Updates
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The Fearless Fund Decision: Implications for Corporate Giving and Constitutional Standing

The U.S. Court of Appeals for the Eleventh Circuit released its much-anticipated follow-up decision in *American Alliance for Equal Rights v. Fearless Fund Management, LLC*, on June 3, 2024.

The case has been closely watched by corporations and nonprofits alike due to its potential implications for efforts to advance diversity, equity, and inclusion (DEI) in charitable grant programs. 103 F.4th 765 (11th Cir. 2024). The Eleventh Circuit decision, which addresses the treatment of grant programs under antidiscrimination laws, is another major decision in the rapidly changing arena of diversity efforts.

In this Update, we cover the Eleventh Circuit's opinion and address its potential effects on giving programs, including both those operated by nonprofit and for-profit organizations.

Facts in *Fearless Fund*

The Fearless Fund was established in 2019 to "bridge the gap in venture capital funding for Black women." The organization conducted a venture capital funding contest that provided $20,000 grants to Black women and businesses with at least 51% ownership by Black women. A 501(c)(3) membership organization, the American Alliance for Equal Rights, sued the Fund in federal district court, alleging that the contest's eligibility requirements discriminated against white business owners.

The Fearless Fund contest included various obligations on the part of contest participants. The Fearless Fund required contest participants to agree to the official rules for the contest. The official rules, in turn, required applicants to grant Fearless Fund broad use of their names, images, and likenesses for promotional purposes, in addition to granting Fearless Fund the rights to discuss and use the contestants' entries without receiving additional compensation. Fearless Fund initially made it explicit that the contest rules created a contract but, during the litigation, attempted to weaken the contract language. Nonetheless, the revised language granted the Fearless Fund "sole discretion" to "void and disqualify" entries found to undermine its goal of addressing the

funding gap.

The plaintiff, the American Alliance for Equal Rights, alleged that three white business owners were "ready and able" to participate in the contest but were barred from doing so due to their race, in violation of 42 U.S.C. § 1981, which prohibits intentional discrimination on the basis of race in contracting.

The Eleventh Circuit's Holding

Fearless Fund prevailed at the federal district court level but, ultimately, was unsuccessful on appeal. On September 27, 2023, Judge Thomas Thrash of the U.S. District Court for the Northern District of Georgia initially denied the plaintiff's motion for a preliminary injunction in the case. In that opinion, Judge Thrash found that, although the plaintiff had met Article III standing requirements, the plaintiff had failed to meet the requirements for issuing a preliminary injunction. A party seeking a preliminary injunction must clearly show both that it would be irreparably harmed without the issuance of the preliminary injunction and that it would likely succeed on the merits of the case. Because the Fearless Fund's contest "may" have been protected under the First Amendment as a form of expressive conduct, Judge Thrash found that the plaintiff had not met its burden for issuing a preliminary injunction.

However, on June 3, 2024, a panel of the Eleventh Circuit reversed the district court decision. The panel affirmed the lower court's initial finding of Article III standing for the plaintiff but ordered the lower court to issue a preliminary injunction against the Fearless Fund.

In reversing the lower court, the Eleventh Circuit held that the American Alliance for Equal Rights likely would succeed on the merits of its claims under Section 1981 because (1) the Fearless Fund contest constituted a contract; (2) that contract expressly barred individuals from entering into the contest based on their race; and (3) the Fearless Fund's express use of race to determine valid participants was not protected under the First Amendment. The Eleventh Circuit also dismissed the Fearless Fund's contention that its contest amounted to a permissible remedial program aimed, in part, at addressing a manifest imbalance in venture capital funding. The panel held that the contest did not meet the legal bar for remedial programs because its absolute bar on nonminorities impermissibly violated their rights.

The Eleventh Circuit then proceeded to find that the plaintiff could show irreparable harm due to being denied entry to the program and that both the balance of equities and the public interest were served by issuing a preliminary injunction against the contest.

The Eleventh Circuit did not address whether tax regulations for 501(c)(3) charitable purposes may impact the analysis.

Treatment of the Contest as a Contract

In *Fearless Fund*, the Eleventh Circuit panel found that the Fund's contest obligations created a contract, and, thus, it was required to adhere to Section 1981's ban on racial discrimination in contracting. Importantly, the Eleventh Circuit not only found that the initial contest rules, which clearly identified the contest as a "contract," indeed constituted a contract, but also that the contest remained a contract even following the removal of any specific "contract" language. Here, the Eleventh Circuit panel recognized that "the rose remained a rose" and found that the contest's mutual obligations remained sufficient to establish a contract.

