READI Racial Equity Advancement and Defense Initiative

Legal Landscape Analysis

Insights to Promote, Expand, and Defend Race-Explicit Grantmaking

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INTRODUCTION

About READI

The Racial Equity Advancement and Defense Initiative (READI) is a partnership between ABFE, Asian Americans/Pacific Islanders in Philanthropy (AAPIP), Hispanics in Philanthropy (HIP), and Native Americans in Philanthropy (NAP) to promote, expand, and defend race-explicit grantmaking and programming. READI's work is grounded in the following definitions:

- **Race-explicit grantmaking is the practice of specifically acknowledging race** in grantmaking activities with the goal of redressing the historical and contemporary impacts of systemic racism to build a truly just society.
- **Race-explicit grantmaking recognizes that there are well-documented racial disparities** across every indicator of wellbeing, including health, income, education, criminal justice, work, and more. Race-explicit grantmaking invests in specific interventions or policies designed to address the unique needs and challenges faced by different racial groups or individuals.
- **Race-explicit grantmaking serves us all, at the expense of none**; it is an approach that centers inclusion. It is one strategy of many within a foundation's work to achieve its mission.

READI was formed in the spring of 2023 as a response to the then-pending Students for Fair Admissions (SFFA) v. Harvard and SFFA v. University of North Carolina (UNC) United States Supreme Court cases. Both UNC and Harvard had race-conscious admissions programs that treated race as a factor to promote their efforts to have a diverse college student body. Even though the Court acknowledged diversity as a "commendable goal," the Court issued a rationale that using race-conscious admissions criteria is unjustified. Decisions in the SFFA cases discredited the legality of using race as a plus factor in higher education admissions after this form of affirmative action had been upheld as constitutional for nearly 45 years.

Learn more about READI here.

Why has READI created a Legal Landscape Analysis?

The Supreme Court decisions that reversed the constitutionality of affirmative action[1] in college admissions created an understandable wave of alarm across philanthropy. While the decisions were limited to higher education, many wondered if the legal reasoning would be leveraged to create additional challenges to race-explicit grantmaking and programming.

Since those decisions, we've entered a period of further backlash and systemic destruction characterized by a flood of executive actions targeting the civil sector and its efforts, including open hostility towards the values of diversity, equity, and inclusion. The goals of these actions are to instill fear in our movement and paralyze our work. But we have to remember that there has been long-term progress on the side of racial equity. Diversity and inclusion have greater support than most Americans think.[2] There is a mandate to continue our work. All people want a fair shot at opportunities.

Grantmaking organizations are now facing potential legal threats and a hostile political environment that may paralyze them into inaction without considering the ways they can continue courageously funding transformational change. This moment demands the philanthropic sector's active promotion of its values and stated commitments. While some philanthropists will surrender to the pressure to turn away, most foundations[3] are not retreating from race-explicit grantmaking, and many will increase their commitment to funding with a race-explicit lens.

Many organizations have already taken bold steps in response to legal threats: loosening restrictions on existing grants, increasing budgets, funding legal defense, security, and rapid response efforts, organizing collectively to defend their First Amendment rights, and more. These actions show a growing recognition that philanthropy must respond with courage and unity.

This resource is intended to help funders thoughtfully navigate how best to approach owning their influence from a position of strength.

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[1] Affirmative action policies were created in the 1960s as part of the civil rights movement in response to systemic discrimination in schools and in the workforce. Affirmative action provisions were included in the 1964 Civil Rights Act, addressed by Executive Orders by President John F. Kennedy and President Lyndon B. Johnson, and upheld by the Supreme Court until recently. The intent of affirmative action is to promote diversity and address historical disparities by factoring in race, gender, disability, age or ethnicity in recruitment and hiring decisions.

[2] Naomi Isenberg and Markus Brauer, "Diversity and Inclusion Have Greater Support than Most Americans Think," Scientific Reports 14, no. 1 (2024): 28616, https://doi.org/10.1038/s41598-024-76761-8.

[3] Joshua Mintz, "Most Foundations Are Not Retreating from Their Racial Justice Goals," Center for Effective Philanthropy, February 27, 2024, https://cep.org/blog/most-foundations-are-not-retreating-from-their-racial-justice-goals/

READI has created this resource for three main reasons:

1. **To provide transformative and practical insight into the current landscape.**
   This Legal Landscape Analysis stems from READI's mission to promote, expand, and defend race-explicit grantmaking and programming. It does this by demystifying and streamlining the sector's ability to respond to and address rapidly evolving circumstances with as much clarity about the legal landscape as is practical.

2. **To promote an honest conversation about risk recognition, mitigation, and management.**
   The goal is not to reduce or ignore risk, which is inherent to race-explicit work right now, but to understand how best to identify risk and manage it. This includes recognizing that different organizations and communities will be exposed to different levels of risk and will have varied levels of comfort in taking on risk.

3. **To support informed decision-making among leaders.**
   This is a collective effort to empower foundation executives and decision makers to develop sound approaches for exploring their own exposure to potential risks in race-explicit initiatives and to share strategies to move forward in coordination with their employees, donors, grantees, and other interest holders.

Who is the Legal Landscape Analysis for and how should it be used?

