

OPTIONS FOR STATE 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 State 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

STATE 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 state policymakers could pursue in response to the Supreme Court's decision to ban the consideration of race in college admissions. State policymakers include governors, legislatures, departments of education and higher education, administrators of public university systems, and LEAs. We identify policy options for federal policymakers 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 speak most directly to 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 options are grouped under six categories: guidance and communications, data transparency, college readiness, recruitment, admissions policies and practices, and higher education funding.

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 is equally important for these institutions and practitioners to understand what the decision does not affect in their practices as it is 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 and overcorrection of the decision.

1.1. Quickly, repeatedly, and publicly reaffirm a commitment to enrolling diverse classes on college campuses and reckoning with the historical and present effects of racism in the admissions process. To prevent both a chilling effect on applications from Black, Latino, and Native students and a misinterpretation of the Supreme Court's decision, it will be imperative for governors, state departments of education and higher education, legislators, school district leaders, and other public officials to make it clear that diversity remains a core value in all educational institutions, from pre-K through college and graduate programs, because diversity enriches the experiences of all students.

1.2. Request guidance from the U.S. Department of Education and the U.S. Department of Justice to be released before the start of the school year in August 2023. If they have not done so already, state departments of education and higher education may want to contact the U.S. Department of Education to express a need for federal guidance on the impacts and implications of the Supreme Court's decision for both IHEs and LEAs. The vast majority of secondary and postsecondary institutions will not have access to anyone with the level of expertise to explain how the Supreme Court's decision will affect them, but state departments of education may have such resources and can provide the support educational institutions will need.

1.3. Indicate that the state will be releasing guidance on the implications of the Supreme Court's decision for IHEs and LEAs in their state. A simple notification that guidance—building on that from the Department of Education—is coming could prove effective in preempting misguided and incorrect reactions to the decision, which could harm students and students of color in particular.

1.4. Provide guidance for IHEs, LEAs, practitioners, and nongovernmental educational agencies before August 2023. It will be important for IHEs and LEAs to have guidance from state departments of education and higher education to create uniform policies and practices in

postsecondary and secondary institutions and to inform those institutions that they can and should act with the authority of the state behind them. Policymakers may find it useful to consult with education leaders and campus counsels in states such as California that have already created guidance in response to state-level bans on RCA at public institutions (e.g., University of California, 2015). In many areas, the guidance may be that the decision has no impact on practices or policies because much of what institutions do to promote diversity remains wholly legal. Thus, the guidance is designed, in part, to avoid chilling lawful behavior and to preempt overreach and misinterpretation among state policymakers, LEAs, and practitioners. This guidance should follow federal guidance from the Department of Education and/or Department of Justice.

Subjects that will be helpful to address in guidance include the following:

- 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

1.5. 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 (e.g., holistic admissions, test optional policies). 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. Professional development for secondary school counselors could preempt confusion and misinterpretation of the Supreme Court's decision regarding the college and career guidance they provide students.

2. Data Transparency

To understand the impact the Supreme Court's decision will have on admissions, researchers and advocates will need a much clearer understanding of how it affects not only enrollment but also 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. Such data have informed practices in those states and helped IHEs stem the harm that ending RCA 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 RCA but also what needs to be done.

This will not be possible, given current practices in many states. Although some state agencies, such as the State Council of Higher Education for Virginia, collect and publish a significant amount of data about college admissions, in many states, finding admissions data even on public institutions is challenging. Obtaining and publishing complete data on all private IHEs is even more rare. State departments of education and higher education could begin collecting and publishing disaggregated data for every step of the college admissions process, including applications, admits, and enrollments. As we have shown elsewhere, the vast majority of colleges and universities already collect this disaggregated data and will continue to do so in the future, so it presents an absolutely minimal additional burden on IHEs to share that information (Murphy, 2022). In the immediate future, disaggregation could be by existing categories in state databases, 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

Preventing this decision from having the same degree of negative impact on diversity that earlier bans on RCA had will almost certainly depend on the efforts of policymakers, IHEs, and secondary schools. 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.

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 to 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 who have been prepared to apply, be 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). State investments in hiring counselors and providing professional development to ensure they have the necessary skills to provide college and career 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.

4. Recruitment

The Supreme Court’s rulings should not be taken to affect any part of the enrollment process other than admissions decisions directly. There is no need to craft a race-blind recruitment or enrollment strategy. Indeed, a recruitment and enrollment process more keenly attuned to attracting and yielding students of color could increase the likelihood of preserving existing levels of diversity.

