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11th Circuit Fearless Fund Ruling Raises Questions About Future of Race-Conscious Corporate DEI and Philanthropic Initiatives

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On June 3, 2024, the US Court of Appeals for the 11th Circuit ordered entry of a preliminary injunction blocking venture capital firm Fearless Fund from administering a grant program through its philanthropic foundation for Black women-owned businesses. Reversing a lower court's decision, the 11th Circuit ruled in a 2 – 1 opinion that Fearless Fund's Strivers Grant Contest, which provides $20,000 grants to small businesses owned by Black women, is substantially likely to violate the prohibition in Section 1981 of the Civil Rights Act (Section 1981) against race discrimination in making and enforcing private contracts.

While a preliminary ruling on an undeveloped factual record, this new development in a closely watched case confirms a growing split among courts on diversity, equity and inclusion (DEI) initiatives that could ultimately land the issue before the US Supreme Court.

Context

The Supreme Court's ruling last year in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College (SFFA)* that race may not be used as a factor in college admissions has since catalyzed a wave of lawsuits extrapolating its logic to private-sector DEI initiatives, including *American Alliance for Equal Rights v. Fearless Fund.*

Fearless Fund (Fearless) is a venture capital fund that seeks to bridge the gap in venture capital funding for women of color founders. Fearless also has a philanthropic foundation "that provides capital, community, mentorship, and education to women of color entrepreneurs" and runs the Strivers Grant Contest. The lawsuit challenging the contest was brought by the American Alliance for Equal Rights (the Alliance), an organization dedicated to challenging race-based distinctions. Its founder, Edward Blum, is a conservative legal activist who also founded the Students for Fair Admissions organization that brought the *SFFA* suit, and through both these organizations and others has backed multiple lawsuits challenging DEI initiatives in education and business.

11th Circuit decision

Two members of a three-judge panel on the 11th Circuit ordered that the grant program be enjoined during the pendency of the Alliance's legal challenge. The two-judge majority determined that Fearless' contest was likely to violate Section 1981, was unlikely protected by the First Amendment and inflicted irreparable injury.

Strivers Grant Contest challenge

Through Fearless' Strivers Grant Contest, the fund awards $20,000, digital tools for business development and mentorship to four recipients selected through a competitive application process limiting eligibility to Black women-owned businesses.

The Alliance brought suit on behalf of three anonymous members – non-Black business owners who wish to participate in the program but cannot enter because of their race. The lawsuit challenges the legality of the contest on the grounds that it is a contract, and as such, its race-based eligibility requirement violates Section 1981's prohibition against racial discrimination in contracts. The Alliance sought a preliminary injunction preventing Fearless from administering the contest until the legal challenge is resolved.

Fearless argued first that a preliminary injunction was not warranted because the members that the Alliance represents had not adequately alleged any injury resulting from their ineligibility. Second, it argued that Section

1981 was inapplicable because the contest is not a contract, and even if it was, the contest was exempted from proscription as a valid "remedial program" redressing racial inequities. Finally, Fearless argued that its contest was constitutionally protected expressive conduct under the First Amendment.

Grant contest as a contract

The 11th Circuit panel found that Fearless' contest was in fact a contract covered by Section 1981, noting that Fearless itself had previously referred to its contest as such. It further reasoned that the $20,000 and mentorship opportunities that Fearless provided to grantees were not discretionary donations but part of a bargained exchange supporting contract formation. The court also determined that Fearless offered these benefits in exchange for grantees' publicity rights and indemnity obligations. Upon determining that Fearless' contest was a contract, the 11th Circuit panel found that Section 1981 applied to the contest.

No remedial program exception

The 11th Circuit also held that the grant program could not qualify for the "remedial program" exception articulated by the Supreme Court in *United Steelworkers of America, AFL-CIO-CLC v. Weber* (1979) and *Johnson v. Transportation Agency* (1987). Under this exception, historically applied in the context of employment discrimination, a private, race-conscious remedial program is valid if it addresses racial inequities and does not unnecessarily impinge upon the rights of others or categorically bar applicants based on race. The court determined that because Fearless' contest categorically barred non-Black applicants, it could not be exempted from Section 1981 on these grounds. Notably, the court rejected Fearless' arguments that non-Black entrants could seek funding from other sources and ignored the fact (cited in a footnote in the dissent) that Black women-founded companies have received less than 1% of all venture capital funding in recent years.

No First Amendment protection

The court also concluded that the First Amendment did not protect the grant program, since it was not constitutionally protected "expressive conduct," but instead represented "the very act of discriminating on the basis of race," which is not protected under the First Amendment. Acknowledging the jurisprudential difficulty of drawing lines between protected speech and unprotected conduct, the court distinguished advocating racial discrimination from practicing it, reasoning that the grant program was more akin to the latter and thus not constitutionally protected.

11th Circuit decision

Based on these conclusions, the 11th Circuit panel ordered the lower court to grant a preliminary injunction against Fearless from continuing its contest as the lawsuit proceeds. Fearless may seek rehearing by the full 11th Circuit or petition the Supreme Court for review. Absent such further relief, the preliminary injunction against the grant program will stand while the underlying challenge to that program proceeds in trial court.

In sum, the *Fearless* decision should be taken into account by companies and philanthropic organizations administering private-sector DEI initiatives that consider race and confirms that we will continue to see legal challenges to private-sector DEI initiatives following the *SFFA* ruling. While the *Fearless* decision is currently binding only in the 11th Circuit, it may only be a matter of time before other circuits weigh in and these issues ultimately reach the Supreme Court.

Key considerations

- Grant-making organizations should be mindful that contracts (including grants that are, in substance, contracts) limited exclusively to members of a specific race may be prohibited under Section 1981, at least within the 11th Circuit. Similarly, corporate DEI programs that contain race-based (and potentially other) exclusions are vulnerable to legal challenge.
- Because Section 1981 only applies to discrimination on the basis of race, the *Fearless* decision addresses only racial discrimination; it does not address the limitation of the grant program to women. This decision also leaves open other routes for advancing racial equity goals through criteria such as census tracts and socioeconomic status.
- The decision highlights that DEI programs will be scrutinized to determine whether they may be considered contracts under Section 1981. Regardless of simple verbiage changes (i.e., avoiding use of the term "contract"), courts will analyze the specific goals, structure and messaging of a particular DEI program.
- If your organization has existing DEI programs, now is a good time to have in-house or external counsel work with you to review those programs – including public disclosures and documentation relating to those programs – to assess whether they are vulnerable to legal challenge.
- If your organization is contemplating establishing DEI programs, carefully consider how to structure and discuss those

programs to remove race-based and other exclusions while still achieving your goals.

Our team will continue to follow and report on litigation developments in this area. Please contact a member of Cooley's DEI advisory practice if you have questions concerning how the *Fearless* decision could affect your organization.

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