These analyses and resources are for brave leaders—from donors, executives, and board members to general counsels and program directors—at public and private philanthropic institutions and nonprofits who want to:

1. Defend, protect, and advance race-explicit grantmaking in their work.

2. Understand the risks inherent to race-explicit grantmaking and develop informed strategies to manage that risk.

Foundations and nonprofits can use this Legal Landscape Analysis to identify where risk exists, have more informed strategy setting and decision-making conversations, and strengthen a sustained commitment to race-explicit grantmaking. This resource should support a shared understanding of the legal landscape between peers. It is **not** legal advice and should not be used or interpreted as legal advice.

Note: Not all organizations share the same risk tolerance, nor the same capacity to analyze risk. This Legal Landscape Analysis is not meant to be a substitute for an organization's own risk assessment.

CONSIDERATIONS TO DEFEND RACE-EXPLICIT GRANTMAKING

These toplines are the distillation of what READI is learning and observing. As we call on the field to stand in support of racial equity and race-explicit grantmaking, the considerations below aim to ensure philanthropic leaders and organizations can make informed and clear-eyed decisions about how they will continue to do so.

Philanthropic Freedom and The First Amendment

The ideal of philanthropic freedom—meaning the philanthropic sector's entitlement to give dollars according to their views—is still currently covered by the First Amendment. **This means that the First Amendment should still be considered a defense for race-explicit grantmaking, with some learnings from previous challenges.**

When the American Alliance for Equal Rights filed a complaint against the Fearless Fund in 2023, Fearless Fund lawyers employed a First Amendment defense, arguing that charitable organizations have the right to give money in alignment with their mission. The judge at the District Court for the Northern District of Georgia agreed that the First Amendment "may" protect Fearless Fund's contest as a form of expressive conduct.

However, after the case was appealed to the 11th Circuit Court of Appeals, a panel of judges reversed that decision. The Circuit specified that the First Amendment did not protect the "very act of discrimination" of excluding applications from business owners who were not Black women. In relevant part, the 11th Circuit decision states:

> *The First Amendment, of course, broadly prohibits the government from "abridging" a private party's "freedom of speech." […]And the Supreme Court has extended the First Amendment's reach to protect even so-called "expressive conduct." […] But— and it's a big "but," which effectively controls our analysis here—the Supreme Court has clearly held that the First Amendment does not protect the very act of discriminating on the basis of race.*[4]

While the Circuit Court acknowledged how "the line between 'pure speech' and the very act of discrimination itself may at times be hard to draw", it still prevented the Fearless Fund program from continuing as intended. Unfortunately, the Circuit not only issued a remand for a preliminary injunction which prevented Fearless Fund from continuing its contest, it also presumed the Fearless Fund would

[4] AAER v. Fearless Fund, No. 23-13138 (11th Cir. 2024), https://media.ca11.uscourts.gov/opinions/pub/files/202313138.pdf

bear a burden as it would "need to change its contest rules to bring itself into compliance with § 1981" to further "the interest in rooting out race discrimination in all its forms." The case was settled in September 2024.

There are three learnings here for philanthropic organizations.

1. **First, grantmaking is at the intersection of expression (i.e. how you advocate for the idea of racial equity) and action (i.e. how you make decisions about what to fund).** Defining a grant program's goals and criteria with respect to race may represent expressive conduct that articulates mission congruence; selecting or excluding applicants based on race, on the other hand, may be deemed an act of discrimination.

2. **Second, different courts will interpret the law in different ways,** and while the 11th Circuit decided that funding represents an action beyond expressive conduct and therefore is not protected by the First Amendment, that may not hold elsewhere. There still may be an argument that, for the philanthropic sector, funding by its very nature is expressive. We anticipate further attention to this question.

3. **Third, language matters.** READI supports speaking clearly and explicitly about race in this country, and we believe this is consistent with First Amendment rights. At the same time, public-facing language is undoubtedly being monitored to identify potential programs and organizations to target.[5] We are not advising, suggesting, or recommending to include or to eliminate this language from grants and websites. Rather, we are acknowledging that race-explicit language comes with exposure. If you choose to be explicit in your language, it is best practice to understand the compliance measures that will support you (like grant structures or IRS compliance).

Section 1981: Intent vs. Application on Contracts and Grants

Generally, a contract is an offer and acceptance between two or more parties where terms are specified and something of value is exchanged for consideration.

Section 1981 of the 1866 Civil Rights Act, the law used to sue the Fearless Fund, was specifically designed in response to the rampant, destructive, and well-documented racism African Americans were

[5] Karen Yourish, "These Words Are Disappearing in the New Trump Administration," The New York Times https://www.nytimes.com/interactive/2025/03/07/us/trump-federal-agencies-websites-words-dei.html.

experiencing in the wake of the Civil War.[6] The law grants to "all persons . . . the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens."[7]

While the law was passed within a race-explicit context to protect non-white citizens, litigants leveraging this line of argument oppose the recognition of race in **any** context, even if it is to mitigate inequities or address systemic differences.

In the context of the Fearless Fund case, one of the reasons plaintiffs were able to characterize the grants made by the Fund to Black women as contracts that violated the prohibition in racial discrimination was because the Fund's grant program itself was both structured and referred to as a "contract." **Funders may want to revisit grant agreements that require the grant recipient to commit to *legal obligations of any kind***, or that are structured as contracts, since this is the type of grant agreement at issue in the Fearless Fund case. A trust-based model of charitable giving[8] that treats grant recipients as best suited to use philanthropic funding with minimal, but responsible, oversight may also move funders further away from designing their grant programs as contracts.

