

## Venture Capital Fund Sued on Allegations of Discrimination in Grantmaking

A venture capital fund in Georgia and its affiliated organizations, including a 501(c)(3) public charity, has been sued in federal court in Georgia on allegations that the fund's grantmaking program offering grants to Black women who are small business owners violates U.S. anti-discrimination law.

In this client alert, we discuss the case, *American Alliance for Equal Rights v. Fearless Fund Management LLC, et. al.* (“*Fearless*”) and some of its implications for grantmakers and other organizations seeking to advance diversity, equity, and inclusion (“DEI”) goals through grantmaking and related programs.

### I. Background and Summary of the *Fearless* Complaint

On June 29, 2023, the U.S. Supreme Court [ruled in](#) *Students for Fair Admissions, Inc., v. President and Fellows of Harvard College* and *Students for Fair Admissions, Inc., v. University of North Carolina* (collectively “*SFFA*”) that Harvard and the University of North Carolina violated Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution by impermissibly considering race when making undergraduate admissions decisions.

In the few weeks since the *SFFA* decision, it has sparked a national conversation on the legality of efforts to promote racial and other forms of diversity beyond the college admissions context, including in the workplace and in the charitable and philanthropic sectors. For instance, on July 13, thirteen state Attorneys General, all Republicans, sent a [letter](#) to Fortune 100 CEOs arguing that, in light of *SFFA*, “[t]reating people differently because of the color of their skin, even for benign purposes, is unlawful and wrong,” and that many corporate DEI efforts are therefore unlawful. A second group of state Attorneys General, all Democrats, responded with a [letter](#) to the same group of business leaders, vowing to “fight back” against “any attempts to intimidate or harass businesses who engage in vital efforts to advance diversity and expand opportunities for the nation’s workforce.”

On August 2, 2023, the American Alliance for Equal Rights (“AAER”) [sued](#) Fearless Fund Management, LLC, a Georgia limited liability company, and various affiliated companies, including a charitable organization, alleging that a Fearless Fund grantmaking program, the Fearless Strivers Grant Contest, offers grants exclusively to Black women in violation of 42 U.S.C. § 1981, a federal civil rights law that prohibits racial discrimination in private contracting. Below, we summarize AAER’s complaint and request for a preliminary injunction. We then briefly consider the implications for grantmaking programs that attempt to advance DEI goals more broadly.

### I. The Complaint

AAER describes itself as a “not-for-profit 501(c)(3) membership organization dedicated to challenging distinctions and preferences made on the basis of race and ethnicity.”<sup>1</sup> AAER’s complaint begins by quoting the Supreme Court’s decision in *SFFA*: “Racial discrimination is invidious in all contexts... It demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities . . . Eliminating racial discrimination means eliminating all of it.”<sup>2</sup>

According to its website: “Fearless Fund invests in women of color led businesses seeking pre-seed, seed level or series A financing. Our mission is to bridge the gap in venture capital funding for women of color founders building scalable, growth aggressive companies. Fearless Fund is built by

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<sup>1</sup> See <https://americanallianceforequalrights.org/>.

<sup>2</sup> *American Alliance for Equal Rights v. Fearless Fund Management LLC, et. al.*, (1:23-cv-03424) (N.D. Ga.), Dkt. 1 (“Complaint”) ¶¶ 1-2 (cleaned up).

women of color for women of color.”<sup>3</sup> The Fearless Fund website includes a link to the Fearless Foundation, a Section 501(c)(3) organization whose stated mission is: “to advance the progression for people of color by reducing racial inequities and providing access to capital. Through strategic partnerships, grant programs, educational programs, and college scholarships, the Fearless Foundation creates opportunities to encourage and aid those who are in need of equitable and sustainable support. We are dedicated to the advancement of those in need by supporting other foundations, organizations, and missions that align with this important work.”<sup>4</sup>

