



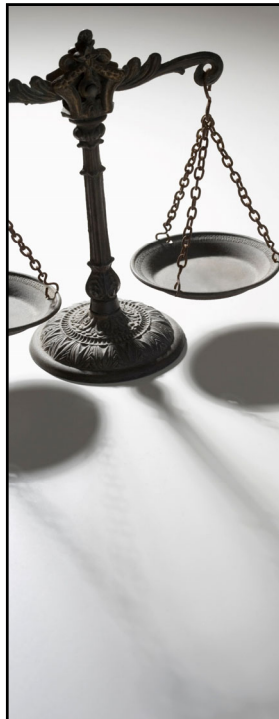
# Civil Rights Laws & Nonprofit Missions

Minnesota Council on Foundations | Minnesota Council of Nonprofits  
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## Overview



- Civil rights laws are designed to protect individuals from discrimination and ensure equal opportunities and treatment under the law, regardless of their personal characteristics like race, religion, or sex.
- These laws guarantee fundamental rights, and protect against discrimination in housing, employment, public accommodations, and contracting.
- Nonprofit organizations often play a crucial role in advancing civil rights through their missions and activities focused on equality, justice, and social change.

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## Overview

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- Some nonprofits operate programs that are designed to provide equal opportunities for groups that have historically faced discrimination, and to improve access to resources for all. This may include using racial criteria to help achieve these objectives.
- In recent years, civil rights laws that were originally enacted to dismantle the vestiges of slavery and protect groups subject to historic discrimination, have been used to challenge race-conscious programs, including those related to affirmative action and general efforts to support diversity, equity, and inclusion.
- Today we will discuss the civil rights laws and how recent litigation and executive branch actions may impact nonprofits that are committed to diversity, equity, and inclusion and those who may structure programs in a manner that is conscious of race.

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## Agenda

- Legal Framework
  - Federal and State Laws
  - Case Law
  - Executive Branch Actions
- Tax Exemption Considerations
- Understanding & Mitigating Risk
- Q&A

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## Legal Framework – Federal Law

### ■ § 1981 of the 1866 Civil Rights Act

- Prohibits discrimination on the basis of race, color, and ethnicity when making and enforcing contracts.
- Applies to both private and government actors.
- A plaintiff bringing a § 1981 claim must show (1) a contract exists between the parties and (2) that the alleged contract-related injury would not have occurred “but for” the racial categorization.

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## Legal Framework– Federal Law

### ■ Equal Protection Clause of the 14<sup>th</sup> Amendment

- Provides that no State shall deny to any person within its jurisdiction the equal protection of the laws. This has been interpreted as preventing government actors from engaging in discrimination based on race or gender.
- A claim that a law discriminates on the basis of race is subject to “strict scrutiny”, which requires the government to prove (1) that the classification serves a compelling government interest; and (2) that the classification is necessary (i.e. narrowly tailored) to the accomplishment of its purpose.
- A claim that a law discriminates on the basis of gender is subject to a lower level of scrutiny.

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## Legal Framework– Federal Law

### ■ Title VI of the Civil Rights Act of 1964

- Prohibits discrimination on the basis of race, color, or national origin in programs and activities that receive federal financial assistance.
- This means that programs receiving federal funds cannot exclude people from participation, deny them benefits, or subject them to discrimination based on race, color, or national origin.
- Individuals alleging a violation of Title VI may file administrative complaints with the agency providing the funding, or may file suit in federal court.

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## Legal Framework– Federal Law

### ■ Title VII of the Civil Rights Act of 1964

- Prohibits employment discrimination based on race, religion, national origin, color and sex.
- It applies to hiring, promoting, firing, setting wages, testing, training, and all other terms and conditions of employment by employers (including many nonprofits).

### ■ Title IX of the Education Amendments of 1972

- Prohibits discrimination based on sex in educational programs or activities that receive federal funding.

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## Legal Framework– Minnesota Law

### ■ Minnesota Human Rights Act

- State law prohibiting discrimination in Minnesota. It is enforced by the Minnesota Department of Human Rights.
- The state law prohibits discrimination in employment, housing, public accommodations, public services, education, credit, and business based on protected class, such as: race, religion, disability, national origin, sex, marital status, familial status, age, sexual orientation, and gender identity.

