

The Supreme Court's Ruling: Race in Admissions...and Beyond

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A Moment for Leadership

Now is the time for leadership, not retrenchment.

In the face of new challenges, we have opportunities. Seize them.

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Not Legal Advice

Preliminary Analysis...More to Come

The Court's opinion is complex and our analysis is preliminary, still subject to further refinement.

Nothing in this presentation should be construed as legal advice, which is highly fact- and context-specific. We elevate key points of interpretation and practice as general guidance to consider as you consult with your counsel.

Preliminary Analysis on Which Presentation is Based



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**Preliminary Guidance Regarding the U.S. Supreme Court's Decision in
SFFA v. Harvard and SFFA v. UNC
July 6, 2023**

This preliminary working draft has been developed to provide initial guidance regarding the Supreme Court's SFFA opinions. We offer this draft, directional guidance to support understanding and leadership within the higher education community in light of immediate enrollment issues with which institutional leaders are grappling. Given the complexity of the decision and the issues implicated, this draft will be reviewed and supplemented in the coming weeks.¹

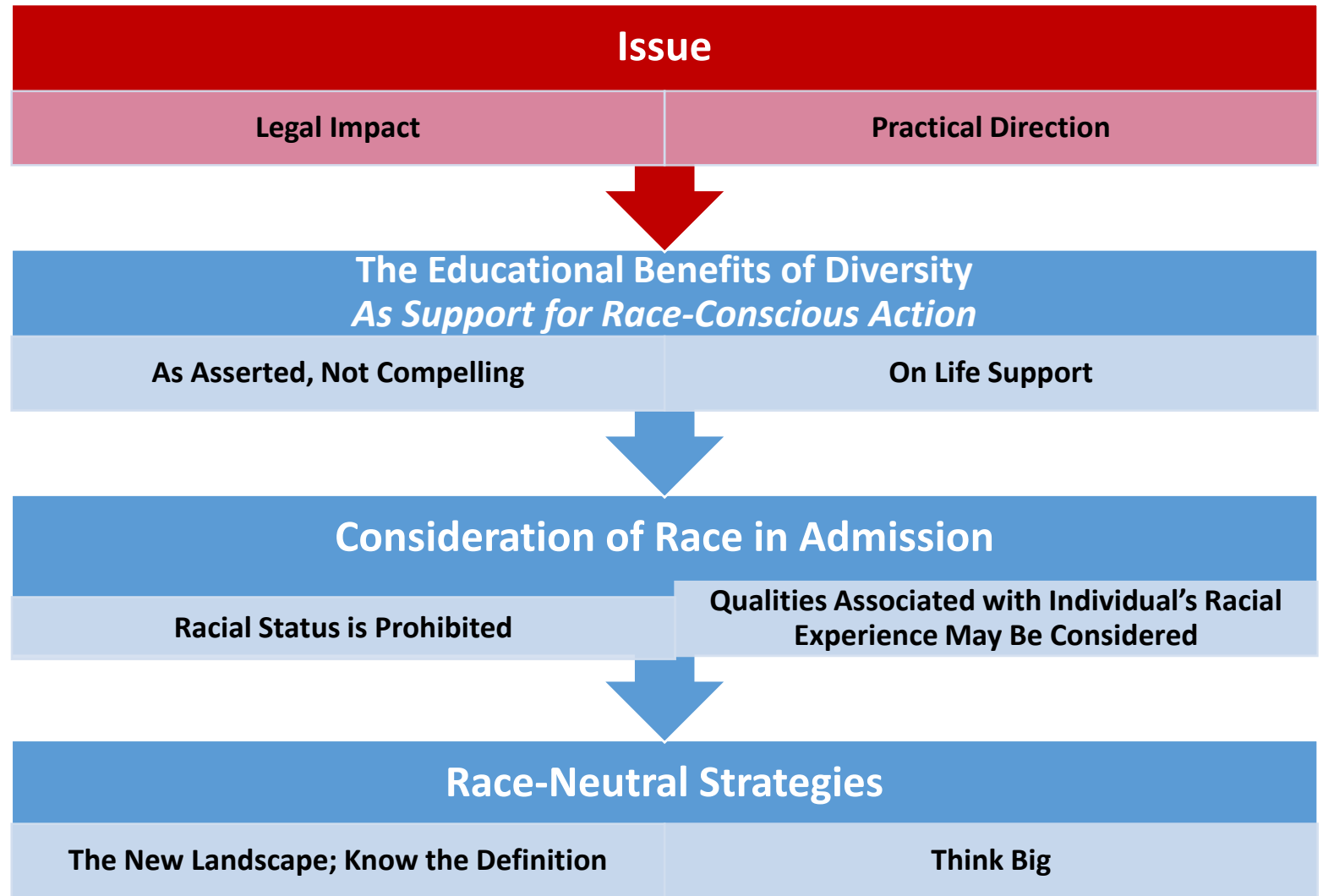
<https://educationcounsel.com/?publication=educationcounsels-preliminary-guidance-regarding-the-u-s-supreme-courts-decision-in-sffa-v-harvard-and-sffa-v-unc>