According to the Complaint, Fearless Fund operates the Fearless Striver Grant Contest, which offers a \$20,000 grant to winning applicants and is “open only to [B]lack females,” and the winners of the grant contest in 2022 and earlier in 2023 were all black women.<sup>5</sup> The Complaint further alleges that “[u]nder the program’s terms, the submission of an entry forms ‘a contract’ between Fearless Fund and the applicant.”<sup>6</sup>

AAER claims that conditioning eligibility for the grant explicitly on race violates Section 1981, which guarantees “[a]ll persons . . . the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens”—in other words, race neutrality in private contracting.<sup>7</sup> AAER therefore asks the court to enter a declaratory judgment that the Fearless Strivers Grant Contest violates Section 1981 and to issue a preliminary injunction barring the defendants from closing their next application period, selecting grant recipients, or “enforcing their racially discriminatory eligibility criteria for the Fearless Strivers Grant Contest.”<sup>8</sup> AAER also seeks nominal damages, fees, and costs.<sup>9</sup>

### Next Steps in Litigation:

On Thursday, August 17, the Court issued an order extending the deadline for Fearless Fund to respond to AAER’s motion for a preliminary injunction until August 31 and giving AAER until September 8 to file its reply.<sup>10</sup>

## II. Considerations for Grantmakers

The ultimate decision in the *Fearless* case may have broad implications for organizations including foundations, impact investors, and other actors that have aimed to remedy past discrimination and pursue related DEI goals through grantmaking, investment, contracting, and other programs, to the extent that those programs include considerations of race and other protected characteristics.

One key question that the *Fearless* court may be compelled to answer is whether, for the purposes of Section 1981 claims, grants are contracts that are subject to Section 1981 enforcement. Although Fearless Fund appears to have explicitly designated its grants as “contracts,” other grantors may take the position that their grants are gifts—based on the specific terms of the grant, including whether there are any conditions or consideration provided—and therefore are not subject to Section 1981 enforcement. This defense is relatively untested and may be hard to prove, as the term “contract,” as used in Section 1981, is generally given its ordinary meaning—meaning, where there is an offer, acceptance, and consideration, there is a contract.<sup>11</sup> Thus, a grant supported by any kind of consideration is likely to be treated as a contract for purposes of Section 1981.

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<sup>3</sup> <https://www.fearless.fund/>.

<sup>4</sup> <https://www.fearless.fund/foundation-2>.

<sup>5</sup> Complaint ¶¶ 3–4, 29.

<sup>6</sup> *Id.* ¶ 3.

<sup>7</sup> *Id.* ¶¶ 68, 73. Although the text of Section 1981 refers to “white citizens” it is relatively well-established that its protection extends to persons of all races. *See, e.g., McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 286–87 (1976).

<sup>8</sup> Complaint at 12 (Prayer for Relief).

<sup>9</sup> *Id.*

<sup>10</sup> *American Alliance for Equal Rights v. Fearless Fund Management LLC, et. al.*, (1:23-cv-03424) (N.D. Ga.), Dkt. 44 at 1.

<sup>11</sup> *See Walker v. Abbott Labs.*, 340 F.3d 471, 476 (7th Cir. 2003) (giving the word “contract” in § 1981 its “ordinary meaning”); *Lauture v. IBM*, 216 F.3d 258, 261 (2d Cir. 2000) (same).

Regardless of the outcome in the *Fearless* case, *SFFA* has opened the door to such challenges. Although the full impact of *SFFA* and related litigation remains to be seen, organizations with DEI initiatives may wish to stay abreast of legal developments in order to adjust to a shifting landscape. It is timely for organizations to consider a review and risk assessment of their grantmaking, investment, contracting, and related programs that aim to advance DEI goals. There is no one-size-fits-all approach, and the decisions of each organization will ultimately be based on its programmatic objectives, where and how it operates, and its risk tolerance.

We will continue to provide additional updates on *Fearless*, related cases, and other developments in the wake of the *SFFA* decision.

**This alert is for general informational purposes only and should not be construed as specific legal advice. If you would like more information about this alert, please contact one of the following attorneys or call your regular Patterson contact.**

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