4.1. Require IHEs to report the name and location of every high school that admissions officers visit on recruiting visits and require all public high schools to report the name of every IHE that sent an admissions officer to visit on a recruiting visit. A recent study of state flagship universities revealed “socioeconomic, racial, and geographic disparities in [their] recruiting patterns,” with most of the universities in study visiting “more out-of-state than in-state” locations and targeting “affluent, predominantly White localities” (Salazar et al., 2021). States could shine a light on recruiting practices by requiring data collection from all IHEs that receive federal or state funding and from high schools, and publishing that information on the state’s Department of Education website.

4.2. Encourage the expanded use of geographic data for recruitment purposes. Enrollment tools, such as the College Board’s Landscape tool, which uses a variety of measures to provide a much richer sense of an applicant’s neighborhood and school context than any application form can, have shown promising effects in pilot programs. Census-tract data could be used in recruiting and marketing efforts to make sure that a diverse pool of students are being extended an invitation to apply, and they could be used in efforts to increase “yield,” that is, the percentage of admitted students who enroll. Census-tract-level data could be used to determine state and institutional aid—both of which are powerful tools for encouraging enrollment—and to identify students for summer bridge programs, mentoring, or other practices that can increase enrollment and completion.

4.3. Increase the enrollment of more community college transfer students at four-year IHEs by simplifying and aligning the transfer process into public and private institutions.

Many students of color begin their education at community colleges with the intention of transferring to a four-year institution, but only 31% of degree-seeking community college students transfer to a four-year institution and a mere 14% go on to earn a bachelor’s degree (CCRC, 2021). White students are twice as likely to transfer as Black and Latino students are (CCRC, 2021). Boosting transfer rates could be one pathway to increasing campus diversity, but doing so will require removing the formidable barriers to transfer.

One significant barrier experienced by transfer students is the lack of a clearly articulated pathway from a two-year IHE to a four-year IHE in many states (CCRC, 2021). Another is the relatively small number of transfers from community colleges that most highly selective IHEs, in particular, admit each year. Legislators could provide stronger motivations for public and private IHEs to admit more transfer students, as well as require IHEs to provide clearer pathways to transfer, including a full transfer of credits earned at a community college to all institutions that receive state financial aid dollars.

5. 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.

5.1. Ban the use of a legacy preference in admissions. The 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. However, the evidence suggests that legacy applicants are disproportionately White and that legacy applicants have a

significantly higher rate of admission to highly selective IHEs (Arcidiacono et al., 2019). Legacy applicants at Harvard, for instance, are five times more likely to be accepted than non-legacy applicants.

Eliminating legacy preferences is a way of reducing reliance on criteria that reward inherited advantage over individual talent and potential. 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 to increase diversity, legislatures could respond to the ban on RCA by following the example of Colorado, which banned the use of legacy preferences at all public IHEs in 2021, or the example of the University of California system and almost all Florida and Texas public universities, which eliminated legacy preferences after their state banned RCA.

5.2. 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, state 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.

5.3 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 attorneys general 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.

5.4. Encourage the expanded use of geographic data in admissions processes. Enrollment tools, such as the College Board's Landscape tool, which uses a variety of measures to provide a much richer sense of an applicant's neighborhood and school context than any application form can, have shown promising effects in pilot programs. For instance, at IHEs using census-tract data in their admissions process, applicants from the most socioeconomically challenging schools and neighborhoods saw a 5-percentage point increase in their chance of admission compared to similar applicants from the year before the IHE began using the census-tract tool. These increased chances of admission for students from challenging environments did not, however, translate into more socioeconomically, racially or ethnically diverse classes (Mabel et al., 2022). The lack of impact on enrollment could be a function of affordability; thus, it could be more effective to use census-tract data to determine state and institutional aid and identify students for summer bridge programs, mentoring, or other practices that can increase enrollment and completion.

5.5. Create percentage plans that guarantee a spot for top-ranked students in every public high school in a state. As discussed in Section 3, the effectiveness of percentage plans to make a large, aggregate change in enrollment demographics remains an unsettled issue. However, percentage plans can have a significant impact on the opportunities of students of color, which, given the lack of evidence for negative effects of percentage plans, means they could still provide benefits, making their implementation worthwhile. One way to enhance the benefit of percentage plans would be to raise the bar for students who attend high schools receiving Title I funding, high schools where more than 50% of students receive free or reduced-price lunch, or high schools that have sent very low numbers of students to public, four-year IHEs. Percentage plans would not be feasible for private IHEs that draw from a national and international pool of applicants.

5.6. Require public universities or private universities that receive revenue from state aid to consider attendance of a public high school in the state as a "plus factor" in admissions. "Plus factor" is a term of art in college admissions, referring to a factor in a highly qualified applicant's profile that could provide an advantage in the highly competitive admissions process

at some IHEs. Plus factors considered at some IHEs include athletic ability, legacy status, residency in a low-population state, low-income status, and more. Plus factors certainly do not guarantee admission, but they can make a significant difference when a high number of qualified students are competing for a limited number of seats in a freshman class. Highly selective IHEs enroll a high percentage of students from private high schools where tuition can be more than \$50,000 a year and which are often much less diverse than the colleges to which they feed so many of their very wealthy students (Murphy, 2021). This benefit could be reduced by giving an explicit “plus factor” to in-state applicants who attend public high schools. This effect could be enhanced by increasing the plus factor for students who attend a high school that receives federal Title I funding or a high school that has historically sent very few students to the IHE to which an applicant has applied.

