

Fearless Fund Decision May Impact Race-Based Grantmaking

On June 3, 2024, a divided three-judge panel of the United States Court of Appeals for the Eleventh Circuit [ruled](#) that an Atlanta hedge fund likely violated 42 U.S.C. § 1981—the federal prohibition on racial discrimination in public and private contracting—by operating a grant contest that awarded \$20,000 grants to select small business owners, all of whom, by the contest’s express rules, had to be Black women. While this opinion, *American Alliance for Equal Rights v. Fearless Fund Management, LLC* (11th Cir. 23-13138) (“*Fearless*”), is only binding in the states of Alabama, Florida, and Georgia, it represents the most important statement by a federal appellate court on the role of race-based affirmative action in American life since the June 29, 2023 decision by the Supreme Court in [Students for Fair Admissions, Inc. v. President and Fellows of Harvard College](#) (“*SFFA*”) to curtail the consideration of race in admissions by most American colleges and universities.

In this alert, we summarize the Eleventh Circuit’s holdings in *Fearless* and offer initial thoughts on what the opinion could mean for grant-makers, employers, and not-for-profit organizations seeking to advance diversity, equity, and inclusion through grantmaking and related programs.

I. Background

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 (collectively, “Fearless Fund”), 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. In addition to bringing a lawsuit, AAER sought a preliminary injunction barring Fearless Fund from excluding non-Black women from its contest.¹

In September 2023, Judge Thomas Thrash of the United States District Court for the Northern District of Georgia declined to issue AAER’s requested injunction. In his ruling, he held that AAER had standing to sue Fearless Fund, that the Fearless Strivers Grant Contest was a “contract” within the meaning of § 1981, and that Fearless Fund likely did not have a valid affirmative action defense to the claim that its grant contest was discriminatory. However, Judge Thrash declined to issue AAER’s requested injunction because he believed that Fearless Fund was likely to prevail on its argument that the First Amendment to the United States Constitution permitted Fearless Fund to engage in the “expressive conduct” of donating money in order to promote its message that Black women-owned businesses are vital to the American economy.

AAER appealed Judge Thrash’s denial to the Eleventh Circuit. While its appeal on the merits was pending, AAER also asked the Eleventh Circuit to grant an injunction pending appeal. A divided three-judge panel then did so, with the judges in the majority concluding that the First Amendment “does not give [Fearless Fund] the right to exclude persons from a contractual regime based on their race.” See *Am. Alliance for Equal Rights v. Fearless Fund Mgmt.*, 2023 WL 6520763, at *1 (11th Cir. Sept. 30, 2023). Judge Charles Wilson dissented, concluding that only racial minorities can bring claims under § 1981 and noting that § 1981 was passed to protect the rights of Freedmen following the Civil War, not to frustrate efforts to narrow the gap in venture capital funding caused by “centuries of intentional racial discrimination.” *Id.* at *2–3.

A different panel of the Eleventh Circuit heard oral argument on the merits of the underlying appeal in January. That panel has now issued its decision.

¹ A preliminary injunction is a request for a court to issue an order compelling or restraining action on the part of the non-movant in advance of the court’s final determination on the merits of the underlying lawsuit.

II. The Ruling

Writing for the majority, Judge Kevin Newsom held “(1) that [AAER] has standing and (2) that preliminary injunctive relief is appropriate because Fearless’s contest is substantially likely to violate § 1981, is substantially unlikely to enjoy First Amendment protection, and inflicts irreparable injury.” Op. at 2.

The majority first held that AAER had standing to bring its claims. This holding rested in turn on two conclusions—that AAER could identify its members by pseudonyms rather than by their actual names, and that three of its members (identified as “Owner A,” “Owner B,” and “Owner C”) had sufficiently alleged that they were “able and ready” to apply for a grant from Fearless Fund, that is, that they “would compete in Fearless’s contest but for its race-exclusionary rules.” *Id.* at 9–13.

Next, the majority considered whether the grants at issue were contracts, a key question given that § 1981 guarantees that “[a]ll 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.” 42 U.S.C. § 1981(a) (emphasis added). Defining a contract as “an agreement between competent parties that is supported by consideration, mutual consent, and mutual obligation,” the majority found “[t]hat definition fits Fearless’s contest to a T.” Op. at 15–16. Crucially, the Court held that the promise to provide grants to contest winners was supported by sufficient consideration, as applicants had to “grant[] Fearless permission to use [their] idea, name, image, and likeness for promotional purposes and agree[] to indemnify Fearless[, and] to arbitrate any disputes that might arise.” *Id.* at 16.