The Fearless Fund's program, which funded Black women in a corrective effort to minimize the pervasive resource gap Black women business owners face, can be distinguished from other programs that fund issues that implicate race. For example, a fellowship program that indicates it is "for Black doctors" or limited to "African American applicants" may be more likely to be regarded as violating the prohibition on racial discrimination under section 1981 as compared with a fellowship program that indicates it is for "doctors demonstrating a commitment to provide culturally sensitive care in Black communities that have historically been healthcare deserts with high rates of chronic, preventable or communicable diseases."

Grant Basis and Mission Clarity

In race-explicit investing, clarifying the disparity you are addressing, internally and externally, can reduce risk exposure. A strong understanding of an organization's basis for issuing grants and how that practice is connected to a charitable mission is an important step in determining any organization's legal or reputational exposure. If your mission advocates for the elimination of prejudice and discrimination and your grant program supports that, this is still likely to be considered a charitable activity, provided the efforts do not clearly violate existing anti-discrimination laws (which are currently subject to uncertain interpretations by US courts).

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[6] Federal Judicial Center, "Civil Rights Act of 1866," *Federal Judicial Center*, https://www.fjc.gov/history/timeline/civil-rights-act-1866.
[7] 42 U.S.C. § 1981 (2023), https://www.law.cornell.edu/uscode/text/42/1981.
[8] Trust-Based Philanthropy Project, "What Is Trust-Based Philanthropy?, https://www.trustbasedphilanthropy.org/what-is-tbp.

One way to gauge whether grant basis and mission clarity are connected is to consider articulating how a grant program may be offering compensation of some kind. For example, an organization may have a mission focused on ensuring all people have access to the economic resources they need to thrive. Through their strategy, they may point to US federal policy that has limited the ability of Black families to accumulate wealth at the same rate as white families. Therefore, their investments may aim to specifically build assets for this impacted group.

Philanthropic Funding and the Political Status of Tribal Nations

Another essential part of this legal grantmaking landscape is understanding the legal distinctions that apply to Tribal Nations and their citizens. As the first governments of this land, Tribes have an established political relationship with the United States[9]. The foundation for the political relationship stems from the treaties and agreements in which Tribes relinquished land in exchange for specific promises and assurances. Both the political status of Tribal Nations and the importance of treaty agreements as legal standards are embedded in the U.S. Constitution and guide determinations around policies, funding, and support for Tribal communities.[10] The U.S. Supreme Court has consistently upheld and affirmed the legal basis for this unique political relationship, including for federal programs that provide preference for Tribes and their citizens based on their political status.[11]

Therefore, grantmaking to Tribal citizens and Native communities typically falls under a different legal standard since it is often represented through Tribal Nations' government-to-government relationship with the federal government, which is not subject to the same level of constitutional scrutiny as race-based classifications. Funders should consider this legal status and political relationship when providing funding to Tribal Nations and communities.

[9] *Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832), https://supreme.justia.com/cases/federal/us/31/515/*.

[10] *U.S. Constitution*, art. I, sec. 8, cl. 3; and art. IV, sec. 2, https://constitution.congress.gov/browse/.

[11] *Morton v. Mancari*, 417 U.S. 535 (1974), https://supreme.justia.com/cases/federal/us/417/535/.

CURRENT LAW AND CASE PRECEDENT

This section provides READI's perspective on four key questions leaders in the philanthropic sector may have about the legal status and history of race-explicit grantmaking. Given the current volatility of the legal landscape, it is critical for leaders to be in continuous communication with their own leadership and legal advisors about their organizations' unique exposure.

Is race-explicit grantmaking currently legal?

Yes, it is for private funders, and we believe it should be. However, since race-explicit grantmaking has been attacked by lawsuits, as of 2024, the legality of making race part of grantmaking programs in the 11th Circuit is unsettled.

Is there legal precedent that directly supports race-explicit grantmaking?

While American courts have grappled with the intersections of race and the law for centuries, race-explicit grantmaking is a relatively new area of attack. Although a number of relevant cases have been filed, many have also been settled, which means they have not led to accessible guidance. As we survey existing jurisprudence to better inform and communicate our understanding in this particular area, we expect leaders in the philanthropic sector to become familiar with the origins and opponents of this practice.

Legal precedent supporting race-explicit grantmaking:

- **The Internal Revenue Service (IRS) definition of "charitable,"** which states that "the term charitable is used in its generally accepted legal sense and includes relief of the poor, the distressed, or the underprivileged; advancement of religion; advancement of education or science; erection or maintenance of public buildings, monuments, or works; lessening the burdens of government; lessening neighborhood tensions; eliminating prejudice and discrimination; defending human and civil rights secured by law; and combating community deterioration and juvenile delinquency."[12]
- Racially targeted programs and activities of 501(c)(3) nonprofit organizations that seek to eliminate discrimination have been historically approved by the IRS and referenced as examples in **Treasury Regulations about grant rules that apply to private foundations**. One example describes a scenario where a company foundation provides 20 college scholarships per year for members of a

[12] *See* 25 CFR § 1.501(c)(3)-1(d)(2) for complete definition.

certain ethnic minority. All members of this minority group (other than the foundation's insiders) living in State Z are eligible to apply for these scholarships. Scholarship selections are made by a committee of education experts, based on criteria such as prior academic performance and financial need. Federal regulations explicitly state that the foundation's operation of this scholarship program: (1) is consistent with the existence of the foundation's exempt status under section 501(c)(3); (2) utilizes objective and nondiscriminatory criteria in selecting scholarship recipients from among the applicants; and (3) utilizes a selection committee which appears likely to make objective and nondiscriminatory selections of grant recipients."[13]