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The Court's Ruling

The Top Takeaways



The Court Ruling

Compelling Interest

- The educational benefits of diversity (previously recognized) are no longer compelling to justify race-conscious action.
- Too “amorphous” & “elusive.” | Not “sufficiently measurable” or “coherent.”
- Note: “worthy” and “commendable”

Negative Effect/Stereotypes

- The “classification” of race was “used as a negative” and impermissibly “stereotyped” applicants based on race.
- Led to 11% decrease in number of Asian American students admitted.
- College admissions are “zero-sum.” | Admission involved “preferences on the basis of race alone”

End Point in Time

- Admissions programs “lacked a logical end point.”
- Tight percentage bands by race, from year to year implicated “[o]utright racial balancing.”
- Process of periodic review isn’t sufficient for satisfying durational requirement; need specific end point to the consideration of racial status

The Court Ruling

Institutional Mission

- “Universities may define their mission as they see fit” within broad legal parameters.
- Significant deference is afforded to higher education institutions on this issue.

Qualities from Student Racial Experience

- “[N]othing in this opinion should be construed as prohibiting universities from considering an applicant’s discussion of how race affected his or her life...”
- The “touchstone of an individual’s identity [must be with respect to] challenges bested, skills built, or lessons learned” —not the color of their skin.

What the Court Did Not Expressly Address

Scholarships
and Financial
Aid

Outreach and
Recruitment

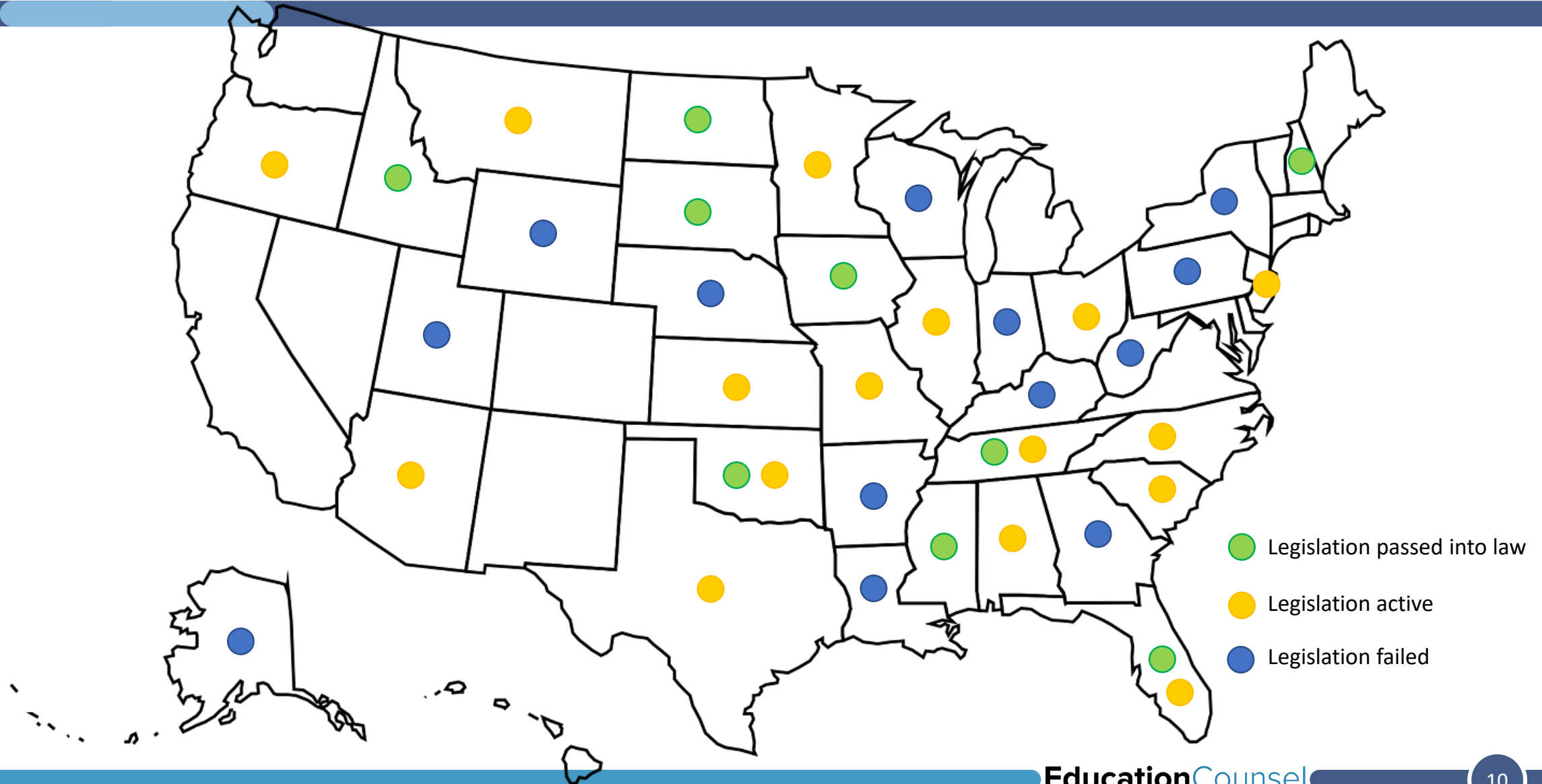
Pipeline and
Pathways
Programs

Data
Collection

Employment

Race-Neutral
Strategies

“Political Strict Scrutiny”: Anti-DEI Bills Have Been Introduced In 35 States



Definitions

Back to Basics: Definitions

Race-conscious

Express-Intent-Effect-
Individual Benefit

E.g., Fisher II Majority:
Texas Top 10% Plan

Race-neutral

Intent-Effect
(Often) Broad-based/Inclusive

E.g., General Recruitment &
Outreach

How Definitions May Translate

Race-conscious

Involves consideration of applicant's racial status

Race-neutral

Involves consideration of an individual's qualities associated with experience relating to race

Other qualities and characteristics like first generation, low income/wealth, etc.

Policy and Practice Implications

The Race Continuum: The Relevance of Race In Applications



Identity Dependent

“Check the Box”

Racial Status

Race-Neutral, Experience-Related Qualities

Quality associated with
experience of race in a
person’s own life journey
relevant to mission

Race-Neutral Qualities: Subject, Expertise, or Action

Issues of race or equity as subject of
actions of commitment or knowledge
relevant to mission

Key Qualities Associated with Experience

Expertise or Record

- Formal expertise in race issues/inequities
- Record of elevating others' understanding, creating welcoming climate for all

Commitment

Commitment to ameliorate racial injustice

Knowledge

- Deep knowledge of issues of race in society, community, or education; or from other meaningful engagement with communities

Implications: Admissions

Holistic Review

