

Pro Bono

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Fearless Fund Litigation Update – What Nonprofits and Other Private Actors Should KnowBy [Christina Holder](#), [Natalie J. Kraner](#), and [Alexander Shalom](#)

On June 3, 2024, a divided [U.S. Court of Appeals for the Eleventh Circuit issued a decision](#) in *American Alliance for Equal Rights v. Fearless Fund Management, LLC*, No. 23-13138 (11th Cir., June 3, 2024) (“Fearless Fund”) upholding a preliminary injunction preventing Fearless Foundation, Inc., the fund’s charitable arm, from moving forward with a funding contest open only to businesses majority-owned by Black women. The panel found that American Alliance for Equal Rights was “substantially likely” to prevail in its lawsuit claiming the funding contest violated Section 1981 of the Civil Rights Act of 1866 (“Section 1981”) and was “substantially unlikely to enjoy First Amendment protection.” The trial court below had [declined to grant a preliminary injunction](#) to halt the contest after determining that it may be protected under the First Amendment as expressive conduct.

According to news reports, Fearless Fund is evaluating its legal options, which may include seeking en banc review by the full Eleventh Circuit or petitioning the U.S. Supreme Court for review. If Fearless Fund does not appeal, the case will be remanded to the trial court to enter a preliminary injunction barring Fearless Foundation from continuing the contest. The trial court would then further evaluate the facts and the lawfulness of the grant program.

Section 1981 specifically grants all individuals within the U.S. the same rights and benefits as “enjoyed by white citizens” regarding contractual relationships. 42 U.S.C. § 1981(a). The Supreme Court has interpreted the law to prohibit discrimination not only on the basis of race but also on the basis of ancestry and ethnic characteristics that are associated with race. See *Saint Francis College v. Al-Kahzraji*, 481 U.S. 604, 609-13 (1987).

In issuing its decision, the Eleventh Circuit panel concluded that the unnamed plaintiffs had standing to proceed with their case. The Second Circuit and Northern District of Ohio recently reached opposite standing decisions in similar cases. See *Do No Harm v. Pfizer Inc.*, 96 F.4th 106 (2d Cir. 2024), and *Roberts v. Progressive Preferred Insurance Co.* (N.D. Ohio, May 21, 2024).

The court’s decision did not grapple with the history of Section 1981, which was passed during the Reconstruction era to remedy the persistent economic exclusion of Black people, nor the argument made by amici that Section 1981’s drafters did not intend for the law to regulate charitable giving.¹ American Alliance for Equal Rights and other activist organizations are actively challenging race-conscious activities of nonprofits and businesses in courts around the country.² The decision is among the first to apply Section 1981 to the charitable sector.

The Eleventh Circuit, while rejecting the argument that the grant contest was a donation rather than a contract, left open the possibility that pure donations—without the element of a bargained-for exchange—may be protected by the First Amendment as expressive conduct. The court also left open the possibility that the remedial-program exception to the antidiscrimination prohibition contained in Title VII of the Civil Rights Act of 1964³ may apply in Section 1981 cases arising outside the employment contract context, though the court concluded that the defense was not available because the contest “unquestionably ‘create[s] an absolute bar’ to the advancement of non-black business owners.”

Nonprofits, grant-makers, and other private sector actors concerned about the impact of the *Fearless Fund* decision should remember that the law remains unsettled, such race-explicit charitable funding contests are not illegal under current law outside of the Eleventh Circuit, and cases will likely wind their way through the courts for months and years to come. Lowenstein will continue to monitor developments and advise clients on the implications of this and similar cases.

Please contact a member of your Lowenstein team if you would like to discuss risk mitigation strategies.

¹ See amicus briefs filed in the *Fearless Fund* litigation, <https://www.gibsondunn.com/fearless-fund-briefs>, especially Brief of States and Brief of Professor Roger Colinvau.

² See, e.g., The American Alliance for Equal Rights website, *Our Cases*, <https://americanallianceforequalrights.org/our-cases>; America First Legal website, *Featured Cases*, <https://aflegal.org/litigation>; Do No Harm website, *Litigation*, https://donoharmmedicine.org/litigation/?location=all&case_status=all&topic=all; Wisconsin Institute for Law & Liberty website, *Equality Under the Law Project*, <https://will-law.org/equality>.

³ Title VII prohibits employment discrimination based on race, color, religion, sex, and national origin.

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