

OPTIONS FOR FEDERAL POLICYMAKERS TO RESPOND TO THE SUPREME COURT OPINIONS IN *SFFA V. HARVARD* AND *SFFA V. UNC*

This brief contains the policy options enumerated in the Education Reform Now report, [*A Compelling Interest: How Federal Policymakers Can Respond to the Supreme Court's Rulings on Race-Conscious Admissions*](#), which provides

- background on race-conscious admissions (RCA) and the impact of banning RCA in several states;
- an evaluation of institutional and state responses to bans on RCA;
- a summary of the court's opinions;
- a discussion of the threats posed by the court's decisions;
- a discussion of policy options for responding to the opinions;
- and an extensive bibliography

FEDERAL POLICY RESPONSES TO THE SUPREME COURT'S DECISIONS BANNING THE CONSIDERATION OF RACE IN COLLEGE ADMISSIONS

In the remainder of this brief, we identify a range of policy options that federal policymakers, including the Department of Education, the Department of Justice, and Congress, could pursue in response to the Supreme Court's decision to ban the consideration of race in college admissions. We consider policy options at the state level in a separate brief. The absence of policy options directed at IHEs should not be confused with any form of abnegation of their responsibilities and opportunities for protecting diversity on campuses. IHEs will be crucial partners in policymakers' efforts to respond to the Supreme Court's decision. The policy options most directly address undergraduate admissions processes, but much of what is suggested here would apply to graduate programs, which will also be impacted—perhaps even more sharply—by the end of RCA.

The policy options are grouped under five categories: guidance and communications, data gathering, college readiness, recruitment, admissions policies and practice, and higher education funding and taxation.

1. Guidance and Communications

The Supreme Court's decision will lead to significant changes in the practices and policies of some IHES and many LEAs, as well as the work of people who directly support students through the college admissions process, including school counselors, teachers, principals, and coaches at community-based organizations. *It will be just as important for these institutions and practitioners to understand what the decision does not affect in their practices as it will be to understand what will be affected.* Much of what IHEs, LEAs, and practitioners do to promote diversity remains wholly legal. Guidance must be designed to prevent the decision from having a chilling effect on lawful behavior and to curb overinterpretation of and overcorrection for the opinion.

1.1. Quickly, repeatedly, and publicly reaffirm a commitment to diversity on college campuses and a dedication to closing bachelor's attainment gaps between underrepresented students of color and their peers. To prevent both a chilling effect on applications from Black, Latino, and Native students and a misinterpretation of the Supreme Court's decision, it would likely be useful for the Biden Administration, the Department of Education, and members of Congress to clarify the value of enrolling diverse classes at IHEs.

1.2. Announce that guidance will come from the Department of Education before August 2023. There are approximately 25,000 high schools in the United States and more than 3,000 IHEs. The vast majority of them will not have access to anyone with the level of expertise to explain how the Supreme Court's decision will affect them. A simple notification that guidance is coming could prove effective in preempting misguided and incorrect reactions to the decision, which could harm students and students of color in particular.

1.3. Provide guidance for IHEs, LEAs, practitioners, and nongovernmental educational agencies from the Department of Education before August. The Supreme Court's decision may be the end of the consideration of race in the admissions process, but it is also the start of significant change in the practices and policies of some IHES and most LEAs. It will be important for IHEs and LEAs to have guidance from the Department of Education in order to create uniform policies and practices in postsecondary and secondary institutions and to let those institutions know that they can and should act with agency authority behind them. In many areas, the guidance may be that the decision has no impact on practices or policies, but it could well be worth spelling that out to preempt overreach and misinterpretation among state policymakers, LEAs, and practitioners. In order to reduce the likelihood of misinterpretation or overcorrection, the guidance could remind IHEs about existing obligations under federal law, including Title VI & Title VI's implementing regulations, which affirmatively require universities to prevent racially hostile learning environments & prohibit admissions policies that produce a substantial racial disparate impact. Subjects that will be helpful to address include:

- Specifics of what can still be included and what cannot be included in applicants' admissions files, which are considered by admissions committees
- Application platforms
- Recruitment practices and programs
- Summer bridge programs
- Financial aid practices
- Scholarship programs
- Offices of Diversity, Equity, and Inclusion
- Affinity groups
- Faculty hiring
- Campus climate efforts

