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# CONDUCTING AND FUNDING RACE-CONSCIOUS ACTIVITIES: A RISK ASSESSMENT TOOL

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Race-conscious activities, that is, activities designed to support people of a specific race, have long been accepted as powerful, legally valid weapons in the fight to combat the harmful effects of race-based discrimination and disenfranchisement. However, 501(c)(3) nonprofits—which we refer to in this Tool as "charities"—and their funders working to promote racial justice, eliminate race-based disparities, and build power in communities of color, may have concerns about evolving legal risks in the wake of recent lawsuits (specifically, the U.S. Supreme Court's June 2023 decision in the *Students for Fair Admissions* case (*"SFFA"*) and others that followed), Executive Orders issued by President Trump in January 2025 (the "Executive Orders"),[1] and publicity surrounding new challenges to race-conscious programs.

Despite these evolving developments and the perception of increasing risk, the vast majority of race-conscious programs that charities conduct and that their funders support remain legal and do not pose a threat, under current law, to a charity's tax-exempt status. ***Even in this evolving legal landscape, charities and funders can continue, for now, to advance racial equity—directly, explicitly, and effectively.***

This Tool is designed to help organizations that conduct or fund race-conscious programs to make informed decisions about whether, and if so, how to adjust their programs to align their programmatic goals with their risk tolerance. The Tool is ***not designed to address whether an organization's existing programs are legal*** as currently conducted; for that, organizations should consult legal counsel with civil rights law expertise. (As of this writing, ***no*** existing programs outside college admissions have become illegal yet due to recent or pending court cases, or as a result of the Executive Orders, despite their repeated, misleading references to "illegal" DEI activities.) Our hope is that the Tool reinforces organizations' racial justice and equity efforts by helping them understand and analyze the underlying factors that may affect their risk of inviting a lawsuit, and identify and evaluate options for altering that risk, increasing their confidence to continue their work and control the narrative surrounding their programs.

This Tool is generic; it does not offer and cannot replace specific legal advice tailored to each organization's particular facts and circumstances. Consult knowledgeable legal

[1] Soon after taking office in January 2025, President Trump issued a series of Executive Orders (EOs 14148, 14151, 14173, 14185, and 14190) seeking to curtail the promotion of diversity in government and the private sector. These EOs signal the Trump administration's hostility to diversity, but importantly, do not, by themselves, change current federal civil rights or tax law.

counsel for specific advice about how your organization can manage legal exposures associated with its programs.

The Tool has three parts:

- ***Questions*** identifying a range of factors in three categories that affect risk;
- ***Explanations*** of each factor; and
- ***Further information*** about the Tool and how to use it.

# *Questions/Factors*

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***NOTE:*** *Having higher risk in one or more factors does not mean that an activity is not legal or should be discontinued, just that the activity may be more likely to be challenged by opponents, and/or that if opponents were to bring a legal challenge, the organization may be less likely to win on the merits. For most organizations, the overall risk profile is more important than any one factor. Relatively high-risk activities may be appropriate for a given organization in light of its specific mission and risk tolerance.*

## ● *Factors Related to Program Participant Selection/Composition*

**1.** ***Do you require an individual applicant (or an organizational applicant's leadership) to be of a specific race, or is the applicant's race one consideration among many in the selection process?***

| | | |
|---|---|---|
| Specific race is an eligibility requirement. | Open to anyone; race is a key factor. | Open to anyone; race is one factor among many. |

**2.** ***Do you require potential beneficiaries to have demonstrated "particularized harm" as a result of structural or institutional racism, or is there no such requirement?***

| | |
|---|---|
| You don't require evidence of particularized harm. | You require beneficiaries to demonstrate particularized harm. |

**3.** ***Does your organization set selection criteria and select program beneficiaries itself, or are other organizations responsible for selection?***

| | | |
|---|---|---|
| All selections made entirely in-house. | Your organization participates in selection alongside others. | All selections made by others. |

**4.** ***Does your organization solicit or accept applications from the public, or does it develop candidates through an internal process?***

| | | |
|---|---|---|
| Organization publishes criteria and invites applications. | Organization accepts but does not solicit applications. | Organization does not accept applications. |

**5.** ***Regardless of the selection process, do the demographic characteristics of the selected individual or organizational beneficiaries suggest that the selection process excluded potential beneficiaries based on race?***

| | | |
|---|---|---|
| All successful applicants are of the same race. | Most of the successful applicants are people of color. | Successful applicants are a racially diverse group. |

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# *Questions/Factors (continued)*

**6.** ***Does your race-conscious program address core First Amendment rights (freedom of speech, freedom of the press, freedom of religion)?***

Participation in your program does not involve activities protected by the First Amendment (speech, religion, journalism, etc.).