- **General Counsel Memorandum** (GCM) 38841[14], issued **by the IRS's Office of Chief** Counsel, provides helpful insights into race-explicit charitable programs. This memorandum, issued in 1982, acknowledged charitable programs that exclusively benefit minorities are permissible if they are not discriminatory and serve a public purpose. Although the memorandum stated that "aid to minority business owners is not itself a charitable purpose under Section 501(c)(3)," as "[t]here is no indication that all minority-owned businesses and individuals connected with them, who are the primary beneficiaries of the purchasing councils' activities, are impoverished, underprivileged or similarly distressed," ultimately, the IRS approved the program, as it was rooted in policy finding that such programs "will mitigate the effects of past discrimination, will reduce future discrimination in economic opportunity, and will thereby effect other social welfare goals such as reduced poverty and community rehabilitation." (G.C.M. 38841).
- US Supreme Court case law supports the notion that charitable grantmaking is protected by the **First Amendment** as a form of expressive conduct reflecting "'a variety of speech interests'"[15] that are "inextricably intertwined with ... fully protected speech" through advocating for certain ideals. For at least a few decades, the First Amendment has successfully been used as a constitutional basis for protecting an organization's right to donate to charitable causes or express a message that aligns with their values through grantmaking.[16] Notably, the 11th Circuit Court in the American Alliance for Equal Rights v. Fearless Fund case ruled the First Amendment did not protect the grantmaker's

[13] U.S. Department of the Treasury, Grants to Individuals, 26 C.F.R. § 53.4945-4 (2023), https://www.law.cornell.edu/cfr/text/26/53.4945-4.

[14] Internal Revenue Service, General Counsel Memorandum 38841, "Helping a Minority Business to Reduce Economic Discrimination and Increase," https://www.taxnotes.com/research/federal/irs-private-rulings/general-counsel-memorandums/helping-a-minority-business-to-reduce-economic-discrimination-and-increase/1fy9s?highlight=GCM%2038841.

[15] Schaumburg v. Citizens for Better Environment, 444 U.S. 620 (1980), https://supreme.justia.com/cases/federal/us/444/620/#632.

[16] Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781 (1988), https://tile.loc.gov/storage-services/service/ll/usrep/usrep487/usrep487781/usrep487781.pdf.

conduct because "the First Amendment does not protect the very act of discriminating on the basis of race."

Key legal decisions:

- **American Alliance for Equal Rights v. Fearless Fund** saw Section 1981 of the 1866 Civil Rights Act used to sue the Fearless Fund for discriminating in contracts. Section 1981 of the 1866 Civil Rights Act is a law that was passed during the Reconstruction Era to prohibit racial discrimination in contracting. In this case, plaintiffs alleged that an Atlanta organization's grant contest for small business owners violated Section 1981 because the contest's rules explicitly required the contest participants to be Black women. After the 11th Circuit ordered a pause to the Fearless Fund grant program in June 2024, the case ended in a settlement in September 2024. As the settlement avoided the court reaching a decision on the merits of the case, the impact of this case is both limited and telling. As a result, the legality of race-explicit grantmaking programs in the 11th Circuit (Alabama, Florida, and Georgia) is unsettled.
- The **SFFA v. Harvard and SFFA v. University of North Carolina** cases examined the use of race in the admissions process in both public and private institutions. In a joint decision, the Supreme Court held that the use of an applicant's race in the admission process through affirmative action programs violates the Constitution's Equal Protection Clause and Title VI of the Civil Rights Act of 1964. Notably, the ruling stated "[e]liminating racial discrimination means eliminating all of it. And the Equal Protection Clause… applies 'without regard to any differences of race, of color, or of nationality'—it is 'universal in [its] application… For '[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.'"[17] The Supreme Court's ruling that university admissions decisions that hinge on race violate the constitution opened a door for race based decision making in a myriad of other programs to be challenged, namely scholarships, financial aid, and philanthropic grantmaking. Further, the Supreme Court found that both Harvard and UNC's programs "lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points."[18]

Taken together, these precedent-setting laws, definitions, and cases have created a landscape where the law itself is expected to be challenged and possibly changed. Although legal decisions do not necessarily change the law in one fell swoop, they create persuasive precedent that can then be cited and relied

[17] Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, No. 20–1199, slip op. at [page number] (U.S. June 29, 2023), https://www.supremecourt.gov/opinions/22pdf/20-1199_hgdj.pdf.
[18] Students for Fair Admissions, Inc. v. President and Fellows of Harvard College

upon by other courts. Legal rulings can also be used by lawmakers to propose new laws. **For now, race-explicit grantmaking remains legal despite legal challenges to it.**

Are there different legal considerations for foundations vs. other nonprofits?

In short, yes—any organization's state, federal, and legal structure is always relevant to how they are regulated and what protections may be available to them. The applicable considerations to keep in mind will always be unique to that organization's specific institutional form, mission, and legal experience. It is critical to ensure appropriate local and licensed legal counsel is engaged to accurately capture any immediate risks a foundation or nonprofit is navigating in the area of race-explicit grantmaking, especially at this time.