1.4. Provide a grace period of one academic year to all IHES to bring policies into compliance with the Supreme Court's decision. Given the very brief period of time between the release of the opinion and the start of the admissions cycle, which begins as soon as August 2023 at some institutions with rolling admissions procedures, IHEs that employ RCA may face a significant challenge in adapting the admissions procedures in the 2023-24 cycle, particularly if guidance is delayed or lacking. The Department of Education could announce that while it expects compliance with the court's decision, it will not bring enforcement actions for admissions decisions made during the first admissions cycle. This grace period might discourage misinterpretation of the opinion made by admissions officers.

1.5. Starting in July 2023, build awareness among IHEs, LEAs, practitioners, and nongovernmental educational agencies about practices and policies that may boost ethnic and racial diversity on college campuses, including, but not limited to, those outlined in Section 3. These efforts could be part of a robust communications campaign to ensure that guidance and awareness reach all constituencies. Well-resourced IHEs likely have the information they need to respond as robustly as they wish to the end of RCA. Less wealthy institutions may not, and LEA and practitioners likely will not. The Department of Education could build a clearinghouse, much like the What Works Clearinghouse, but for promoting racial diversity and reckoning with institutional racism.

2. Data Transparency

To understand the impact the decision will have on admissions, researchers, and advocates will need a much clearer understanding of how it affects not just enrollment but applications and admits. Data gathering could also have a deterrent effect by shining light on practices that likely serve as counterforces to increasing diversity.

2.1. Increase transparency and accountability in college admissions by expanding data collection, disaggregating it by race and ethnicity, and making the data easily accessible.

None of the research findings about the impact of the end of RCA in California, Texas, or elsewhere would have been possible without public universities in those states collecting, disaggregating, and publishing data about who applied, who was admitted, and who enrolled at state IHEs. These data have informed practices in those states and helped IHEs stem the harm that ending RCAs inflicts on the enrollment of underrepresented students of color. Disaggregated admissions data have made it possible for states, IHEs, researchers, and policy advocates not only to see what happened with the loss of RCAs but also what needs to be done.

This will not be possible, given the current procedures used in the Integrated Postsecondary Education Data System (IPEDS) administered by the National Center for Education Statistics (NCES). IPEDS collects admissions data for applicants, admits, and enrollments, but only that last group is disaggregated by race, ethnicity, and Pell-eligibility. As we have shown elsewhere, the vast majority of colleges and universities already collect racially/ethnically disaggregated data for applicants and admits and they will continue to do so into the future, so it presents an absolutely minimal additional burden on IHEs to share that information (Murphy, 2022). Either the Department of Education's NCES or Congress could foster greater transparency in college admissions by requiring the collection and publication of richer data. In the immediate future, disaggregation could be by existing racial and ethnic categories in IPEDS, but expanding categories to capture the considerable variation within racial categories would provide an even richer picture of admissions practices.

2.2. Increase transparency and accountability in college admissions by collecting data on applications by legacies and on early admissions programs, disaggregating it by race and ethnicity, and making the data easily accessible.

Expanded collection of disaggregated data around legacy preferences and early admissions programs—two practices that research has shown can reduce the enrollment of underrepresented students—could help IHEs and researchers understand their impact and drive efforts to increase diversity on campus. It would also provide insight into the beneficiaries of these admissions programs, particularly at IHEs that have historically been less accessible to students of color.

3. College Readiness

Inequitable access to high-quality education is one of the problems that RCA helps address by providing a fairer assessment of each applicant's academic talent and potential. While much of the responsibility for college readiness falls on the shoulders of state policymakers and LEAs, there is also a role for the federal government here.

3.1. Improve access to dual enrollment, early college, Advanced Placement, and other rigorous courses that increase preparedness for and enrollment in higher education. One of the reasons Black, Latino, and Native students continue to be underrepresented at four-year IHEs is the persistence of inequitable access to educational opportunities (Government Accountability Office, 2020). If the responsibility for increasing diversity on college campuses is left solely on higher education, the effort is likely to fail. Legislation increasing equitable access to high-quality primary and secondary education and to rigorous coursework would likely expand the pool of students of color prepared to apply, get admitted, and succeed in college (Griffin et al., 2017).

