

United States Senate

COMMITTEE ON COMMERCE, SCIENCE,
AND TRANSPORTATION

WASHINGTON, DC 20510-6125

WEBSITE: <https://commerce.senate.gov>

LILA HARPER HELMS, MAJORITY STAFF DIRECTOR
BRAD GRANTZ, REPUBLICAN STAFF DIRECTOR

February 1, 2024

Carrie Lozano
President and Chief Executive Officer
Independent Television Service
1435 Folsom Street
San Francisco, CA 94103

Dear Ms. Lozano:

The Independent Television Service (ITVS)—a taxpayer-funded organization that touts itself as “public media’s leading incubator and presenter of independent film”—administers a Diversity Development Fund for “directors of color.”¹ Because white filmmakers are facially ineligible for this seed money, the fund runs afoul of Title VI of the Civil Rights Act of 1964 and Section 1981 of the Civil Rights Act of 1866.² I therefore urge you to remove race as an eligibility criterion for the Diversity Development Fund. ITVS can surely pursue its mandate to “expand the diversity and innovativeness” of public programming without violating the law.³

Congress established ITVS in 1988 as an “independent production service” backed by the federally funded Corporation for Public Broadcasting (CPB).⁴ ITVS develops public programming by entering into licensing and development agreements with independent filmmakers in exchange for financial support. Through its Diversity Development Fund, for example, ITVS enters into agreements with “directors of color,” providing them “up to \$35,000 in research and development funding” in exchange for certain rights over their projects.⁵ Presumably, the goal of this racially exclusive funding opportunity is to further CPB’s directive to aid “producers of programs addressing the needs and interests of minorities.”⁶ But programming need not be produced exclusively *by* minorities to address the needs and interests

¹ *ITVS Mission*, ITVS, <https://itvs.org/about/mission/> (last accessed Jan. 31, 2024); *Diversity Development Fund*, ITVS, <https://itvs.org/funding/diversity-development-fund/> (last accessed Jan. 31, 2024).

² Civil Rights Act of 1964 tit. 6 (editorially codified as amended at 42 U.S.C. §§ 2000d–2000d-4a); Revised Statutes § 1977 (editorially codified as amended at 42 U.S.C. § 1981).

³ See Communications Act of 1934 § 396(k)(3)(B)(iii)(IV) (editorially codified as amended at 47 U.S.C. § 396).

⁴ § 396(k)(3)(B)(iii).

⁵ *Diversity Development Fund*, *supra* note 1 (“The Diversity Development Fund is not a grant. You will receive funding in the form of a development agreement that assigns ITVS certain rights over your project during the term of the contract.”).

⁶ See Communications Act of 1934 § 396(k)(3)(B)(i).

of minorities. Furthermore, ITVS’s requirement that an applicant “[i]dentify as a person of color”⁷ violates federal law.

Federal civil rights laws forbid ITVS from limiting funding opportunities to applicants of particular races. Title VI prohibits discrimination based on race in programs or activities that receive federal financial assistance.⁸ Likewise, Section 1981 prohibits discrimination based on race in the making and enforcement of private contracts.⁹ The Supreme Court has recognized so-called reverse discrimination claims under these statutes, noting in the case of Section 1981, for instance, that it “was not understood or intended to be reduced . . . to the protection solely of nonwhites,” but rather “by its broad terms, to proscribe discrimination in the making or enforcement of contracts against, or in favor of, *any* race.”¹⁰ Moreover, courts have found that race-conscious eligibility criteria—like those ITVS relies upon—contravene Title VI and Section 1981 even if they are purportedly aimed at remedying past racial discrimination.¹¹

In addition to discriminating based on race, ITVS appears to discriminate based on political ideology. The ITVS website features an “Impact” page demonstrating how its documentaries “inspir[e] audiences to take action” on politically charged issues like criminal justice reform.¹² These documentaries overwhelmingly reflect a liberal worldview. For example, one ITVS-funded film, “Everything Wrong and Nowhere to Go,” focuses on a woman’s “search of a cure for her crippling climate anxiety in a deeply personal documentary about therapy and existential

⁷ *Diversity Development Fund*, *supra* note 1.

⁸ Civil Rights Act of 1964 § 601 (editorially codified as amended at 42 U.S.C. §§ 2000d) (“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”); *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 290 (2023) (Gorsuch, J., concurring) (“Title VI prohibits a recipient of federal funds from intentionally treating any individual worse even in part because of his race, color, or national origin and without regard to any other reason or motive the recipient might assert.”).

⁹ Revised Statutes § 1977 (editorially codified as amended at 42 U.S.C. § 1981) (“All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens.”); *Comcast Corp. v. Nat’l Ass’n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1019 (2020) (“To prevail” on a Section 1981 claim, “a plaintiff must initially plead and ultimately prove that, but for race, it would not have suffered the loss of a legally protected right.”).