- **Private foundations** are among the most regulated tax-exempt entities by the IRS, but they often enjoy more resources with which to resist legal challenges. These resources are not just financial, but operational risk mitigation methods through which private foundations can employ general counsel, retain the services of a law firm, and fund potential legal battles.
- **Nonprofits** and public charities face fewer restrictions in their operations than private foundations but typically lack the same institutional power. These organizations are likely to have fewer resources with which to analyze their own legal risk and defend against an attack. This makes the need to provide (or facilitate providing) legal support to nonprofit public charities and grantees even more imperative.

How can organizations ensure they maintain 501(c)(3) status?

501(c)(3) status is granted and administered by the Internal Revenue Service (IRS). The IRS must follow certain procedures to question an organization's tax-exempt status, including giving the organization an opportunity to defend itself.[19]

While each organization is distinct, the best general practice for maintaining this designation and managing risk is to **ensure compliance in all aspects of established law**. Compliance is key in the current climate.

[19] American Bar Association, "How the IRS Can—and Cannot—Revoke Federal Tax-Exempt Status," Business Law Today, May 2025, https://www.americanbar.org/groups/business_law/resources/business-law-today/2025-may/how-irs-revoke-federal-tax-exempt-status/

The IRS has made publicly available a document titled How to lose your 501(c)(3) tax-exempt status (without really trying)[20] which may be instructive to organizations looking to maximize their compliance. The document includes, among other measures, the following of the organization's charitable purpose, regulations on lobbying, unrelated business income, and prohibition on political activity. As nonprofits face increased scrutiny, it is important that organizations continue to prioritize best practices to maximize compliance.[21]

[20] Internal Revenue Service, How to Lose Your Tax-Exempt Status (Without Really Trying), https://www.irs.gov/pub/irs-tege/How%20to%20Lose%20Your%20Tax%20Exempt%20Status.pdf.
[21] Internal Revenue Service, How to Lose Your Tax-Exempt Status.

GEOGRAPHIC CONSIDERATIONS

How will cases advance through the legal system?

The groups that bring legal complaints against race-explicit grantmaking are likely enthusiastic about seeing a challenge advance to the Supreme Court, where a definitive ruling would create new legal parameters across the country. To get there, cases are often heard by several lower-level courts and appealed at each step. This is a long and costly process that can sometimes take years.

Usually, if the complaint challenges a federal law (such as Section 1981 of the Civil Rights Act), it would first be tried in one of 94 federal district courts. The ruling of that court may then be appealed, at which point it would advance to one of the 12 Circuit Courts of Appeals. The ruling of that court may be appealed as well, at which point parties can petition the Supreme Court to hear the case. The Supreme Court agrees to hear about 80 of the more than 7,000 cases that it is asked to review each year.[22] The chosen cases tend to represent timely and complex legal questions. If the Supreme Court does not hear a case, the ruling of the Appellate Court stands.

The path a case takes will be heavily influenced by a number of factors, including not only the decisions of lower courts and the resources representatives have to appeal, but also the litigants' capacity to expend resources, time, or assume the risk of creating case law that is unequivocally unfavorable.

The Fearless Fund case was settled between the two parties when Fearless Fund agreed to shutter a specific program. This settlement limited the impact of the case affecting potential parties outside of the 11th Circuit (Alabama, Georgia, and Florida) by avoiding the case being reviewed and decided by the Supreme Court.

Where will cases be brought?

It is impossible to predict where cases will be brought, but prudent to prepare for the possibility of a legal challenge in every state. The legal landscape is constantly shifting, particularly with an issue as charged as race-explicit grantmaking. No matter where an organization is physically located, its leaders should proactively prepare for mitigating challenges to established charitable programs that are purposefully race-explicit.

Still, some locations may be more vulnerable to lawsuits than others.

[22] Supreme Court of the United States, "Frequently Asked Questions," Supreme Court of the United States, https://www.supremecourt.gov/about/faq_general.aspx.

The Advancing DEI Initiative "monitors federal lawsuits that directly or indirectly affect DEI in the workplace."[23] Of the types of cases they track, lawsuits challenging "Targeted Programs" are most relevant to race-explicit grantmaking (Targeted Programs are defined as "Programs intended to uplift or benefit a marginalized or underrepresented group, such as a scholarship, grant, fellowship, or internship.")

As of September 2025, the breakdown of cases challenging Targeted Programs by Circuit is as follows:[24]

- First Circuit: 0 cases
- Second Circuit: 9 cases
- Third Circuit: 4 cases
- Fourth Circuit: 3 cases
- Fifth Circuit: 13 cases
- Sixth Circuit: 4 cases
- Seventh Circuit: 9 cases
- Eighth Circuit: 3 cases
- Ninth Circuit: 8 cases
- Tenth Circuit: 1 case
- Eleventh Circuit: 5 cases
- D.C. Circuit: 5 cases

This list is only a proxy for understanding legal challenges by geography and does not represent a full risk assessment. All organizations should work closely with legal counsel to understand their risk exposure and monitor potential vulnerabilities.