5.7. Permanently remove any IHE requirement of admission exam scores for admission and for state or institutional aid.

Racial, ethnic, and socioeconomic gaps in admissions exam scores persist, and requiring exam scores may suppress applications from underrepresented students of color. After COVID reduced access to testing, the vast majority of four-year IHEs dropped the requirement that students submit exam scores, and they have, with few exceptions, continued to do so, even as testing opportunities became widely available once again (Carey, 2023). Almost all four-year IHEs give students the option to submit a score for consideration in the application process. For some applicants, show them at their best, but not for all. Bills have been introduced in Tennessee (Stockard, 2022) and Texas (Menchaca, 2023) to make all public universities require applicants to submit test scores. In Tennessee, the University of Tennessee’s board of trustees reinstated testing requirements after the bill was introduced. In Colorado, on the other hand, the legislature passed a bill in 2021 that allowed public universities to decide whether to require test scores (CDHE, 2021). Illinois went a step further that same year when the state passed legislation making all public IHEs test optional (Bauer-Wolf, 2021).

require any institution that is test optional in admissions to also be test optional in awarding aid institutional aid. The strongest stance would also remove the requirement for test score IEs to submission from any state-administered grants. As noted in Section 3, the evidence for test optional policies’ ability to increase diversity is limited, in no small measure, because widespread adoption at highly selective IHEs is still fairly new, and there has been too little research on the impact of test optional policies at more accessible IHEs that admit more applicants than they reject. It could greatly benefit future policy development regarding admissions exam policy if states conduct research on the impact of test optional policies at IHEs in their state.

5.8. Encourage or require IHEs to conduct an admissions audit to reassess existing admissions processes, practices, and criteria. In recent years, advocates for college access have been calling attention to a range of potential barriers to campus diversity, including early admissions plans, legacy preferences, testing requirements, athletic preferences, and curricular requirements. Consider the example of calculus. Anderson and Burdman found that “calculus is favored by many admissions offices as a sign of rigor... [and] for many admissions officers, calculus on a transcript carries prestige and a presumption of intelligence.” The problem, they found, is that only about half of all high schools offer calculus, and, worse yet, only 38% of high schools where students are predominantly Black or Latino offer it. The Supreme Court’s decision offers an opportunity for IHEs and states to reassess admissions practices, identify barriers to access, and retool operations in ways that better align with their institutional mission and with high school curricula.

6. Higher Education Funding

State-based financial aid and funding for public IHEs could play an important role in the response to the decision, which made no ruling about institutional funding or financial aid.

6.1. Increase funding for need-based state grants, increase state funding for public IHEs in order to increase affordability, fund institutional aid for students with need, and curtail funding for state merit aid programs that disproportionately benefit wealthy White students. Paying for college is a serious challenge for many students, as the federal Pell Grant and state aid have not kept pace with the cost of attendance of most four-year colleges. Persistent wealth and income gaps make affordability an even more widespread challenge for underrepresented students of color (Levine, 2022). In 2012, the percentage of students with very high need (i.e., they have zero expected family contribution to paying for college) was 29% for White students and 37% for Asian American students, but it was 47% for Hispanic students and 60% for Black students (Office of Planning, Evaluation, and Policy Development, 2016).

Increasing need-based aid from states and IHEs could help lower this barrier to access. One way to increase funding for need-based aid and to help close enrollment gaps may be to eliminate state merit scholarships that disproportionately award money for college—money that comes from state coffers—to students White and Asian American students and thus exacerbate racial, ethnic, and socioeconomic caps in college attendance (Dynarski, 2000; Lee, 2020).

6.2. Include robust weights in performance- and outcome-based funding to incentivize institutions to maintain and increase racial and ethnic diversity through all legal mechanisms. Performance-based funding (PBF) has become a popular form of determining state appropriations for public IHEs; under PBF, states tie a portion of higher education funding to student outcomes, such as retention and completion. A growing body of research has shown that

existing “PBF policies have done little to improve degree completion and have resulted in unintended consequences that are likely to widen racial and economic educational disparities” (Rosinger et al., 2021). Given the popularity of PBF policies among many state policymakers, they are unlikely to be phased out soon. If they are not to further exacerbate the effects of a ban on RCA, it will likely be necessary to include robust weights in PBF to incentivize the enrollment and completion of underrepresented students.

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.