Frequently Asked Questions

Updated March 2025

1. Why are nonprofits and their funders so concerned about their race-conscious grants and programs?

There have been a number of anti-equity efforts that have caused concern among organizations working toward racial justice. The various attacks can feel overwhelming and difficult to keep track of. So far, only one anti-equity effort has changed the legal landscape on a national level.

Students for Fair Admissions (SFFA) sued Harvard College and the University of North Carolina, saying their use of race to favor underrepresented minority applicants in their college admissions decisions unlawfully discriminated against white people. After nine years of litigation, the U.S. Supreme Court held in June 2023 that Harvard and UNC's affirmative action programs were unlawful, overturning decades of court cases that had permitted pursuing a diverse student body as a compelling interest. The schools were ordered to stop considering race as a plus factor in their admissions process, although they are not prohibited from pursuing a diverse student body through other lawful means, including targeted recruitment of underrepresented students. The Court also held that students may still discuss their race and the role it has played in their life in their college applications. Finally, the Court's decisions also left open the possibility that race-conscious admissions programs could be upheld under a different compelling interest. This could include, for example, remedying specific acts of an institution's past and present discrimination. The decision has significant implications for admissions at colleges and universities nationwide.

The SFFA ruling has emboldened civil rights opponents to file lawsuits under other civil rights laws challenging racial equity programs outside of higher education.

2. Did the Supreme Court's decision in SFFA apply to nonprofits' race-conscious programs?

No. The ruling applied to higher education admissions. Specifically, it limited the ability of colleges and universities that are public institutions or receive federal funding to use race as a systemic factor in their admissions process. The Supreme Court had previously addressed the legality of race-conscious programs in other contexts, such as employment and government contracting. Consideration of race in other contexts, such as charitable giving, has never been addressed by the Supreme Court.

3. Can a nonprofit organization still engage in mission-driven work to pursue racial and ethnic equity?

Yes, nonprofits with a mission of eradicating discrimination or creating greater racial equity may continue their work. Seeking to eliminate discrimination and increase racial representation in groups lacking diversity -- student bodies, trades and professions, homeowners, business communities, etc. -- remains legal. While the SFFA ruling limited the circumstances in which colleges and universities may consider race as a factor in admissions, nonprofit organizations are still able to pursue the ultimate goals of nondiscrimination and diversity, including in higher education. Some specific practices may face challenges, but the overall goal of advancing racial justice is protected by the law and our Constitution.

That being said, the current federal administration has issued two Executive Orders (EO), Executive Order 14151 ("EO 14151") titled, "Ending Radical and Wasteful Government DEI Programs and Preferencing," and Executive Order 14173 ("EO 14173"), titled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity" that are creating more risk for federally-funded 501(c)(3) organizations engaged in work to advance diversity, equity and inclusion. It is a shifting landscape, given that there are several ongoing legal challenges to the anti-DEI EOs in federal courts. It is up to the courts to determine the EOs' legality. In the meantime, it would be advisable for any 501(c)(3) that receives any amount of federal funding to become familiar with the anti-DEI EOs – and to contact counsel if they receive communications from the federal government related to their equity related funding.

They should also be in touch with their government grant administrator, document any relevant actions or costs resulting from the anti-DEI EO implementation, and communicate any contact from the government to subgrantees – since the implementation of the EOs may extend to them as well.

4. Can we consider race in choosing beneficiaries for our programs?

It depends. While the SFFA did not address the use of race outside of college and university admissions, organizations that use race as a factor in choosing beneficiaries should consider having their programs reviewed by counsel to ensure compliance with relevant civil rights laws, including Section 1981 of the Civil Rights Act of 1866, if privately funded, and Title VI and Title IX if federally funded. Generally speaking, for privately funded organizations, using a multi-faceted selection process where race is one consideration among many is less risky than requiring grantees to be a specified race or to be led by individuals of a specified race. There also may be means to achieve the same overall goal by focusing on specific issues and communities rather than the race of specific people.

5. What was the Fearless Fund lawsuit?

American Alliance for Equal Rights (AAER) sued Fearless Fund, a venture capital fund, and its foundation, for a contest open to Black women entrepreneurs, who have historically faced extreme difficulty obtaining start-up funding for their businesses from conventional sources. The Strivers Grant Contest awarded $20,000 grants to the winners. AAER said that limiting contestants to Black women illegally discriminated against white people. The case settled, with the Fearless Fund agreeing to end the contest, which had already come to a natural close. Despite the closure of the Strivers Grant Contest, Fearless Fund has continued to pursue its mission of supporting under-resourced entrepreneurs. The case received a great deal of publicity, even though the outcome only applies to Fearless Fund and its foundation.

6. Does the Fearless Fund case mean that funders can no longer fund nonprofits that consider race in their programming, or consider race in grantmaking themselves?

No. The Fearless Fund case settled without any judicial rulings on the substantive merits of the claims, meaning there are no legal impacts on any other programs or organizations. During the course of the lawsuit, the 11th Circuit – a federal appeals court – ordered the Fearless Fund to pause the Strivers Grant Contest. This pause is called a preliminary injunction, and meant that the Fearless Fund could not operate the Strivers Grant Contest until a final decision or outcome was reached in the case. As part of issuing the preliminary injunction, the 11th Circuit indicated that it would find grant programs that consider race or ethnicity violate Section 1981 of the Civil Rights Act of 1866, making them illegal. The 11th Circuit's preliminary decision indicates that other federal courts in the 11th Circuit (Georgia, Alabama and Florida) will also similarly find that race-conscious grant programs are illegal, but federal courts in other circuits and states do not have to make the same decision.