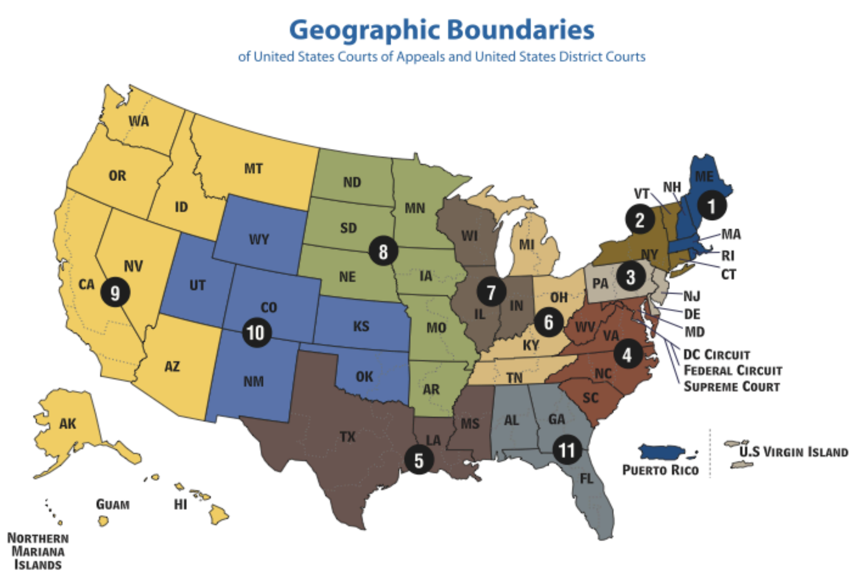


Figure 1: Map of United States District Courts[25]

[23] Meltzer Center for Diversity, Inclusion, and Belonging, "Methodology," Advancing DEI Initiative, https://advancingdei.meltzercenter.org/methodology

[24] Meltzer Center for Diversity, Inclusion, and Belonging, "Methodology," Advancing DEI Initiative.

[25] Administrative Office of the U.S. Courts, U.S. Federal Courts Circuit Map, https://www.uscourts.gov/file/document/us-federal-courts-circuit-map

STRENGTHENING YOUR RISK APPETITE

There is inherent risk in pursuing race-explicit grantmaking in a litigious climate that is changing every day. We believe it can be thoughtfully managed by leaders who want to unequivocally determine a clear path forward. Instead of trying to avoid all risk at the expense of neglecting to execute on grantmaking initiatives, READI encourages funders to engage in **a radical assessment of their institutional, reputational, fiscal, and legal risk appetite**. Our hope and vision are that every organization finds and strengthens its risk appetite.

As a necessary starting point for sector-wide action, this section outlines steps that organizations may consider as they develop frameworks for understanding their risk appetite in accordance with their own standards, resources, and needs. This is one of many tools that should be used in coordination with other resources.

The goal of answering these questions is to guide an informed determination of your risk appetite and how you might strengthen it. While each foundation is structurally different, this is a tool for philanthropic leaders to bring to a collaborative conversation with your leadership team, legal counsel, and communications leads.

STEP 1

Risk Identification

What programs or actions do we believe are most vulnerable to a legal challenge? Why?

STEP 2

Resources and Liabilities Discussion

With your team, facilitate a discussion around the following questions. This is not an exhaustive list, and you should feel encouraged to add your own questions to best fit your organization.

LEGAL

- What counsel do we have relationships with or would we consider asking for legal advice on this matter?
- What interests and stakeholders may be impacted by a lawsuit against our organization?
- Are there any court rulings that might be relevant to guide our understanding of the potential for a challenge to advance?
- What resources might we consider leveraging or obtaining to defend against a lawsuit?

EXPERTISE

- To what extent does our leadership team and Board have experience with threats or litigation of this sort?
- What experience and expertise might we need to seek to defend against a challenge? How feasible is it to obtain?

PARTNERSHIPS

- What sponsors or supporters within our network might be better positioned and willing to take on or assist our organization with a costly and time-intensive challenge for sector-wide benefit?
- Who are the partners we know are eager to use their voices, influence, and resources to support us in a manner aligned with our approach?
- Are there any peer organizations who are navigating the same challenges?

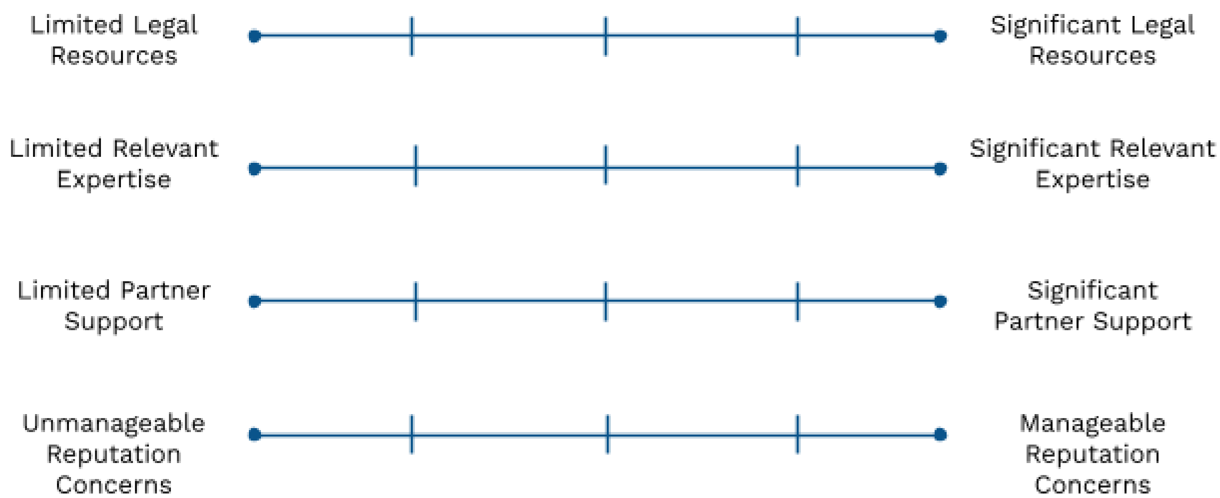
REPUTATION

- What is the risk of walking back our commitments with our staff? With grantees? With peers?
- How does moving away from a race-explicit stance align with our organization’s mission and values?
- How do we ensure our credibility with our board is nurtured and leveraged?