3.2. Improve access to high-quality college and career counseling. In many American public high schools, school counselors are responsible for hundreds of students, and college and career counseling is only one of their responsibilities. In most states, student-to-counselor ratios far exceed recommended levels, and not all counselors receive the necessary training to provide expert advice through the college application process, including how to handle one of its most byzantine aspects: financial aid (American School Counselor Association, 2022). A high-quality school counselor can have significant positive effects on college-going (Mulhern, 2022). Federal investments in college and career counselors, including professional development to ensure they have the necessary skills to provide guidance, could help offset the effects of a ban on RCA, particularly if those investments are focused on high schools that receive Title I funding or enroll large populations of students of color.

3.3 Require all recipients of TRIO and GEAR UP funding to participate in training about the impact of the court's decision on their work and on the students they advise.

4. Admissions Policies and Practices

There is great potential for admissions reforms that could help boost diversity at IHEs, particularly those that have historically excluded applicants of color. While many of these changes may be made voluntarily by IHEs, policymakers can provide crucial support and impetus for implementing them.

4.1. Ban the use of a legacy preference in admissions. While research on the impact of providing an advantage in the college admissions process to applicants whose relatives are alumni of that IHE is limited by the fact that universities have carefully guarded data about just how many applicants, admissions, and enrollments come from legacies, the evidence suggests that legacy applicants are disproportionately White and that legacy applicants have a significantly higher rate of admission at highly selective IHEs (Arcidiacono, Kinsler, et al., 2022). Legacy applicants at Harvard, for instance, are five times more likely to be accepted than non-legacy applicants. The legacy of segregation, both de facto and de jure, at many highly

selective institutions means that White legacy applicants have a multi-generational advantage over their non-White peers. Racial and ethnic gaps in bachelor's degree attainment also contribute to the disadvantage that legacy preferences represent for students of color. Given that legacy preferences harm a university's capacity for increasing diversity, Congress could respond to the ban on RCA by passing the Fair College Admissions for Students Act. Sponsored by Sen. Jeff Merkley (D-OR) in the Senate and Rep. Jamaal Bowman (D-NY) in the House, the legislation would bar all universities that receive funds from federal financial aid from providing a legacy preference.

4.2. Introduce legislation protecting the freedom of speech of applicants and the integrity of college applications. In the Court's majority opinion, Chief Justice John Roberts acknowledges that "all parties agree, nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise." The consensus that students should be allowed to tell their stories and that admissions offices should be allowed to take them into consideration is encouraging. Roberts cautioned that "universities may not simply establish through application essays or other means the regime we hold unlawful today... The student must be treated based on his or her experiences as an individual—not on the basis of race." The upshot is that universities may consider how race impacted an applicant's life, but cannot use that information to recreate the sorts of practices Harvard and UNC engaged in.

What is less clear is how universities will operationalize these instructions. There is a risk that certain institutions or state agencies misinterpret (unintentionally or maliciously) the opinion to be stating that an applicant's race or ethnicity can only appear in essays and may try to expunge all other elements of an application essay that might reveal something about their race or ethnicity. This would be inconsistent with the opinion. It is also a fool's errand, as impractical as it would be unfair, since so many components of an application have the potential to be revelatory with respect to race and ethnicity, including essays, extracurricular activities, memberships, high school, ZIP code, and name. Any effort to remove racialized elements from an application would prevent an applicant from presenting their whole self, which could end up transforming a ban on RCA into a new form of discrimination in which only some applicants could present an authentic application. It would also limit their free speech.

Additionally, there are practical considerations regarding attempts to redact every instance in an application that could potentially reveal something about an applicant's race. Some universities receive more than 50,000 applications every year, and a few receive more than 100,000. Who would carry out the work of going through every single application? Artificial intelligence is not a plausible answer, given the propensity of algorithms to reproduce and reinforce biases (Lee, Resnick, et al., 2019). More importantly, who would determine what to redact, and how would they make those determinations about what items are racially revelatory and which are not?