The Eleventh Circuit panel's determination that a contract exists points to the very broad—and not commonly understood—construction of a contract under Section 1981. While many charitable grant programs may not, on their face, appear to be contractual in nature, many such programs include various obligations on the part of

recipients. To the extent that those gifts are targeted to diversity-related organizations, they raise the prospect of being unwittingly swept into Section 1981's reach.

Anti-DEI Lawsuits and Article III Standing: A New Circuit Split?

Nestled within the Eleventh Circuit's *Fearless Fund* decision is an approach to Article III standing that likely indicates future terrain for upcoming legal battles in the DEI space. Ever since the Supreme Court released its landmark decision in *Students for Fair Admissions (SFFA)*, litigation surrounding DEI practices has seen an uptick, with corporations and nonprofits facing new claims of reverse discrimination on the basis of their DEI initiatives. The plaintiffs in these cases have used a range of novel tactics in order to pursue their claims, including raising claims of irreparable harm by such programs against *unnamed* plaintiffs. Here, it appears a circuit split may be brewing.

In *Fearless Fund*, the Eleventh Circuit found that the American Alliance for Equal Rights was able to show that its members were "ready and able" to participate in the Fearless Fund contest despite failing to identify the allegedly "ready and able" individuals. Two judges on the Eleventh Circuit panel found that this sufficed for purposes of Article III standing requirements, holding that Article III standing does not require specific naming of the individuals allegedly harmed. A third judge, Judge Robin Rosenbaum, in dissent, rejected this analysis and argued for a higher standard to establish standing. Evoking the soccer tactic of "flopping," where a player feigns suffering a foul in order to force a referee to award a penalty in her team's favor, Judge Rosenbaum heavily criticized the use of anonymous plaintiffs with identically worded allegations and declarations citing alleged harms to achieve standing.

Judge Rosenbaum's approach has appeared in other circuits already. Recently, in *Do No Harm v. Pfizer Inc.*, the U.S. Court of Appeals for the Second Circuit held that Article III standing requirements include a naming requirement. 96 F.4th 106 (2d Cir. 2024). The Second Circuit reasoned in that decision that declarations from the applicants that they intended to apply were insufficient to establish Article III standing, and Judge Rosenbaum explicitly referenced the Second Circuit decision in her dissenting opinion. Following the *Fearless Fund* decision, it is expected that the question of whether Article III standing requirements impliedly include a naming requirement will become a central focus of future court battles.

Implications for Giving Programs

The *Fearless Fund* decision is a reminder of important guardrails for grant programs that seek to enhance diversity, including nonprofit awards programs and corporate charitable grant programs, to consider as they develop initiatives to advance diversity and inclusion through targeted funding.

First, the use of express racial classifications in corporate giving should be broadly avoided. As a general principle, charitable grant programs should not exclude individuals or groups on the basis of their race. As shown in the *Fearless Fund* decision, practices that exclude individuals or groups based on race present a high risk of antidiscrimination liability under Section 1981.

Second, where possible, programs should seek to structure their funding initiatives as gifts rather than as contracts. As the *Fearless Fund* decision indicates, merely eliminating the use of the word "contract" will not be sufficient for positioning a grant or other form of charitable funding as a gift. Rather, corporate giving programs should seek, where possible, to ensure that few to no obligations exist on the part of potential fund recipients. This includes both affirmative obligations (requirements for participants to do something in order to receive funds) and negative obligations (requirements for participants to avoid doing something in order to receive funds).

Companies should also be mindful of the complex landscape related to gifts to educational institutions. Many companies have created giving programs that emanate from a desire to assist racial minorities in various programs, such as funding grants for STEM majors. In addition, some of these programs were spurred by current or former executives who have directly earmarked these gifts for specific backgrounds. While the holding in *SFFA* related solely to university admissions decisions, anti-DEI advocates have sought to challenge these programs as impermissibly considering race. Moreover, many state anti-DEI measures have explicitly targeted diversity-related scholarships. Close review of these awards should be undertaken to address heightened risks related to these programs.

Due to the complexity of these issues, the legal risks that can result from unvetted programs, and the developing nature of this area of the law, organizations are encouraged to seek the assistance of counsel when developing charitable giving initiatives and throughout the life of such programs.

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