STEP 3

Self-Assessment

Based on the discussion above, place your organization on the spectrums below. You may choose to add additional spectrums based on your conversation.



STEP 4

Opportunities to Strengthen

Based on your self-assessment, answer the following questions to determine your next steps in strengthening your risk appetite:

- What are three actions we might take to strengthen our risk appetite?
- In what areas do we want to mitigate or lessen our risk exposure (rather than building up our risk appetite)? Why?

Access the printable risk assessment worksheet here.

RESOURCES

Please find below a non-exhaustive collection of resources that may support individuals and organizations who wish to promote, expand, and defend race-explicit grantmaking.

READI Resources:

- **READI Resource Bank:** A repository of tools and resources for nonprofits engaged in race-explicit grantmaking or programming to support them in navigating this complex legal and social landscape.
- **READI Legal and Security Fund**: An upcoming fund that will provide financial support to nonprofits that face legal challenges due to their race-explicit grantmaking or programming, ensuring they have access to necessary legal counsel.

External Resources:

- Advancing DEI Initiative: DEI Litigation Tracker: A digital tool from the Meltzer Center for Diversity, Inclusion, and Belonging at NYU School of Law that provides information about litigation challenging DEI and how federal courts are addressing DEI issues.
- Democracy Forward: Safeguarding and Strengthening DEI Initiatives: A report from Democracy Forward that demonstrates how efforts by anti-DEI opponents to weaponize the SFFA v UNC and SFFA v Harvard rulings by the Supreme Court have largely failed to dismantle other DEI programs through the court system.
- Investing In Racial Equity Through Charitable Grants: A resource from the Lawyers' Committee for Civil Rights Under Law providing "a non-exhaustive list of lawful ways to continue the critical work of fostering fairness and economic opportunity for communities of color."
- Advocacy, Awareness, & Action: A Strategic Campaign to Defend and Advance Philanthropy's Freedom To Invest in Community Well-Being: A coordinated campaign (including sector resources) to protect the philanthropic ecosystem and the role it plays in building a vibrant civil society.

Please Note: some resources are only available to members.

HOW DID READI CREATE THIS RESOURCE?

In addition to the expertise of the four philanthropy-supporting organizations (PSOs) that make up READI, the team also consulted experts, including foundation executives and general counsels, to better understand the challenges facing philanthropic organizations, their legal perspective, and their approach to this moment of increased scrutiny. READI engaged RALLY, an advocacy communications agency that specializes in driving progress around complex political, cultural, and social challenges to create this resource, as well as The Campbell Law Firm (TCLF) of Build Up Companies to provide legal insights in our collective development of this document.

FREQUENTLY ASKED QUESTIONS AND CONSIDERATIONS

Please Note: The ‘Frequently Asked Questions And Considerations will be updated quarterly and additionally as needed to maintain an accurate record of information.

What constitutes a contract?

A contract is generally understood as an agreement between parties, where each party agrees to engage in (or refrain from engaging in) a particular activity, supported by consideration. Consideration is the promise of or active provision of something of value in exchange for the promise of another party. Contract and grant agreement templates should be regularly reviewed by legal counsel to understand the implications of the agreement.

How can an organization assess whether a grant program forms a contract?

If either party receives benefits, those benefits could constitute consideration. For funders, be prepared to articulate what, if anything, your organization receives in exchange for payment (such as intellectual property rights, the right to receive reports, or a commitment to use the funds for a specific purpose).

Is it legal to incorporate race into a grantmaking program?

Yes. However, there are federal, state, and local laws and regulations (and ongoing litigation) that could impact the ways in which a grant program may incorporate race.

It is important to work with counsel to understand and mitigate the potential impact of these laws, regulations, and litigation on your organization’s grant program, including internal conversations with your organization’s leadership to align on your organization's risk appetite.

What is the legal authority of an Executive Order?

An Executive Order[26] allows the President to direct federal executive branch agencies and staff to take or stop taking specific actions related to the execution and implementation of law. Historically, executive orders were not used to take powers that belong to other branches of government, such as Congress's power to pass laws. However, the recent weaponization of executive orders is unprecedented and

[26] Christopher Anders, "What Is an Executive Order and How Does It Work?" American Civil Liberties Union, February 4, 2025, https://www.aclu.org/news/privacy-technology/what-is-an-executive-order-and-how-does-it-work

destabilizing. This is not normal, but it is being normalized—this is something we are continuing to monitor.

Courts may review and rule on the permissibility of an Executive Order. For example, plaintiffs are currently challenging the anti-DEI Executive Order that was issued on January 29, 2025.[27] As of the date of publication, parts of that Executive Order are blocked from taking effect.[28]

What are the practices organizations can implement to continue race-explicit grantmaking?

