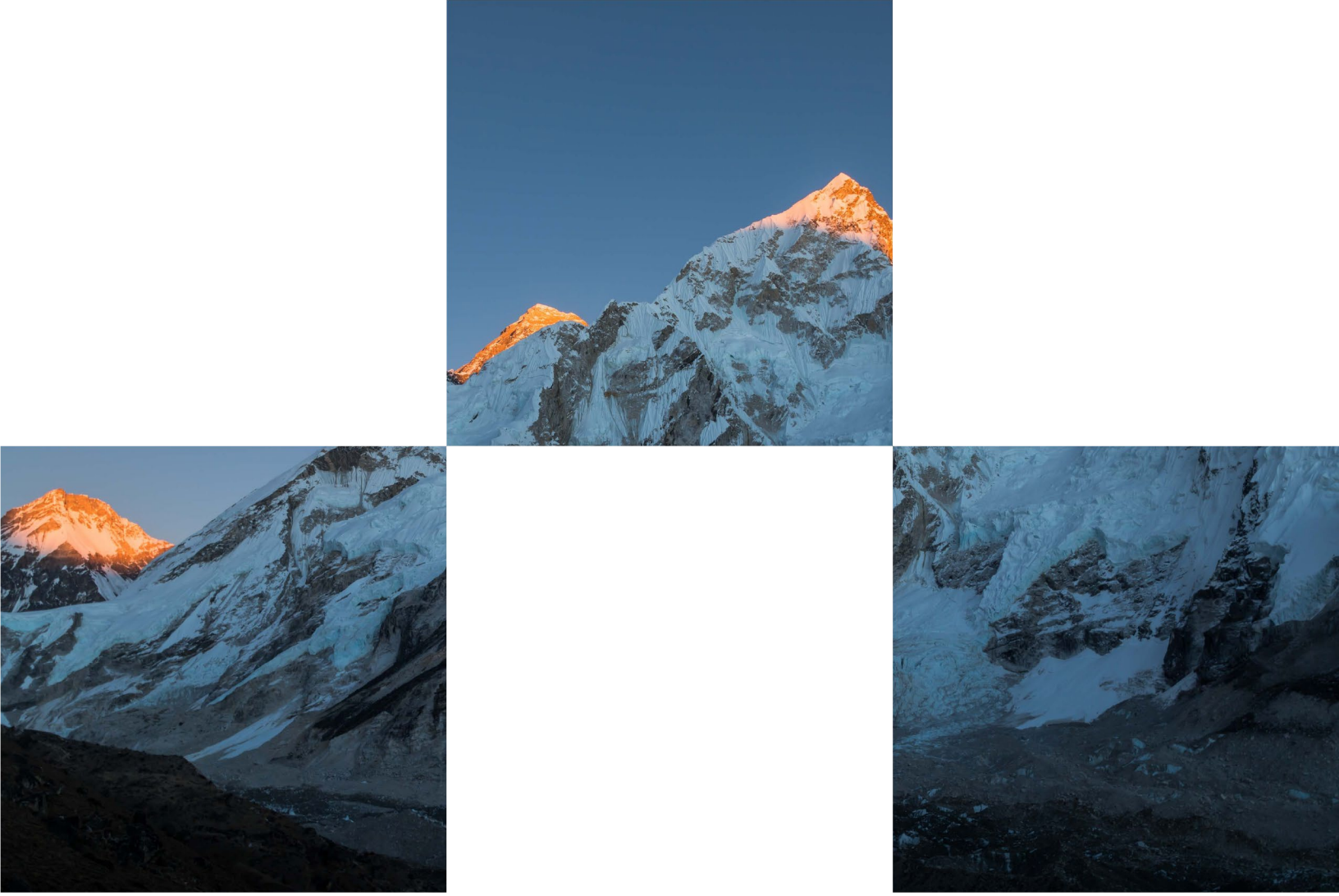

ALERT

US Supreme Court Affirmative Action Ruling and Potential Impact on Employers

August 24, 2023

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On June 29, 2023, the United States Supreme Court in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* struck down the use of race-based affirmative action in college admissions. The case involved two consolidated lawsuits brought by Students for Fair Admissions, Inc. ("SFFA"), one against Harvard College and the other against the University of North Carolina. In each case, SFFA asserted that the schools impermissibly considered race to the detriment of White and Asian American students as part of their admissions programs. Both schools argued that their affirmative action policies complied with US Supreme Court precedent. The Court previously recognized in *Regents Univ. of Cal. v. Bakke*, 438 US 265 (1978) and *Grutter v. Bollinger*, 539 US 306 (2003), that educational diversity is a compelling interest that permits schools to take account of race as one factor, among many, in admissions decisions. Departing from this precedent, the Court stated that while the schools' justifications for their affirmative action programs were laudable, the justifications were too amorphous to pass muster under the strict scrutiny standard, which is the standard courts use for reviewing race-based action under the Fourteenth Amendment of the United States Constitution.

The Court's opinion in *Students for Fair Admissions, Inc.*, does not apply to private employers. The decision was based on the Equal Protection Clause of the Fourteenth Amendment to the Constitution and Title VI of the Civil Rights Act. Private employer diversity, equity and inclusion ("DEI") and affirmative action programs are governed by Title VII of the Civil Rights Act. Nonetheless, many anticipate there will be an uptick in litigation involving private employers, in which plaintiffs will seek to apply the Court's holding concerning race-based affirmative action in college admissions to private employers. Even before the recent Supreme Court decision, a few lawsuits had already been filed against private companies over their allegedly discriminatory DEI policies and programs.

Following the Court's ruling, a number of government officials released statements – some in support of, and others criticizing, the Court's decision. The Chair of the US Equal Employment Opportunity Commission released a statement stating, "[t]oday's Supreme Court decision effectively turns away from decades of precedent and will undoubtedly hamper the efforts of some colleges and universities to ensure diverse student bodies . . . . It remains lawful for employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace."

By contrast, on July 13, 2023, thirteen Republican state Attorneys General signed on to a letter directed to Fortune 100 CEOs that sought to remind such companies of their obligations 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." Explicitly referencing the US Supreme Court's decision in *Students for Fair Admissions, Inc.*, the letter stated, "[t]hese principles apply equally to Title VII and other laws restricting race-based discrimination in employment and contracting." In response, twenty-one Democratic state Attorneys General wrote their own letter to the same Fortune 100 CEOs, commending their DEI policies and programs, and stating that "corporate efforts to recruit diverse workforces and create inclusive work environments are legal and reduce corporate risk for claims of discrimination." The Democratic Attorneys

General emphasized that the recent US Supreme Court decision does not impose new limits on private employers.

Given the greater scrutiny placed on employer diversity practices and the likelihood of increased litigation in this area, private employers should review their DEI policies and programs to minimize risk, and consider the following guidance:

1. "Quotas" and "Targets" which mandate hiring decisions (or any other employment decision) are *per se* illegal and violate Title VII of the Civil Rights Act.
2. Human Resource professionals should be reminded that they should not give preferential treatment to protected classes (e.g., race, ethnicity, gender, sexual orientation, etc.) when making employment decisions.
3. All DEI policies and programs, including all materials and communications, should be reviewed for statements that could be construed as running afoul of the principles set forth in the recent Supreme Court decision.
4. Employers may continue efforts to broaden applicant pools, including, along with other efforts, by expanding recruitment to focus on groups that were historically excluded from such efforts.

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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