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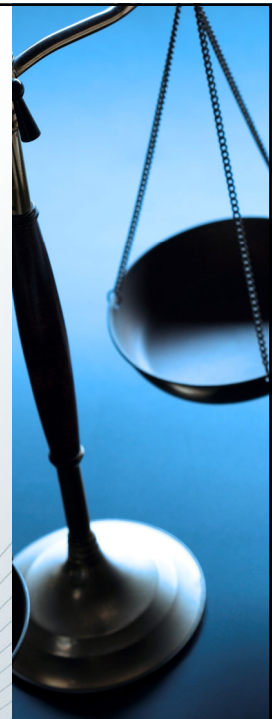
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## Legal Framework– Case Law

### ■ Students for Fair Admissions (SFFA) v. Harvard and SFFA v. UNC (Supreme Court, 2023)

- The Court ruled that the race-conscious admissions policies of Harvard and UNC were unconstitutional because they violated the Equal Protection Clause (UNC) and Title VI of the Civil Rights Act of 1964 (Harvard).
- The majority opinion noted, “eliminating racial discrimination means eliminating all of it.”
- The Court confirmed that despite its decision, students could still include race while describing their lived experience (race could be considered in the context of a response to a race-neutral question).

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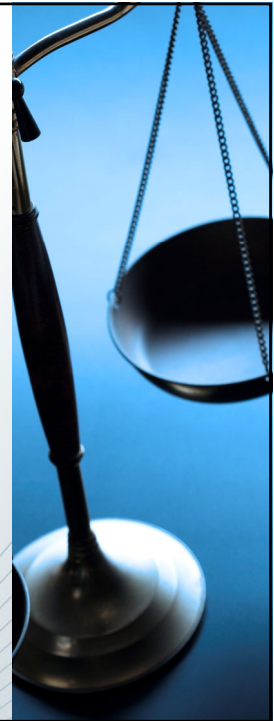
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## Legal Framework– Case Law

### ■ Impact of SFFA

- The SFFA decision was limited to race-conscious admissions programs at public colleges and institutions receiving federal funding.
- What was not decided:
  - No discussion of charitable missions or tax-exemption
  - No changes to contract law
  - No changes to employment law
- While the **decision** did not change the legal basis for scholarships, contracts, tax-exemption, or grantmaking, the **rationale** of the decision is being applied in these contexts.

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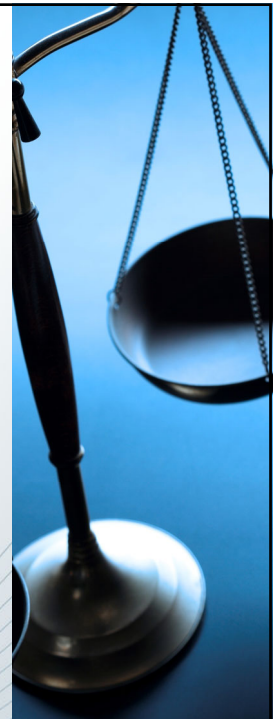
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## Legal Framework– Case Law

### ■ Impact of SFFA

- Following SFFA, challenges to race-conscious programming and targeted programs are being based on allegations that they violate one or more of the following authorities:
  - Equal Protection Clause
  - Title VI of the Civil Rights Act of 1964
  - § 1981 of the 1866 Civil Rights Act

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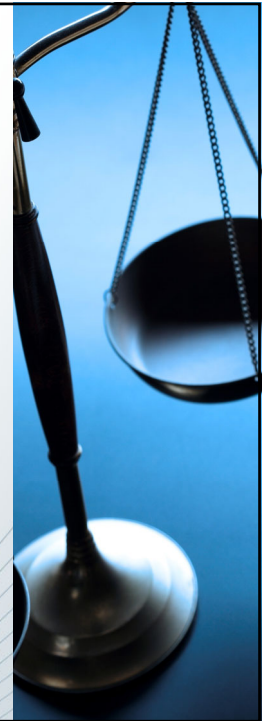


## Legal Framework– Case Law

- **AAER v. Fearless Fund (11<sup>th</sup> Cir.)**

- Plaintiffs' group challenged the Fund's grant program which was designed to redress historic discrimination in venture capital funding. Grant eligibility was limited to small businesses that were majority owned by Black women. Recipients received a cash award and mentoring.
- While the case eventually settled, the 11<sup>th</sup> Circuit granted a preliminary injunction in favor of the plaintiffs, finding that the grant program likely violated § 1981. The ruling is limited to 11th Circuit (Alabama, Florida, Georgia), but it is of interest that:
  - The Court found the grant agreement used by the Fund was a contract to which § 1981 applies.
  - The Court rejected an argument that the First Amendment protects decisions about where to donate money, noting that there is no First Amendment right to engage in racial discrimination.