Participation in your program involves the direct exercise of a First Amendment right (speech, religion, journalism, etc.).

- ***Factors Related to Your Organization and How it Conducts its Race-Conscious Programs***

**7.** ***To the extent your public communications describe the degree of race-consciousness in your program, are your internal communications consistent with that description?***

External and internal communications refer explicitly to using race to make decisions.

External communications highlight race-neutral factors, but internal communications reflect race-consciousness.

External and internal communications consistently reflect race-neutrality.

**8.** ***Do you receive government funding for your race-conscious program(s)? If so, does the government require that your activities be race-conscious?***

Your program receives public funding without any race-conscious mandate.

You're part of a government-funded program to remedy past discrimination.

Your funding sources are private, race-neutral, and non controversial.

**9.** ***Do you require beneficiaries to provide your organization with anything in return for receiving benefits, or are your benefits provided purely as gifts?***

Recipients of the benefits you provide must provide services, produce deliverables, or give up rights in exchange for the benefits.

You provide benefits to recipients without requiring them to do anything, or to give up any rights, in exchange for the benefits.

**10.** ***Does your program provide benefits only to individuals selected to participate, or does it target a community?***

Only individuals with specific racial characteristics are eligible for your program.

Your program is available to all individuals in a geographic community selected with reference to the predominant racial characteristics of residents in that community.

# *Questions/Factors (continued)*

- ***Factors Related to Courts, the Litigation Process, Legislation, or Regulation***

**11.** ***Has a lawsuit been filed in court, or is an opponent using a weaker method, like a "demand letter" directed to your organization or to a regulatory agency, to challenge a race-conscious program similar to yours?***

A program like yours is the subject of a lawsuit that has been filed in court.

You have received a letter from an individual alleging that your program is illegal because it discriminates against that person.

**12.** ***Does your organization have a presence in a place where potential opponents perceive a more favorable judiciary (regardless of where you conduct race-conscious programs)?***

You conduct activities in a jurisdiction more receptive to challenges to race-conscious programs.

You conduct activities in a jurisdiction more protective of race-conscious programs.

**13.** ***Has litigation challenging a race-conscious program like yours resulted in a final decision on the merits?***

Your program is indistinguishable from a program that has been struck down.

Your program has similarities to a program that has been struck down.

Your program's only similarity to a program that has been struck down is race consciousness.

**14.** ***How similar is your race-conscious program to a program that has been successfully challenged in litigation?***

A substantially similar program was struck down on the merits, and all appeals have been exhausted.

A judicial challenge to a substantially similar program has survived procedural rulings, but merits have not yet been considered.

A lawsuit involving a substantially similar program has been filed, but no other judicial actions have been taken.

**15.** ***Does any final court decision striking down a race-conscious program like yours apply to your organization based on where you operate your programs?***

Final decision applies where you operate.

No final decision applies where you operate.

**16.** ***Has a legislative or regulatory proposal been introduced or passed, or an EO issued, that might affect your program or the risks associated with conducting it?***

Legislation or regulation has been enacted, or an EO has been issued, that directly invalidates or defunds your activities.

Legislation or regulation has been proposed that would, if enacted, directly or indirectly invalidate or defund your activities.

***Explanation of Each Question/Factor***

***NOTE:*** *Having higher risk in one or more factors does* ***not*** *mean that an activity is not legal or should be discontinued, just that the activity may be more likely to be challenged by opponents, and/or that if opponents were to bring a legal challenge, the organization may be less likely to win on the merits. For most organizations, the overall risk profile is more important than any one factor. Higher-risk activities may be appropriate in light of an organization's specific mission and risk tolerance. For example, an organization whose mission specifically focuses on race-exclusive strategies, may be comfortable accepting the risk inherent in such programs, but may want to reduce its overall risk by adjusting how it operates and implements its programs.*

Factors Related to Program Participant Selection/Composition

1. ***Do you require an individual applicant (or an organizational applicant's leadership) to be of a specific race, or is the applicant's race one consideration among many in the selection process?***

   A program that screens potential participants based on their racial identity is riskier than a program that considers race, among other relevant factors. For example, a grant program that only allows people of a given race, or organizations led by people of a given race, to be eligible to apply is riskier than a grant program that is open to all applicants but still weighs the applicant's race as one factor among many. A program that does not consider race specifically, but rather considers applicants' lived experience (e.g., a history of specific discriminatory treatment based on their race (see Factor 2)) or relevant access or experience (e.g., leaders who have credibility in the target community) poses even less risk. A program that seeks to invest in power building within a community can be designed and implemented without incurring high risk on this factor.

