should—and legally, must—be square one for any employment "best practices" the Department promulgates. We hope to work with the Department to promote meaningful diversity efforts that abide governing federal- and state-law limits. In the meantime, we will continue to oppose measures—like the Department's proposed Business Diversity Principles—that perpetuate unlawful treatment of individuals on the basis of race.

Sincerely,

Kris W. Kobach
Kansas Attorney General

Austin Knudsen
Montana Attorney General

Jonathan Skrmetti
Tennessee Attorney General & Reporter

Steve Marshall
Alabama Attorney General

Tim Griffin
Arkansas Attorney General

[13] 88 Fed. Reg. at 83,380 n.1 (citing McKinsey & Company, *supra*); *id.* at 83,381.
[14] *SFFA*, 143 S. Ct. at 2176 (quotations omitted).
[15] *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979); *see also Hunt v. Cromartie*, 526 U.S. 541, 546 (1999).
[16] *SFFA*, 143 S. Ct. at 2161.

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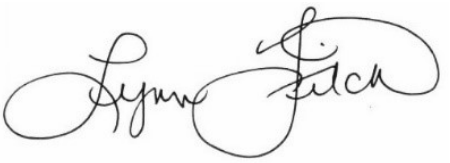

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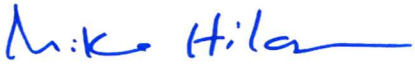

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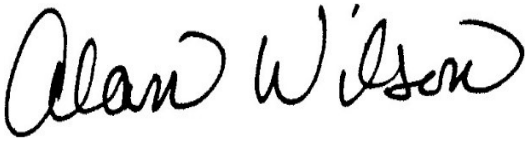

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