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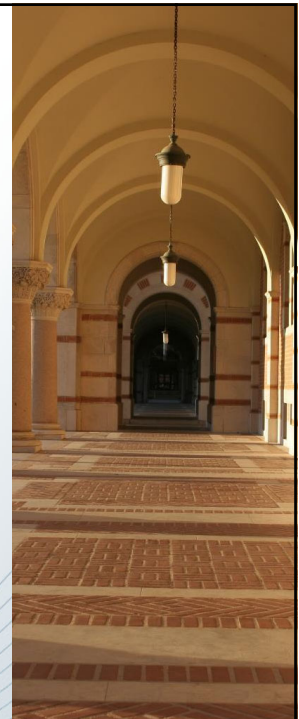


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## Legal Framework– Executive Branch

- After he was sworn into office, President Trump signed dozens of Executive Orders covering a broad range of issues, a number of which have a direct effect on nonprofits with federal grants and contracts.
- Many of these actions are subject to legal challenge.
- **Ending Radical and Wasteful Government DEI Programs and Preferencing (Executive Order, January 20, 2025)**
  - Directs OMB and the OPM to coordinate with all federal agencies to terminate all DEI programs in federal agencies, including equity related grants and equity action plans.

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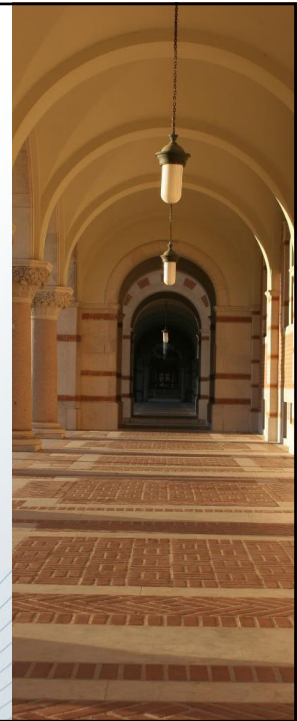


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## Legal Framework– Executive Branch

- **Ending Illegal Discrimination and Restoring Merit-Based Opportunity (Executive Order, January 21, 2025)**
  - Requires agencies to enforce “longstanding civil-rights laws and to combat illegal private sector DEI preferences, mandates, policies, programs, and activities”
  - Directs agencies to “identify up to nine potential 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 over 1 billion dollars”
- **Restoring Public Service Loan Forgiveness (Executive Order, March 7, 2025)**
  - Excludes from definition of “public service” activities that have a “substantial illegal purpose,” including engaging “in a pattern of aiding and abetting illegal discrimination.”

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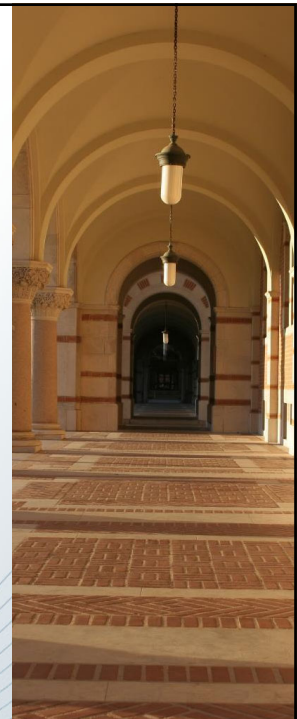


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## Legal Framework– Executive Branch

- **Criminal Investigation of DEI Activities and Programs – Ending Illegal DEI and Discrimination and Preferences (Memorandum, February 5, 2025)**
  - U.S. Attorney General Bondi directed DOJ to align its litigating positions with the requirement of equal dignity and respect. This includes taking actions to “investigate, eliminate, and penalize” private companies and universities that have “illegal” diversity, equity, and inclusion programs.
- **DOJ Civil Division Enforcement Priorities (June 11, 2025)**
  - Memo from Asst. Attorney General Shumate to Civil Division employees, noting that the “Civil Division will use all available resources to pursue affirmative litigation combatting unlawful discriminatory practices in the private sector.” This includes bringing claims under the False Claims act for any person who receives federal funds and knowingly violates civil rights laws.