   Racial qualifications may be framed as requirements ("this program is open to Black-led organizations"), aspirations ("the ideal candidate will be a Black-led organization" or "… a community-led organization"), or preferences ("Black-led organizations are encouraged to apply"). Requirements are riskier than aspirations, which are, in turn, riskier than preferences.

   Where race-conscious selection occurs at the level of *communities*, rather than individuals or organizations, see Factor 10.

2. ***Do you require potential beneficiaries[2] to have demonstrated "particularized harm"[3] as a result of structural or institutional racism, or is there no such requirement?***

   A program that is only available to participants based on their specific racial identity, without considering the presence (or absence) of any particularized harm suffered by potential participants, is riskier than a program whose participants have demonstrably experienced the discriminatory treatment that the program is intended to redress. Put another way, a program that assumes harm and provides support based solely on the participant's race, or that seeks to address broad, systemic, structural, or institutional racism without taking into account an individual beneficiary's demonstrated experience of harm, may provide a more appealing target for a lawsuit than an activity that provides support based on the specific participant's lived experience.

3. ***Does your organization set selection criteria and select program beneficiaries itself, or are other organizations responsible for selection?***

   Lawsuits opposing race-conscious activities generally target the entities that make specific decisions about who can receive the benefits of the program. The more distant your organization is from these selection decisions, the lower your organization's risk. Conversely, the more directly or closely involved your organization is in the selection of beneficiaries of a race-conscious program, the greater the risk to your organization.

   As a general matter, *funders* of race-conscious programs that are conducted by the funders' *grantees* will be more removed from the grantee's selection process, and, therefore, have a lower risk than the grantees conducting the program and making the selections. To our knowledge, private funders that merely support race-conscious programs conducted by others have not been sued as a result of funding those programs. However, a funder's risk may increase if the funder also establishes the criteria that the grantee must use to select beneficiaries.

4. ***Does your organization solicit or accept applications from the public, or does it develop candidates through an internal process?***

   The process of soliciting applications inherently involves publicizing information about who is eligible. While eligibility requirements may legally include racial characteristics, publicizing them allows opponents to see what they will perceive as racial discrimination.

   At the other end of the spectrum, programs may identify beneficiaries via a non-public, internal process, without a process for accepting applications from potential beneficiaries or publishing any information about qualifications, racial or otherwise. The less public information there is

[2] Throughout this Tool, "beneficiary" refers to any person or organization that receives the benefits (services, grant funds, investments, etc.) provided by the race-conscious program.

[3] "Particularized harm" refers to specific, identifiable instances of racial discrimination that a person or entity has experienced.

about racial qualifications, the lower the risk. The more transparent the role of race is in considering applications, the higher the risk.

Application-driven programs create the opportunity for a person or entity that believes they were excluded on the basis of race to claim that their failure to be selected constitutes impermissible discrimination. A program that has no publicized requirements or rubrics and that selects beneficiaries via an internal process is much more difficult (though not necessarily impossible) to challenge, because no one can easily demonstrate that they should have been eligible, let alone should have been selected. If your organization accepts but does not solicit applications, or accepts applications from invited candidates without publishing eligibility requirements, the risk is lower than with an open invitation with published race-conscious criteria.

5. ***Regardless of the selection process, do the demographic characteristics of the selected individual or organizational beneficiaries suggest that the selection process excluded potential beneficiaries based on race?***

In some contexts, a process that does not *expressly* focus on race nonetheless may be perceived as racially discriminatory by potential opponents if the outcome of the process is the exclusion of potential beneficiaries based on their race. For instance, if the criteria for a program state that the program is open to anyone in the state of California, but each year, the program's only beneficiaries are Black Californians, potential opponents may try to challenge the program as racially discriminatory. A program that, in fact, only benefits members of a specific race is riskier than one with racially diverse beneficiaries.

Of course, this does not mean that every program must have racially diverse beneficiaries. The point is that a program that has racially diverse beneficiaries poses less risk of attracting the interest of opponents of race-conscious activities.