The Court then held that Fearless Fund had no valid affirmative action-based defense to its conduct. After expressly flagging as an open question whether the longstanding recognition of an affirmative action defense to charges of discrimination in violation of § 1981 and Title VII of the Civil Rights Act of 1964 remains good law following *SFFA*, see Op. at 18 n. 5, the majority held that valid affirmative action plans cannot “create an absolute bar to the advancement of non-Black business owners,” and that Fearless Fund created such a categorical bar by blocking all non-Black applicants, see *id.* (cleaned up). In so holding, the majority specifically rejected the idea that it was acceptable for Fearless Fund to make race-based decisions because non-Black women could get funding for their businesses elsewhere, calling that argument “anathema to the principles that underlie all antidiscrimination provisions.” *Id.* at 18–19.

Finally, the Court ruled that the First Amendment did not protect Fearless Fund’s conduct because “the First Amendment does not protect the very act of discriminating on the basis of race.” *Id.* at 20. According to the Court, if it recognized a First Amendment right to only offer grants to Black women, it would have to allow a racist white business owner to fire all his Black employees to communicate his bigoted views. Per the majority, “Fearless’s position—that the First Amendment protects a similarly categorical race-based exclusion— risks sowing the seeds of antidiscrimination law’s demise.”² *Id.* at 24.

III. What’s Next?

It is not yet clear what will follow from Monday’s opinion. Fearless Fund could seek reversal from the Supreme Court or the full Eleventh Circuit sitting *en banc*. However, the opinion is the law of the land for now in the three states covered by the Eleventh Circuit, and will also be an important precedent with which other jurisdictions may need to grapple when considering similar issues. Thus, we offer initial thoughts on what this opinion means for those seeking to advance their DEI goals:

- **Broad Definition of Contracts in Grantmaking Context:** The *Fearless* court takes an expansive view of what constitutes a contract under § 1981, concluding that a grant is a

² The dissenting judge, Robin Rosenbaum, focused on AAER’s standing to bring suit, arguing that its members were “flopping”—faking an injury they had not actually experienced to receive a favorable ruling from the federal judiciary. See *generally, id.* at 1–22 (Rosenbaum, J., dissenting).

contract when the grant application requires the applicant to give up certain rights, such as the right to sue rather than arbitrate disputes. Whether a grant is a contract under § 1981 is generally a question of state law, so the Court's decision here is not necessarily applicable outside of Georgia.³

- **Skepticism Regarding Affirmative Action Defense:** The Court acknowledged that the Eleventh Circuit has previously recognized an affirmative action defense to § 1981 cases that arise in “the employment-discrimination [context].” Op. at 18. However, the Court expressly declined to decide whether such an affirmative action defense might be applicable in § 1981 cases, like this one, that do *not* involve employment agreements, potentially signaling an unwillingness to recognize affirmative action defenses in grant-making. Furthermore, the Court seems unsure that affirmative action should remain a valid defense even *within* the employment context in light of *SFFA*. See *id.* at 18 n.5. The Court's apparent skepticism toward an affirmative action defense in Title VII and § 1981 cases suggests there may be an appetite among some federal judges for reconsidering long-established precedent permitting employers to engage in affirmative action under certain narrow circumstances.
- **The Opinion is Limited to Race Discrimination:** Because Section 1981 only applies to discrimination on the basis of race, the Court did not address classifications based on other protected characteristics, such as sex or sexual orientation, in holding that Fearless Fund was unlikely to succeed on its First Amendment defense. Although we note that racial classifications are subject to the law's highest degree of scrutiny while classifications based on some other protected characteristics (like sex) are subject to lesser degrees of scrutiny, we cannot predict based on this opinion how a court considering a challenge to a grantmaking program based on other traditionally protected characteristics might rule on this issue.
- **§ 1981 Applies to Everyone:** In a footnote, the majority “reject[ed] any suggestion that § 1981 protects only members of minority groups.” Op. at 19 n. 6. This was already the governing assumption among most courts.

In sum, the *Fearless* decision puts some pressure on foundations, corporations, and other grantmakers that consider race in grantmaking and other programs to meet DEI objectives. Yet, unlike the Supreme Court decision in *SFFA*, *Fearless* is just the expression of one appellate court, not at this time governing law for the whole country. The courts will continue to grapple with the role of race in all facets of public life following *SFFA*, and *Fearless* is an important part of that body of judicial work, particularly for employers, nonprofits, and other grantmakers. We will continue to monitor developments in this and other cases around the country impacting employers and the non-profit sector.

³ Notably, however, the Court did not purport to apply Georgia's law of contacts and instead applied “hornbook law” persuasive in all jurisdictions. *Id.* at 15.

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