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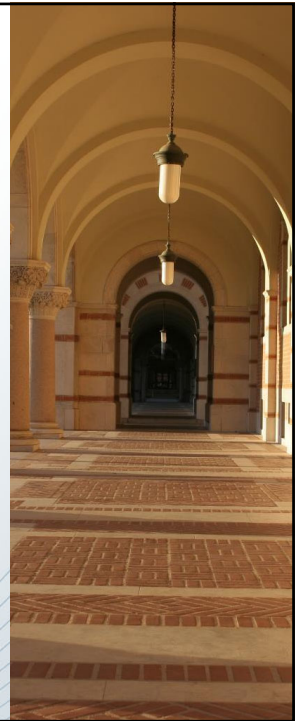
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## Legal Framework– Executive Branch

- What is “illegal DEI”?
  - Ambiguity may well be part of the strategy
  - Enforcement positions of federal agencies have changed
  - The law remains largely unchanged
  - After *SFFA* and *Fearless Fund* and emboldened by EOs, there are increased efforts by activist groups to apply Section 1981 to race-conscious or race-exclusive programs, grants, and scholarships.
- The Administration’s view of “illegal DEI” may not align with the status of the law in Minnesota.
- Minnesota’s Attorney General has urged nonprofits not to “comply in advance” by making changes to race-conscious programs that are not clearly prohibited by law.

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## Tax-Exemption Considerations

- Under § 501(c)(3), an organization must be “organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes . . .”
- An organization must service public rather than private interests.
- Charitable purposes include, without limitation, the following:
  - Relief of the poor and distressed and underprivileged
  - Promotion of social welfare by lessening neighborhood tensions, eliminating prejudice and discrimination, defending human and civil rights secured by law; or combatting community deterioration and juvenile delinquency.
- Programs targeting specific groups must be structured to achieve a recognized charitable objective.

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## Tax-Exemption Considerations

- Historically, the Internal Revenue Service (IRS) has found that nonprofits may engage in race conscious programming when doing so achieves recognized charitable objectives and the programming is designed to lift up groups that have been historically subject to discrimination.
  - Example - Rev. Rul. 75-285: A nonprofit formed to eliminate discrimination against members of minorities seeking employment in the construction trades by recruiting, educating, and counseling workers, and providing technical assistance to attorneys involved in suits to enforce worker's rights, was organized and operated exclusively for charitable and educational purposes.
- In contrast, the IRS has found that invidious discrimination is not charitable because it violates established public policy.
- It is unclear whether IRS policy on these points will change based on pressure from the current administration.

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## Tax-Exemption Considerations

- Under the public policy doctrine, an organization's activities will not be charitable if they are **illegal**, or they are contrary to **established public policy**.
- If these activities constitute a **substantial part** of the organization's activities, the organization may fail to qualify as a charitable organization described in § 501(c)(3).
  - To be illegal, activities must actually violate the law.
  - There has been considerable discussion as to whether activities contrary to the priorities of the current Administration could be viewed as contrary to fundamental public policy for purposes of this doctrine. It would be an uphill battle for the government to establish that these are contrary to settled, fundamental policy – especially since the policy has significantly shifted in recent months / years.

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## Tax-Exemption Considerations

- Under existing law, revocation of tax-exemption is a highly unusual and extreme remedy. It would typically require an audit, procedural back-and-forth with the IRS, a final determination, and an opportunity to appeal using the judicial process.
- This spring American Alliance for Equal Rights sent formal requests to the IRS to investigate certain private foundations based on their grantmaking initiatives providing opportunities for diverse individuals. The letter argued that the organizations were “engaged invidious discrimination that violates established public policy” rendering them “ineligible for tax-exempt status.” This may suggest a shift in strategy among these groups.

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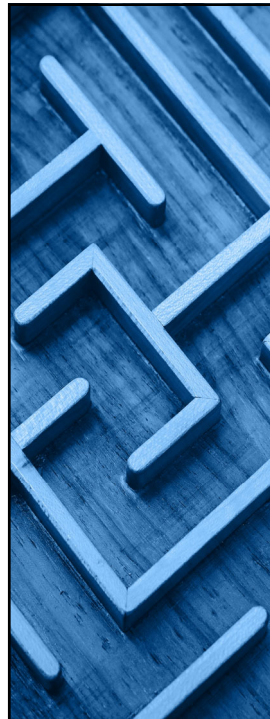


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## Understanding & Mitigating Risk

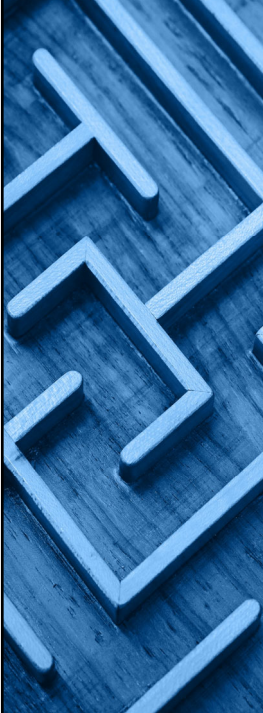
- Nonprofits are still permitted to:
  - Have a mission or values that focus on diversity, equity, inclusion or racial justice.
  - Maintain a commitment to learning about diversity, equity, and inclusion and to understand the history and systems impacting the communities the organization serves.
  - Foster a culture where differences are seen and respected, and voices are heard.
  - Promote communities where all individuals have a full and equal opportunity to participate, contribute and succeed, regardless of race or any other protected characteristic.