6. ***Does your race-conscious program address core First Amendment rights (freedom of speech, freedom of the press, freedom of religion)?***

Charitable programs that support activities involving expressive content or association may be less appealing targets for the suit because such content is protected speech under the First Amendment. Accordingly, race-conscious programs that support the work of artists, authors, journalists, political activists, or religious leaders selected with reference to race should be significantly more difficult for opponents to challenge than race-conscious programs that support activities that are clearly not protected speech, especially where their voice is under-represented in public discourse.

Factors Related to Your Organization and How It Conducts Its Race-Conscious Programs

7. ***To the extent your public communications describe the degree of race-consciousness in your program, are your internal communications consistent with that description?***

   Explicit references to race (including through signifiers like "BIPOC"), or to specific racial identities, in *public* communications, such as descriptions on your organization's website or in materials distributed outside of your organization in connection with operating a race-conscious program, are more likely to attract the attention of opponents. As noted in Factor 1, the role race plays in your selection of beneficiaries can greatly affect your risk on that factor; this factor concerns how you communicate about the role of race, both externally and internally. Saying publicly that race is not a factor in your decisions could reduce your risk of attracting a suit, but if your organization's internal communications suggest that selections are, in fact, made on the basis of race or that race plays a bigger role than your public communications indicate, those inconsistent internal communications may increase the organization's risk of losing if sued. While internal communications, such as emails or memoranda, are less visible to the public, they are likely to be discoverable in the event of litigation. Also, internal communications can be leaked, and differences between public and private statements can be exploited for bad publicity. Opponents will cherry-pick statements that provide the most support for their position, even if the statement is an outlier. In *SFFA*, the University of North Carolina's internal communications suggested that the school gave greater weight to race than its public materials indicated, and the Supreme Court viewed that discrepancy unfavorably.

8. ***Do you receive government funding for your race-conscious program(s)? If so, does the government require that your activities be race-conscious?***

   Government funding of specific race-conscious programs can increase or decrease risk, depending on the circumstances. If you receive government funding that has been appropriated by the legislature explicitly to remedy past discrimination on the basis of race, and the funding requires that race play a role in the conduct of your program, your risk may be reduced because opponents are more likely to attack the government program that provides the funding, rather than attacking any particular recipient of the funding. Moreover, such remedial programs may have been designed with input from agency lawyers to promote compliance with applicable laws against using race in government programs outside the remediation context.

   On the other hand, if a government-funded program is challenged and either the government funder decides to change or discontinue the program, or a court rules against the program, the program runs the risk of losing funding. Furthermore, receipt of government funds triggers the application of certain laws (e.g., Title VI of the Civil Rights Act of 1964) that prohibit race-based discrimination, potentially putting a recipient of such funds who uses them in race-conscious ways at higher risk of a challenge.

   The Executive Orders suggest that at least during the Trump Administration, the federal government will stop operating and funding race-conscious programs. Charities conducting

programs that rely on federal funding should plan to seek other funds or prepare for possible termination of those programs.

While private funding sources would generally present a lower risk of attracting a suit, a grantee's risk may increase if the grantee's specific private funders have been in the news for their support of race-conscious work, have high-profile board members or founders, or have come under investigation or been required to testify before Congress.

9. ***Do you require beneficiaries to provide your organization with anything in return for receiving benefits, or are your benefits provided purely as gifts?***

Because one of the primary civil rights statutes underlying recent litigation (Section 1981 of the Civil Rights Act of 1866) focuses on the presence of a "contract" and may be interpreted to prohibit any use of race in contract decisions, the nature of the relationship between your organization and the beneficiaries of your race-conscious program is a potentially significant component of your organization's risk profile.

As a legal matter, a "contract" exists when there is an exchange of value between the parties, which might include money, services, goods, and/or a promise to do (or not do) something. Put another way, a contract exists when each party to the arrangement has some legally enforceable obligation to the other. For example, if, in order to receive the benefits that your program offers, prospective beneficiaries are required to complete some work or deliver some outcome, to grant your organization a license to use their image or the results of their work, or to relinquish rights or release claims they may have against your organization, the arrangement may constitute a contract.

Depending on the outcome of pending lawsuits, where a contract does or may exist (even if called something else, such as a "memorandum of understanding," "letter of intent," or "award letter"), the arrangement could be subject to Section 1981, which would preclude considering race when choosing the other party to the contract.

