



## LEGAL UPDATES

# In Fearless Fund Decision, Federal Court of Appeals Halts Race-Based Philanthropic Program

06/06/2024 | 4 minute read

In a case that has been closely watched by the charitable sector, on June 3, 2024, the U.S. Court of Appeals for the 11th Circuit issued a decision blocking a race-based grant program that provided funds and mentorship to Black women business owners. The ruling is the first time a court has held that a philanthropic program not supported by any local, state, or federal government funding and administered by a private nonprofit corporation may violate federal civil rights laws.

## The American Alliance for Equal Rights v. Fearless Fund Decision

The *Fearless Fund* litigation was filed in 2023 in federal district court in Georgia by American Alliance for Equal Rights ("AAER"). (AAER is led by conservative activist Edward Blum, who was also behind the lawsuits brought against Harvard University and the University of North Carolina that resulted in the U.S. Supreme Court's ruling that those universities' race-conscious approaches to student admissions violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.) In the *Fearless Fund* case, AAER challenged a contest operated by a Black women-owned investment firm and its related private foundation. The contest was intended to award \$20,000 grants and mentorship to businesses that are majority owned by Black women.

The district court denied AAER's request for an injunction; however, on appeal, a three-judge appellate panel of the 11<sup>th</sup> Circuit, in a 2-1 decision, reversed the district court, issued a preliminary injunction ordering the defendants to suspend operation of the grant program, and remanded the case for further proceedings in the district court. The court held that AAER "has established a substantial likelihood that it will succeed on the merits" of its argument that Fearless Fund's grant program discriminated on the basis of race in violation of Section 1981 of the Civil Rights Act of 1866. That law guarantees a person's equal right to make and enforce contracts without regard to race. Specifically, Section 1981's contract clause provides 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." Unlike Title VI or the Fourteenth Amendment,

## Related People

### Greg A. Larson

Partner

Minneapolis

612.632.3276

[greg.larson@lathropgpm.com](mailto:greg.larson@lathropgpm.com)

## Related Services

[Charitable Gift Planning](#)

## Related Sectors

[Nonprofit & Tax-Exempt Organizations](#)



Section 1981 protects against discrimination by non-governmental actors, permitting it to be deployed against a private foundation.

## Fearless Fund's Defenses

### *Standing*

Fearless Fund argued that the plaintiffs lacked standing to sue because they had failed to make specific allegations that at least one member of AAER had suffered or would suffer harm that could be redressed by the court. AAER had brought the suit on behalf of three of the organization's members, business owners identified only as Owners A, B, and C, who alleged they were "ready and able" to enter Fearless Fund's contest but were barred from doing so because they were not Black. The court held that the business owners had established the requisite harm by filing these declarations of readiness.

In dissent, Judge Rosenbaum explained at length why she would have dismissed the case for lack of standing. She pointed to precedent in which the Supreme Court, the 11<sup>th</sup> Circuit, and the 2<sup>nd</sup> Circuit had all rejected similar "ready and able" standing arguments when the record demonstrated only a desire to vindicate the plaintiff's view of the law, not an actual desire to participate in the activity in question. She noted the cookie-cutter nature of the three business owners' declarations, the fact that none of them actually said the owner "would enter the contest, plans to enter the contest, intends to enter the contest, or is even thinking about entering the contest," and that none of the owners attested that they had ever sought a business grant of any other kind, entered a similar contest in any other circumstance, or had any need for the grant support offered through the Fearless Fund contest.

### *Gift, Not Contract*

Fearless Fund contended that its contest did not involve the making of a contract, but was instead a vehicle for making discretionary gifts, and so did not involve conduct regulated by Section 1981. The court rejected that argument, holding that the contest resulted in a bargained-for exchange: Fearless Fund provided grant money and technical support to the winner, and in return the contest winner granted Fearless Fund permission to use its business's name and image for Fearless Fund's promotional purposes and agreed to indemnify Fearless Funds against disputes that might arise. The court also noted that the contest rules had, at one point, explicitly declared that the rules did indeed form a contract.

### *Protected Speech*

Finally, Fearless Fund argued that the First Amendment protects its right to express itself by choosing what to do with its funds and that its contest communicated its commitment to the Black women-owned business community. The court acknowledged that in considering questions of "expressive conduct," it can be difficult to distinguish between expression protected by the First Amendment and the very act of discrimination itself; however, it concluded that Fearless Fund's refusal to consider applications from business owners who weren't Black females was simply an act of discrimination.

## Takeaways for Nonprofits Engaged in Racial Justice and Equity Work

The risk that privately administered race-based or race-conscious grant programs might be successfully challenged under Section 1981 has increased in light of the *Fearless Fund* decision, and the effects of the decision are likely to reverberate throughout the charitable sector. In particular, its holding that a grant may be a "contract" within the meaning of Section 1981 has far-ranging implications.

Still, a charitable organization whose mission includes racial justice work need not overgeneralize in applying lessons from this decision. The *Fearless Fund* decision was based on the particular facts of the case, some of which are unlikely to be held in common with other grant programs. Furthermore, legal outcomes of challenges to race-conscious or race-based charitable programs continue to reveal splits in courts along largely ideological lines, as demonstrated by recent dismissals (based on lack of standing) of cases that were factually similar to *Fearless Fund*.





It would be prudent for charitable organizations that wish to continue to offer race-based grants to evaluate whether their grant programs involve a “bargained-for exchange” that is susceptible to being characterized as a contract. And, such organizations should assess their own risk-tolerance for operating race-conscious and race-based programs in the current unsettled legal environment, understanding that while the means for achieving racial justice and equity goals may, in some circumstances, need to be re-evaluated or modified, the goals themselves remain viable and of critical importance to a healthy society. At minimum, there is currently no court that has prohibited race- and gender-*neutral* private grant programs designed to benefit underrepresented groups.

If you have questions about evaluating a grant or other charitable program in light of the *Fearless Fund* decision, please contact [Greg Larson](#) or your regular Lathrop GPM attorney.

*Thank you to Natalie Kay and Emma Piazza, 2024 Summer Associates at Lathrop GPM, who contributed to the writing of this alert.*