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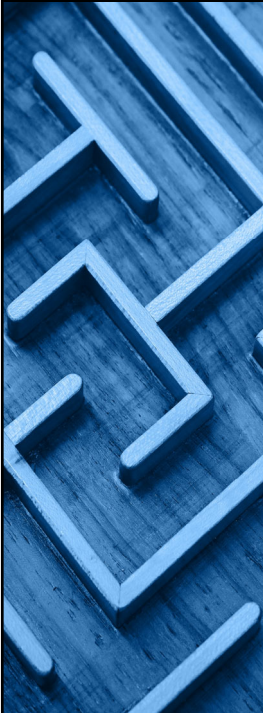


## Understanding & Mitigating Risk

- In the short-term, engaging in race-conscious and or race-exclusive programs will require additional analysis,
  - Public institutions and publicly funded organizations should review any race-conscious or race-exclusive programs with legal counsel. These organizations may need to restructure race-conscious or race-exclusive programs to comply with federal requirements.
  - For most nonprofits that are not funded with public dollars, the law largely remains the same. They can likely continue to operate race-conscious or race-exclusive programs to achieve recognized charitable objectives. However, there is some risk involved with the continued operation of these programs.

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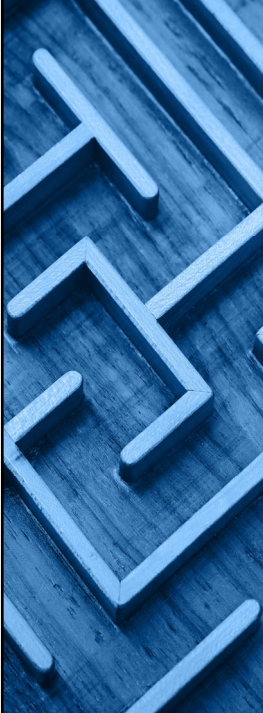


## Understanding & Mitigating Risk

- What does risk mean in this context?
  - Litigation Risk
  - Reputational Risk
  - Political Scrutiny / Government Investigation
  - Impact on Eligibility for Federal Funding
  - Risk of Change
- While not required, some nonprofits are modifying programs that are race-conscious or race-exclusive with a goal of protecting their programs and planning for potential changes in the law.
- For others, a shift in programming may be difficult without altering the organization's reason for existence (e.g., an organization focused on racial equity). An organization's Board should thoughtfully balance the risks before making any changes.

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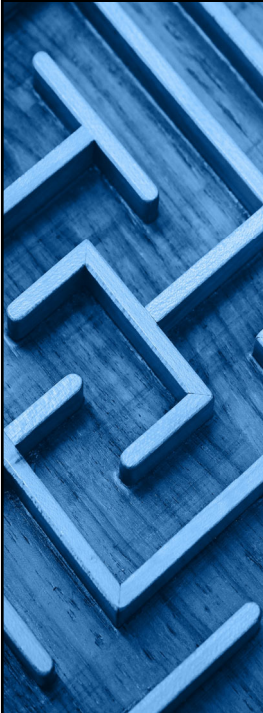


## Understanding & Mitigating Risk

- At this point, whether to make changes and to what extent are largely business decisions for a nonprofit's board.
- Consider the following:
  - How is racial equity connected to our mission and values?
  - How is our organization funded and does that impact our risk analysis?
  - Are the optics of our program going to get us noticed by regulators or private litigants?
  - Is our program compliant with existing judicial precedent?
  - What would our donors/constituents say about us modifying or eliminating race as a component of our programs?
  - What is our risk tolerance, budget, values, public profile, and ability to withstand legal challenges and the significant costs that accompany them?
- A nonprofit Board should undertake this analysis in a manner consistent with its fiduciary duties.

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## Understanding & Mitigating Risk

- Risk Mitigation Strategies
  - When possible, consider using race neutral standards to achieve programmatic objectives.
  - Review website and public statements and consider how race-conscious scholarship programs are presented. *Keep in mind that plaintiffs are using AI to target programs for legal challenge.*
  - Monitor language used in tax returns and other public filings.
  - Preserve flexibility in legal agreements.
  - When possible, request demographic information for assessing impact, not making programmatic decisions.
  - Consider working with legal counsel on a general compliance audit to limit opportunities for criticism / attack.
  - Consider scenario planning to ask the “what if” questions and response options.

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## Questions / Discussion



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