On the other hand, if your organization provides benefits without requiring anything in return, then the arrangement is unlikely to be subject to Section 1981's prohibition on considering race.

Organizations that provide financial benefits may be able to design their programs without legally obligating beneficiaries to provide anything in return. Requiring compliance with the law or requesting reports without requiring them, are less likely to be considered the sort of obligations that create a contract.

10. ***Does your program provide benefits only to individuals selected to participate, or does it target a community?***

A program that distributes benefits only to specific individuals selected with reference to their race, is riskier than one that targets its benefits by selecting a community with reference to the

racial demographic of the community members and makes those benefits available to anyone in the community. Individuals have an attribute we call "race," but communities, issues, or topics have no race, so choosing a community, issue, or topic based on the demographics of its members in the community or people interested in an issue or topic, is fundamentally different from discriminating between individuals using their race.

Furthermore, if individuals can benefit from a program or activity regardless of their race, that program's risk is extremely low. Several recent suits have challenged the distribution of cash benefits to people of a specific race, but none to date has challenged the selective delivery of services into a community chosen because most of its members are people of a specific race. Examples include a program that offers services addressing the particular needs of a specific race, offers culturally competent services, or selects locations to deliver programs based on the racial composition of the surrounding community, without excluding any member of the public from participating or attending. Establishing a health clinic in a predominantly Black area in order to address proven health disparities, or siting a playground in a predominantly Latino area that lacks playgrounds, is unlikely to present an appealing target for litigation.

Factors Related to Courts, the Litigation Process, Legislation, or Regulation

***11. Has a lawsuit been filed in court, or is an opponent using a weaker method, like a "demand letter" directed to your organization or to a regulatory agency, to challenge a race-conscious program similar to yours?***

Although some of the recent attacks on race-conscious activities have been filed in court and may require a response to protect your organization, opponents of race-conscious activities are also using other strategies that are much more likely to generate fear and misunderstanding than they are to change the law.

For example, several recent, high-profile attacks have involved "demand letters" in which the person claiming a legal violation sends a letter with unsupported allegations about a race-conscious program to organizations or to a regulatory agency, demanding some sort of action or threatening litigation. Opponents then generate media attention, highlighting the claims.

In these instances, the primary goal is likely to garner publicity in order to scare organizations that conduct activities that the claimant opposes. Sending such a letter has no legal impact. Most of the time, such one-sided complaints do not result in any significant changes to the relevant rules, and do not affect whether a given program is permissible.

One of the Executive Orders, EO 14173, expressly requires the heads of federal agencies to "identify the most egregious and discriminatory DEI practitioners in each sector of concern" and to "identify up to nine potential civil compliance investigations of publicly traded corporations, large non-profit corporations or associations, foundations with assets of 500 million dollars or more, State and local bar and medical associations, and institutions of higher

education with endowments of over 1 billion dollars." The EO does not define any particular DEI activity as illegal, and does not change current law, but does suggest a strategy of the Trump administration to publicly accuse some nonprofit organizations of engaging in discrimination as a result of their legal race-conscious activities. This strategy will likely encourage more-widespread targeting by private litigants across the sector.

***12. Does your organization have a presence in a place where potential opponents perceive a more favorable judiciary (regardless of where you conduct race-conscious programs)?***

Opponents of race-conscious programs can sue an organization in various state or federal courts, but courts' authority is limited geographically, and a suit can only be maintained if the organization has some connection to the geographic area where the suit is filed.[4] Courts in different states and regions of the country have different judges, so a potential plaintiff (i.e., the person or entity filing a suit) may look for a defendant (i.e., your organization) in a place (referred to as a "jurisdiction") that the plaintiff believes has judges who are more inclined to agree with the plaintiff. (This practice is sometimes referred to as "forum shopping.")

As a general rule, an organization may be sued in any jurisdiction in which it operates or has sufficient connections (i.e., where it has employees, offices, significant programming, etc.). This factor considers whether the entity can be sued in a geographic area in which the judicial environment appears to be more open to claims against entities conducting race-conscious programs, which creates a higher risk both of being sued and of losing your case if sued. If, instead, an organization is only subject to being sued in jurisdictions whose judges may be less inclined to support anti-affirmative action legal arguments, its overall risk of litigation may be lower.