Every organization's processes and practices will be different. We recommend consulting the Transformative Actions document from READI for organizations that want to shore up their commitments internally, in their relationships, and in the field. We also recommend reviewing the Lawyers' Committee document titled "Investing in Racial Equity Through Charitable Grants and Services." Below, we have pulled out the most relevant section

Additional Examples of Lower-Risk Measures to Advance Racial Equity

Whether or not a contract is formed, there are additional ways organizations can advance their racial equity goals through measures that are not race-exclusive and treat applicants of all races and ethnicities the same.

For example, organizations can:

- consider applicants' demonstrated commitment to advocacy on behalf of Black communities or communities of color;
- consider applicants' lived experiences with race, racism, and discrimination;
- voluntarily solicit demographic data from applicants and beneficiaries for analytical purposes to better measure program impacts and results;
- develop aspirational goals if certain groups are underrepresented in your application process;

[27] Donald J. Trump, Executive Order 14151: Ending Radical and Wasteful Government DEI Programs and Preferencing, January 20, 2025, Federal Register 90, no. 19 (January 29, 2025): 8339–8341, https://www.federalregister.gov/documents/2025/01/29/2025-01953/ending-radical-and-wasteful-government-dei-programs-and-preferencing

[28] National Association of Diversity Officers in Higher Education v. Trump, No. 1:25-cv-00333-ABA (D. Md. Feb. 21, 2025), Preliminary Injunction Order, https://www.energy.gov/sites/default/files/2025-03/NADOHE%20v.%20Trump%20Preliminary%20Injunction%20Court%20Order.pdf

- use targeted recruitment and advertising to increase racial and ethnic demographic representation of underrepresented groups in applicant pools, including partnering with Historically Black Colleges and Universities, Hispanic-Serving Institutions, and other Black, Indigenous, and People of Color-serving organizations.

Please Note: This is not an exhaustive list.[29]

How can we prepare to respond to any potential litigation or government inquiry involving our funding programs, such as grants, scholarships, and fellowships?

The best preparation is to develop an internal response plan. It should broadly identify who from the organization needs to be notified to review the threat and develop protocol for responding.

As part of that plan:

- Structure relationships with dedicated providers that can be called upon when needed (for example, legal counsel or a communications firm). Organizations that do not have existing counsel should internally confirm who from the organization would be well-positioned to initially address an inquiry.
- Identify scenarios that could possibly pose a foreseeable threat.
- For each scenario, discuss how the organization will manage questions immediately following the complaint. If the organization intends to respond, develop preliminary talking points that can be used for immediate questions (e.g., a very broad, high-level statement on the program's mission and that the organization is reviewing the complaint and discussing with counsel).
- Establish which roles are required to approve certain communications and which roles are authorized to speak on behalf of the organization.
- Create a plan for communicating updates to partner organizations (funders, grantees, board members, etc.).

[29] Lawyers' Committee for Civil Rights Under Law, Investing in Racial Equity Through Charitable Grants and Services, March 2025, https://www.lawyerscommittee.org/wp-content/uploads/2025/03/LC_Investing-in-Racial-Equity_F-1.pdf

Are there specific language considerations for external communications relating to a funding program that supports a specific marginalized racialized group?

What language to use in external materials about a grant program depends on an organization's unique structure, risk appetite, legal experience, and resources. It is best practice to focus communications on clearly articulating the underlying charitable purpose of how the grant program is meant to address a specific harm to a particular racialized demographic group.

Organizations should also evaluate the degree to which public-facing communications benefit or could ultimately harm the population served, and have discernment around marketing considerations for the program. It is important for public relations and communications teams to coordinate closely with internal or external risk managers or legal counsel before issuing any public-facing communications about a grant program that features language that is aspirational, inaccurate, or that could backfire.

Take care to avoid mischaracterizing the program (for example, by giving the impression that eligibility is based on race if there is no such eligibility criterion).

What jurisdictions are impacted by the Fearless Fund decisions?

The Fearless Fund decision was an 11th Circuit court ruling, which means it most directly impacts Alabama, Florida, and Georgia.

What jurisdictions are impacted by the *Students for Fair Admissions, Inc. (SFFA) v. President & Fellows of Harvard College (Harvard) and Students for Fair Admissions, Inc. (SFFA) v. University of North Carolina (UNC)* decision?

All jurisdictions. A Supreme Court decision is applicable nationwide. In the joint decision, it was determined that the universities (one private and one public) violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.

While the decisions in these cases focus on higher education, courts often interpret non-discrimination laws in similar manners, so lower courts could use the SFFA decision as instructive precedent in cases brought before them.

How can we educate and communicate with staff about our grantmaking strategy?

There are a number of methods organizations can use, including the following:

- Offer trainings to staff about best practices and institutional risk appetite. Consider the format of trainings and whether there are any controls or advisors that may be necessary to ensure the training materials are effectively understood, not easily distributed, or inadvertently leaked to unintended parties.
- Review, update, and circulate any existing communications policies to reinforce the need for staff to regularly guard against disclosure of sensitive or proprietary information. For affiliates who are not employees but have access to sensitive materials, it is important to consider whether a non-disclosure agreement is beneficial.
- Remind partners who act as representatives of the organization how their communications may be scrutinized, exploited, or used against them. Clearly specify which roles are authorized to speak on behalf of the organization in public communications, and that any questions should be directed towards those individuals.
- Provide staff who are authorized to speak on the organization's behalf with pre-set talking points and responses for common questions.
- Use secure channels and encrypted messaging where reasonable and accessible.

Please Note: These materials may still be discoverable or accessible to use in legal proceedings.