- No consideration of racial status
- Consideration of mission-aligned skills, knowledge, and character qualities associated with actual student experience of race

Essay Questions

- An important avenue to elicit mission-aligned information about skills, knowledge and character qualities

Monitoring Class Composition

- Assure complete segregation between information on rolling admissions trends by race and decision-makers involved in holistic review
- (Nothing prohibits collection of disaggregated data for research, evaluation, etc. purposes.)

Shaping the Class

- Not specifically addressed, but problematic to 'shape' class with categorical focus on applicant's racial status
- Consider new models, including identity-neutral DEI factors derived from holistic review analysis

Implications: Financial Aid and Scholarships

Big Picture

- Financial aid and scholarship decisions will be informed and shaped by principles in Court's opinion
- Arguable distinction: scholarships do not operate as "zero-sum game"
- But, even there, challenge on racial status-based awards remain: what compelling interest?

Key Strategy

- Consider full array of neutral factors and/or adaptation of the "experience associated with race" model for aid awards
- Focus: skills, knowledge, character qualities associated with race

Design Option

- For privately endowed scholarships and institutional aid: Pooling and Matching

Implications: Outreach and Recruitment

Big Picture

- The Court’s decision did not address or change what is permissible in terms of recruitment: “Inclusive” programs should remain strategic focus

General Direction

- The subset of recruitment programs that confer a tangible/material benefits on students may be subject to strict scrutiny
- Where selectivity is relevant, consider neutral factors, including qualities associated with experience

Design Options

- Consider clustering similarly focused/designed programs under one “umbrella” with themed components, and with self-selection

Strategies and Action Steps

A Comprehensive Enrollment Policy Evaluation



Pathways

- Outreach
- Recruitment
- Pipeline Programs



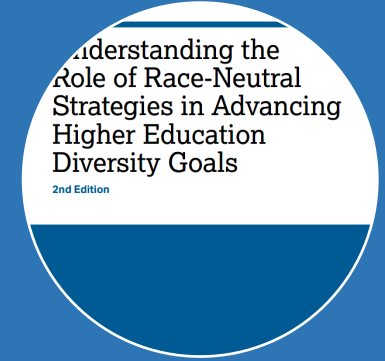
Barriers

- E.g.,
- Legacy
 - Early Decision
 - Test Use
 - Transfer Policies



Admission

- Holistic Review
- Articulation of Desired Qualities
- Legally Neutral, DEI Focused Qualities



“Race-Neutral” Strategies

- Authentic
- Breadth of Enrollment Policy/Practice
- Secondary +DEI Effects

Mission-Focused, Aligned and Integrated

Key Strategies and Action Steps

Policy Decisions

- Make changes re: compliance/legal risk *and* impact

Engagement

- Engage early with key stakeholders on directional shifts and expected impact

Research & Data

- Ground decisions in institutional experience and general research (key data, trends, projections)

Documentation

- Assure policy clarity regarding any DEI element of policy and practice, with focus on clear distinction between status and experience-related qualities

Training

- Develop training materials (guides, tools, power points) that align with/track policy articulation

Communications

- Assure that key stakeholders know of policy decisions and directions; and all public discussion of policy/practice (including web site) reflects alignment.