Applying this factor, however, requires care. The perceived "favorability" of any particular jurisdiction is itself a complex and fairly unpredictable matter and is also subject to change as the composition of the judiciary changes and relevant precedent evolves. There is inherent uncertainty in any prediction about how a given court will rule in a given matter, so it is important not to rely too heavily on general expectations about favorability for one side or the other in any specific case.

***13. Has litigation challenging a race-conscious program like yours resulted in a final decision on the merits?***

Lawsuits may be resolved because of procedural issues (e.g., the plaintiff does not have the legal right to sue—referred to as "standing"—or the defendant is not subject to suit in the jurisdiction in which the case was filed - see Factor 12), without ever getting to the question of whether the plaintiff's claims are valid in light of the underlying facts and applicable law (referred to as a decision "on the merits"). This factor takes into account whether a court at

[4] It is not always easy to determine whether a given organization can be sued in a given jurisdiction. Organizations should consult with knowledgeable legal counsel for help determining whether their activities make them vulnerable to suit in specific circumstances.

any level (state or federal, lower or appellate) has ruled against an entity conducting a substantially similar program because the program itself is deemed to be illegal (referred to as a ruling "on the merits"). If an entity's race-conscious programs were struck down by a court on the merits, and those activities are substantially similar to those your organization conducts (see Factor 14), your risk will be higher. Similarly, if an organization with a substantially similar program to yours has already prevailed on the merits and successfully defended its program, your risk will be lower.

Reaching a resolution on the merits can take many years. For example, the *SFFA* cases wound through the courts for *nine years* before the Supreme Court finally resolved them in 2023. Until a decision is final, it may not bind even the parties to the case, and it certainly does not bind anyone else.

Many cases fail for procedural or technical reasons, and many settle without reaching a resolution on the merits. If a decision is procedural or technical, or a case settles without a decision, it generally has little impact beyond the parties to the suit, while decisions based on the substantive merits of legal issues may have a broader impact. Organizations should not draw conclusions about the legality of their programs from settlements or court decisions that only involve procedural or technical issues. Moreover, courts may make preliminary determinations over the course of litigation that may *predict* the court's view on the merits but that do not actually *decide* them.

For example, in an early stage of litigation, opponents of a program may ask the court to require the organization to stop conducting a program while the litigation is pending, by issuing a "temporary injunction." Before issuing such an injunction, courts typically assess the likelihood that the opponents will ultimately win on the merits, and issue an injunction only when success on the merits seems likely. However, even if a court issues a temporary injunction in a case involving a program similar to yours, that is not the same as a decision from the court that the program is legally impermissible. Sometimes, the final outcome diverges from interim decisions. While such early procedural decisions may be important signals, they do not establish a rule (or "precedent") that will necessarily govern the outcome of the case (or of similar cases).

Additional confusion can arise from media reporting on rulings at preliminary stages—whether plaintiffs have standing to bring the suit; whether the court has jurisdiction where the suit is brought; whether claimants have articulated a valid claim; whether there is a procedural or substantive basis for appealing each decision—because it's news, but media reports may exaggerate, or even misunderstand, the legal implications of preliminary rulings.

If an organization that conducts activities substantially similar to yours has been sued, but the matter was settled out of court, or the matter was otherwise dismissed or closed without a decision on the merits, the decision will likely have less impact on your risk than a decision on the merits; you should consult with legal counsel to determine whether and/or how the result affects your organization's risk profile.

***14. How similar is your race-conscious program to a program that has been successfully challenged in litigation?***

Even if the highest court in a relevant jurisdiction has made a final decision on the merits and struck down a race-conscious program (see Factor 15), differences in the context and facts of your program may make that decision inapplicable to your program. When the Supreme Court decided the *SFFA* cases, it only struck down certain uses of race in college admissions decisions. While this decision may eventually affect the law in other settings, its only direct and immediate effect was on college admissions. The *SFFA* decision did not change laws applicable to employment discrimination, government contracting, private grantmaking, or charitable programs. The closer your program is to a program that has been struck down on the merits, the greater the likelihood that the precedent may be extended to your program soon. Conversely, the less similar your program is to the successfully challenged program, the lower your risk.