¹⁰ *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 295 (1976) (emphasis added). *See also Students for Fair Admissions*, 600 U.S. at 235 (Thomas, J., concurring) (“And, while the 1866 Act used the rights of ‘white citizens’ as a benchmark, its rule was decidedly colorblind, safeguarding legal equality for *all* citizens ‘of every race and color’ and providing the same rights to all.”); *Am. All. for Equal Rts. v. Fearless Fund Mgmt., LLC*, 2023 WL 6520763, at *1 (11th Cir. Sept. 30, 2023) (refusing to limit the standing of a membership organization to file a Section 1981 claim because it has white members).

¹¹ *See, e.g., Am. All. for Equal Rts.*, 2023 WL 6295121, at *7 (N.D. Ga. Sept. 27, 2023) (concluding that even if Section 1981 has an exception for valid affirmative action plans and “even if [the defendant] ha[d] made a showing of a manifest racial imbalance in access to capital for [b]lack women-owned businesses and a showing that its grant fund [did] not bar the advancement of other non-[b]lack women,” the defendant’s grant contest that was only open to businesses owned by black women was unlawful because “its means of achieving balance . . . [was] unlikely to satisfy the narrow tailoring requirement of the strict scrutiny analysis”).

¹² *Impact*, ITVS, <https://itvs.org/impact/> (last accessed Jan. 31, 2024).

threat.”¹³ Another ITVS documentary, “Racist Trees,” focuses on efforts to remove a wooded area in Palm Springs, California, because residents view the trees as “an enduring symbol of racism.”¹⁴ Yet ITVS funds hardly any documentaries from a conservative perspective. A public organization that costs American taxpayers \$17 million a year should not be a vehicle for left-wing agitprop.¹⁵

The Standing Rules of the Senate provide the Committee on Commerce, Science, and Transportation the authority and duty to “review and study, on a continuing basis” matters relating to federally funded public media, including ITVS.¹⁶ So that the Committee may better assess ITVS’s compliance with federal law, please provide the documents requested below and written responses to the questions below no later than February 15, 2024, and in accordance with the attached instructions.

1. Will you commit to removing race as an eligibility criterion for the Diversity Development Fund? Please explain any answer other than yes.
2. How much funding has ITVS provided through the Diversity Development Fund since 2014? Please provide the total dollar amount for each year.
3. Who qualifies as a “person of color” for purposes of the Diversity Development Fund?¹⁷ Who decides whether someone is a “person of color?”
4. Must a film be directed or produced by a “person of color” for it to address the “needs of unserved and underserved audiences”¹⁸ or the “needs and interests of minorities?”¹⁹ Is it possible for a film directed or produced by a white person to address these needs?
5. As a recipient of funding from CPB, must ITVS adhere to “objectivity and balance” in deciding which film projects to support?²⁰
6. Does ITVS adhere to objectivity and balance in deciding which film projects to support? If so, please provide examples of conservative programming funded by ITVS.

¹³ *Everything Wrong and Nowhere to Go*, ITVS, <https://itvs.org/films/everything-wrong-and-nowhere-to-go/> (last accessed Jan. 31, 2024).

¹⁴ *Racist Trees*, ITVS, <https://itvs.org/films/racist-trees/> (last accessed Jan. 31, 2024).

¹⁵ See CORPORATION FOR PUBLIC BROADCASTING APPROPRIATION REQUEST AND JUSTIFICATION FY 2024/FY 2026, 105 (Mar. 13, 2023), [https://cpb.org/sites/default/files/FY24-26 CPB Budget Justification Public.pdf](https://cpb.org/sites/default/files/FY24-26%20CPB%20Budget%20Justification%20Public.pdf).

¹⁶ S. Rules XXV(1)(f), XXVI(8).

¹⁷ Cf. Mary Specht, *Funding from the Feds*, INT’L DOCUMENTARY ASSOC. (July 31, 2006), <https://www.documentary.org/feature/funding-feds> (“To bring in more minority viewpoints, ITVS offers its Diversity Development Fund only to African American, Latino, Native American, Asian American and Pacific Islander filmmakers.”).

¹⁸ Communications Act of 1934 § 396(a)(6) (editorially codified as amended at 47 U.S.C. § 396).

¹⁹ § 396(k)(3)(B)(i).

²⁰ § 396(g)(1)(A).

7. Where is ITVS incorporated?
8. What is ITVS's state of legal domicile, if different from where it is incorporated? If it is different from the state of incorporation, please explain the distinction.
9. Provide:
 - a. A list of, or documents sufficient to show, all applications for the Diversity Development Fund since 2014. In providing that list, please include (i) the name of the proposed project, (ii) the race of the applicant, (iii) whether ITVS funded the project, and, if so, (iv) how much funding ITVS provided.
 - b. All documents or communications referring or relating to any Diversity Development Fund application or application-related inquiry from an individual who was white or otherwise did not "[i]dentify as a person of color."²¹

Thank you for your attention to this matter.

Sincerely,



Ted Cruz
Ranking Member

²¹ *Diversity Development Fund*, *supra* note 1.