7. What is a funder's risk when funding organizations that engage in race-conscious activities?

Funders making grants to organizations that operate race-conscious activities are not likely targets of litigation. Opponents challenging a privately-funded program or activity are most likely to sue the organization conducting the program or activity, not the individuals or entities that fund it. Courts are unlikely to allow a case against a funder to proceed without evidence that the funder directly makes, or requires a grantee to make, allegedly racially-discriminatory selections of who benefits from their programs or work.

8. What if our race-conscious program is government-funded?

Activities conducted by private organizations using government funds as part of a government program that requires taking race into account make it less likely for a nonprofit to be sued, because opponents of racial justice are far more likely to challenge the government program as a whole by suing the arm of government that runs the program, such as a city or county. Nonetheless, while participating organizations are unlikely to be sued, they should be prepared to find other funding sources if the government program that funds their activities is challenged.

Where the government program does not require taking the race of individuals into account, the receipt of government funding can trigger additional regulations, so you should contact a well-informed lawyer about what those obligations may be.

9. What happens if we get sued?

If your organization gets sued and loses, you may have to stop conducting the specific race-conscious programs that were challenged in the lawsuit, or change the manner you have been conducting them. When new challenges to race-conscious programs or activities succeed for the first time, they typically result in an injunction – a court order telling an organization or party to stop doing something – rather than in damage awards or fines. However, claims challenging established unlawful activities, like intentionally discriminatory employment practices, generally will result in monetary damages.

10. Is our 501(c)(3) tax-exemption at risk if we operate race-conscious activities?

No. An organization won't lose its 501(c)(3) status if its race-conscious activities are later found to be unlawful under changing legal standards. If the law eventually evolves such that race-conscious activities that are permissible now become impermissible in the future, an organization conducting those activities will have an opportunity to change those activities long before its tax-exempt status is at risk. Furthermore, donors to that organization will not lose deductions for contributions made while the organization is exempt, nor should private foundation funders be at risk for grants made prior to a revocation.

In late 2024, HR 9495 passed the U.S. House of Representatives, but eventually died in the Senate. The legislation would have authorized the Secretary of the Treasury to temporarily “suspend” the tax-exempt status of an organization designated as a “terrorist supporting organization”. Before making that designation, the Secretary first had to find that the exempt organization had provided “material support” to another organization that itself has been designated (by other officials) as a “terrorist organization”. The legislation did not have an explicit focus on racial justice work, but many organizations were concerned that if passed, nonprofits fighting for racial justice would be targeted and scrutinized. As proposed, HR 9495 was unlikely to result in an organization with race-conscious activities that were otherwise legal, being designated as a “terrorist organization”, so conducting or supporting race-conscious activities would not have affected an exempt organization’s risk.

11. What impact do the executive orders concerning race-conscious efforts have on our ability to do racial equity work?

On January 20, 2025 and January 21, 2025 respectively, President Trump issued two executive orders, Ending Radical and Wasteful DEI Programs and Prefencing, and Ending Illegal Discrimination and Restoring Merit-Based Opportunity. Both executive orders (EOs) allege that diversity, equity and inclusion (DEI) efforts designed to remove barriers and level the playing field, are discriminatory, and seek to end all federal DEI efforts. The EOs, among other things, ordered the closure of any government DEI offices, removal of DEI language from federal agency websites, termination of any DEI related contracts and creation of lists of contractors or grantees who received federal funding to do DEI work.

The EOs also state an intent to prevent the private sector from engaging in racial justice work by ordering the creation of lists of organizations that engage in racial justice work, and requesting that government agencies decide which actions could be taken against racial justice organizations. This is the same threat that has existed since the Supreme Courts’ decision in SFFA – our civil rights laws protect our ability to engage in racial justice work. While opponents to DEI have attempted to weaponize civil rights laws to attack racial justice work, they have had limited success. The creation of lists and threat of lawsuits is part of a larger effort to cultivate fear and encourage overcorrection.

Ultimately, the impact of the executive orders is limited to entities that receive federal funds. Organizations that receive federal grants should consult with an attorney to figure out what changes, if any, they need to make. For private sector organizations that do not receive federal funds, DEI and all racial justice work remains legal.

12. Are there other ways we can manage risk as we pursue racial justice?

Yes. Throughout history, the pursuit of racial justice has required taking risks and challenging oppressive laws and systems with courage, strategy and community power. When funders and organizations retreat from our commitment to racial justice out of fear, misinformation or overly cautious risk aversion, we promote the work of our opposition.

Many factors affect the risk associated with offering or supporting a specific race-conscious program. Nonprofit organizations and their funders can evaluate the extent to which these various factors increase or decrease the risk associated with specific ongoing or proposed programs, empowering them to do as much as they can for as long as possible. The LEAD Assessment Tool identifies some of the most significant factors affecting risk, and illustrates how an organization might manage risk while continuing to operate race-conscious programs. In addition, nonprofit organizations and funders should consult knowledgeable counsel for legal advice about their specific circumstances.