***15. Does any final court decision striking down a race-conscious program like yours apply to your organization based on where you operate your programs?***

If your organization and its activities are substantially similar (see Factor 14) to those that have been successfully and finally challenged on the merits (see Factor 13), that court decision creates a higher risk for your organization if the litigation occurred in a jurisdiction (location) in which your organization is subject to suit, and a lower risk if the litigation occurred in a jurisdiction where your organization has no offices, personnel, activities, or other relevant connections (see Factor 12). As a general rule, the decisions of a higher court (e.g., a state appellate court or a Federal circuit court) are binding on lower courts in the *same* jurisdiction (that is, the lower courts *must follow* the decision of the higher court), but are *not* binding on lower courts in *other* jurisdictions. Decisions of a trial court do not bind higher courts, or courts in other jurisdictions. Only decisions of the U.S. Supreme Court are binding on all courts nationwide.

***16. Has a legislative or regulatory proposal been introduced or passed, or an EO issued, that might affect your program or the risks associated with conducting it?***

In addition to lawsuits, opponents of race-conscious activities may pursue legislation and/or regulation designed to prohibit, defund, chill, or otherwise undermine those activities. As with other factors, the public discussion about these strategies does not always convey accurately the actual implications of the proposal, or even its progress through the legislative or regulatory process. Before making any changes to activities or communications about them, organizations should make sure they understand exactly what a legislative or regulatory development actually means, and where it is in the process.

Proposed *legislation*, whether state or federal, usually takes some time to move through the legislative process presenting opportunities to study its provisions, evaluate its potential impact, mobilize constituents in response, and communicate with legislators about potential changes or how they should vote. Federal tax law allows charities to lobby (within limits that

often are much higher than some people think), and defines several exceptions that further expand charities' ability to influence the outcome of legislation, even if funding sources prohibit the use of funds for legislative lobbying (as defined for federal tax purposes).

Proposed *regulations* implementing legislation enacted by a legislature are issued by executive-branch agencies and go through required steps before taking effect. The issuance of proposed regulations is less visible and the process less familiar to the public than with legislation, so the opportunities to influence the outcome may be harder to identify and exploit than those affecting legislation. However, regulations define and articulate how the agency will interpret and enforce the law, and therefore can have equally significant impact on a charity's programs. Especially in light of ongoing regulatory upheaval at the federal level, organizations should pay attention to regulatory developments as well as legislative ones. Charities can engage fully with government agencies about the development of regulations that might affect them, because federal tax law imposes no limit on a charity's ability to influence regulatory processes.

If legislation or regulations that unambiguously outlaw your program or some aspect of it become final, the risks of continuing to operate as you have may become intolerable, and it may be time to pivot to your back-up plan in order to continue pursuing your mission. However, if it is unclear how final laws or regulations apply to your programs, or if there are grounds to challenge a law or regulation and you have the resources (or can find them), consider using litigation to prevent or delay potential adverse effects.

An Executive Order ("EO") issued by the President (or a Governor) is neither legislation nor regulation, and in most cases does not change federal law. Instead, most EOs provide direction from the President to executive-branch agencies regarding how to interpret and prioritize enforcement of existing law. Federal law does not impose any significant procedural requirements on the issuance of an EO other than signature by the chief executive. Operating in clear and direct contravention of a valid EO (for example, by using public funds in ways that an EO prohibits) could expose a charity to significant risk of enforcement, including (among others) the potential loss of funds or referral to a charities regulator.

### *Further Information*

***This Tool focuses on the risk of being sued, not the risk of losing if you are sued.*** These Factors were developed in the context of recent and pending litigation that ***do not*** directly change the law for most nonprofit organizations, but that do signal the ***possibility*** of significant future shifts in the boundaries of race-conscious activity.[5] The Tool is designed to help organizations face the uncertainties of that future with greater confidence.

[5] This Tool does ***not*** address the risk of loss of tax exemption under Section 501(c)(3) of the Internal Revenue Code from operating race-conscious activities. Based on our analysis, we have concluded that the risk of loss of exemption as a result of engaging in race-conscious charitable activities is essentially zero at this time, and any such risk would take some time to develop.

***Risk tolerance.*** Some organizations may welcome becoming the defendant in litigation to protect race-conscious efforts to end racial inequity and injustice, but others will not. Every organization has a different level of risk tolerance for different types of risk, and we encourage any organization using this Tool to conduct an internal assessment of its tolerance for suit in this area. For example, some organizations may be more concerned with reputational risks, while others may be prepared to weather challenges in the court of public opinion, but find the potential financial impact of litigation of greatest concern. Risk tolerance may be affected by how predominant race-conscious activities are relative to your entire organization; if you have only one program and that program is race-conscious, you may be less comfortable with associated risks than if your race-conscious activities are a small part of your overall operations.