In states with bans on RCA, some institutions remove an applicant's self-reported racial identity from the materials that readers consider in the admissions process. It is conceivable that some institutions or states may go much farther and require the redaction of every marker of race from application materials. To forestall such an effort, which would likely be harmful for students and IHEs alike and which would be utterly impractical, federal policymakers could act to provide legal protection for the integrity of college applications and the free speech of applicants. This may include introducing legislation that would bar IHEs, governing bodies of IHEs, accreditors, and states from redacting any information from application materials or from redacting any information other than the applicant's self-identified race and ethnicity, as indicated on their application.

4.3 Provide legal protection for admissions practices that could boost diversity without including explicit data about an applicant's race. There is a range of so-called "race-neutral" practices that some IHEs currently use to increase the enrollment of underrepresented students of color, which are covered in Section 3 of this brief. Percentage plans, recruitment strategies based on census tract data (College Board, 2019), test optional policies, and holistic admissions processes can all help mitigate the harm that the ban on RCA will likely do to diversity and to students of color, as can recruitment practices, campus climate efforts, scholarship, summer bridge programs, and other efforts that explicitly take race into account without providing a consideration of race in the admissions process itself.

The majority opinion said nothing about race-neutral approaches to enrolling diverse classes, which presumably means they remain completely legal, but these strategies may be subject to further legal attacks.. On April 13, 2023, Edward Blum, the founder and president of SFFA, sent an email to members announcing what could easily be read as a promise for further attacks on diversity in higher education. "From what has been distressingly proposed by dozens of college officials in the event the Court eliminates race and ethnicity in the admissions process," he wrote, "our work will not be over—it will be the end of the beginning, rather than the beginning of the end." In May 2023, a federal appeals court upheld the consideration of a student's zip code in the admissions process of Thomas Jefferson High School, a well-known magnet school in northern Virginia (Elwood, 2023). These attacks on geographic enrollment tools may be the next stage in the ongoing assault on gains made by the civil rights movement. Banning the consideration of geography is deeply impractical, given the incentives that many public IHEs have to enroll in-state residents and the priority many private IHEs place on enrolling students from all 50 states and from other nations. There is, however, the potential chilling effect of the decision on multiple race-neutral strategies, leading admissions offices to abandon perfectly legal practices on which the decision has no bearing. Legislators or attorney generals could affirm a state's commitment to diversity and clarify that race-neutral practices designed to promote diversity are consistent with state law by either passing legislation or providing guidance that explicitly protects the use of race-neutral practices in the admissions process and of race-conscious practices outside of the admissions process to boost diversity on campus.

5. Higher Education Funding and Taxation

The Supreme Court made no ruling about federal incentives for diversity or increasing support for institutions that support underrepresented students.

5.1. Provide relief on the endowment tax for institutions that maintain or increase the number and percentage of Black and Latino students enrolled. In 2017, Congress passed a bill that, for the first time, began taxing the multi-billion dollar endowments of wealthy private universities, based on the endowment dollars per enrolled student. It is a tax with little nuance that affects a few IHEs and does nothing to increase access or affordability in higher education. Indeed, some wealthy universities have protested that the tax has taken away resources that could be used for need-based financial aid. Admissions reform advocates have argued that if that is the case, then let universities prove it by providing some relief on the endowment tax to IHEs that increase the number and share of underrepresented students they enroll (Dannenberg, 2023).

5.2 Increase financial support for Minority Serving Institutions. One potential outcome of the end of RCA is an increase in applications to historically Black colleges and universities (HBCUs), Hispanic-serving institutions (HSIs), and other minority-serving institutions (MSIs). Shirley Morgan, a board member at Morgan State University, speculates that “anticipating that they may encounter a hostile environment, [the end of RCA] can drive [students of color] away from institutions, even if the institutions have declared that they want to try to attract a diverse student population (Donastorg, 2022). The court’s decision provides an opportunity for the federal government to reaffirm its commitment to MSIs through a show of verbal and financial support in the form of increased funding. The Biden administration has taken significant steps to increase support for MSIs, but this sector has long suffered from federal, state, and philanthropic underfunding and would benefit from larger investments (Harris, 2021).

Education Reform Now (ERN) is a non-partisan, nonprofit think tank and advocacy organization that promotes increased resources and innovative reforms in K-16 public education, particularly for students of color and students from low-income families. We seek forward progress in public education—at the federal, state, and local level—developing and advocating for new, bold ideas and mutually reinforcing policies in elementary, secondary and post-secondary education.