Note that risk tolerance may differ across the organization's Board of Directors, its senior leadership, and its staff. Proactively surfacing and resolving any internal disparate points of view can promote confidence in a unified approach to a changing environment. There is no "right" amount of risk an organization should be willing to accept, but the Tool may help an organization realize that actual risks are lower than what they perceived, allowing an organization to do more for longer within the same risk tolerance.

***How do the factors interact? Which factors are most important?*** Application of each factor is more art than science, and we have not attempted to quantify absolute probabilities associated with specific activities, nor to address how different factors may interact with each other. Generally, we see these factors as operating cumulatively, in the sense that higher risk levels on more factors will raise overall risk, but the Tool's analytical power is in disaggregating the factors. Breaking down overall risk allows organizations to choose which factors to focus on. Those choices may be driven by what an organization can most easily control, or weighing factors differently based on varying tolerance for different types of risk. The ultimate goal of using the Tool is to reduce overall risk with minimal impact on effectiveness.

The list of factors is not exhaustive, and we may add, remove, or modify factors as the legal landscape changes with future court decisions or other developments.

***Probabilities versus consequences.*** Risk is the product of the ***probability*** of an event occurring, multiplied by the ***consequence*** of the event if it occurs. This Tool is designed to help organizations assess their risks of being sued. In other words, the Tool addresses probability. It does not address the consequences to the organization or to its mission of losing a case. A full discussion of potential consequences is beyond the scope of this Tool, and of course, it will differ depending on the particular race-conscious program, the nature of the legal claims made against the organization, and the clarity of the law when the suit is brought, but there are some important general points to bear in mind.

- The civil rights laws under which plaintiffs have challenged race-conscious activities are ***not criminal statutes***. This means no one is going to jail, even in the unlikely event that a race-conscious program is successfully challenged in court.

- To date, there have been no monetary damages awarded in such litigation, and for now, at least, none is likely. (In some cases, plaintiffs have sought to recover attorneys' fees.) This is for a number of reasons: plaintiffs generally have sought only to stop activities by having them declared illegal; to be awarded monetary damages, individual plaintiffs would have to prove that they were personally harmed by the behavior (e.g., that they would have been awarded funds or other benefits if not for their race), which is often impossible; and where the plaintiffs' claims seek a novel application of the law to establish a new precedent, which is the nature of this type of civil rights case, an award of punitive damages would not be supported. While fighting a lawsuit may be costly and disruptive, forfeiting your endowment is not a risk in these suits.

- If your organization is sued, you always have the option to settle. Agreeing to change your race-conscious program can rapidly end the suit, minimizing legal fees. This means an organization could reasonably decide to wait to be sued before modifying or stopping its race-conscious program, even if it has no appetite or capacity for drawn-out litigation.

- A settlement ends the suit for the defendant, but only binds the parties to that suit; it does ***not*** change the law. Settling thus eliminates the risk of a broader bad outcome by depriving the court handling the case of the opportunity to issue an unfavorable ruling that ***would*** change the law. Even a favorable ruling would create the possibility of an appeal to higher courts that could eventually reach the U.S. Supreme Court with its current hostility to race consciousness, and its nationwide legal authority. Consequently, a settlement may reflect a strategic decision by the defendant to reduce its risk and costs, and also avoid a broader decision binding others, preserving the issue for another, better day.

- Organizations may be able to find philanthropic support for their defense costs. We are aware of multiple initiatives to create legal defense funds specifically for this purpose.

***Planning in uncertainty.*** As existing and new lawsuits make their way through the judicial system, the legal environment will continue to evolve. A race-conscious program that is safe today may eventually become riskier, or even illegal. Here are steps organizations can take to ensure their resilience if the legal context becomes more challenging.

1. Decide how much, and what types of risk, your organization can tolerate.

2. Assess the risk of your current race-conscious activities using this Tool.

3. Compare your risk tolerance to your assessed risk, and, if needed, make adjustments. The Tool's factors may highlight a range of options you have to reduce your risk, and in our experience, risk can often be reduced without reducing

the effectiveness of your program. Consider consulting legal counsel for specific guidance about your organization's risk profile and management options.

4. Monitor the shifting legal landscape.

5. Have a backup plan: Know exactly what your organization would change and how it would make those changes if the law evolves in a way that undermines your ability to continue to use the approach you have been using.

6. If the law changes and the risk becomes unacceptably high for your organization's risk tolerance, pivot to your Plan B.