ALERT MEMORANDUM

U.S. Circuit Court Orders Preliminary Injunction, Finding Grant Program Aimed at Black Women Business Owners Likely Violates § 1981

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The Eleventh Circuit Court of Appeals issued a decision ordering a preliminary injunction against Fearless Fund's grantmaking program designed to provide venture capital funding to businesses owned by Black women, holding that § 1981 likely prohibits race-based grants of the type offered by Fearless Fund, and that such grants are not protected under the First Amendment.[1]

The decision comes as part of a suit filed on August 2, 2023 by the American Alliance for Equal Rights ("AAER") against Fearless Fund Management, LLC, a Georgia limited liability company, and various affiliated companies, including a charitable organization (collectively, "Fearless Fund"), alleging that the Fearless Strivers Grant Contest (the "Contest"), a Fearless Fund grantmaking program, violates 42 U.S.C. § 1981 because it offers grants exclusively to Black women. AAER also sought a preliminary injunction to enjoin Fearless Fund from enforcing its Black-only criteria. Upon the district court's denial of AAER's requested injunction, AAER appealed to the 11th Circuit Court of Appeals. After hearing oral argument in January 2024, a panel of three 11th Circuit judges issued a split decision on June 3, 2024, ordering a preliminary injunction against Fearless Fund, finding AAER to have standing and that preliminary injunctive relief is appropriate because the Contest is likely to violate § 1981, is unlikely to be protected by the First Amendment, and inflicts irreparable injury. The decision came from two of the three panel judges, with the third issuing a dissenting opinion.

[1] *Am. All. for Equal Rts. v. Fearless Fund Mgmt., LLC*, No. 23-13138 (11th Cir. June 3, 2024), ECF No. 125-1 [hereinafter *Eleventh Circuit Opinion*].

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11th Circuit's Decision

Standing.

The majority agreed with the district court in holding that AAER has standing to sue Fearless Fund, finding that (i) AAER's anonymous members need not be identified by name because the claim asserted did not require individualized proof or the anonymous members' participation, (ii) its members had suffered an "injury in fact" based on declarations in which each stated they were "able and ready" to enter the Contest, but could not enter due to the race requirement, and (iii) AAER "seeks racial equality for its members," which is "an interest germane to the organization's purposes."[2] In her dissenting opinion, however, Judge Rosenbaum disagreed with the majority that the AAER members had actually suffered any injury. Judge Rosenbaum stated that none of the AAER members had demonstrated a genuine interest in actually entering the Contest and expressed her belief that AAER had tried to "manufacture an 'injury' to allow [AAER] to challenge" the contest, comparing AAER to a soccer player's attempt to win by "flopping on the field" to fake an injury near the opposing team's goal.[3]

Likelihood of Success.

The 11th Circuit also held that AAER has a substantial likelihood of success on the merits of its claim. The Court agreed with the district court that the Contest i) qualifies as a contract under § 1981 because it "ends in the formation of a contractual relationship between Fearless and the winner" and ii) does not qualify for any remedial-program exception to § 1981 because it "categorically bars non-black applicants" and thus "unquestionably 'create[s] an absolute bar' to the advancement of non-black business owners."[4]

Unlike the district court, which had denied the injunction upon finding that the First Amendment likely shields the Contest, the 11th Circuit found that the Contest is likely not protected by the First Amendment because it directly discriminates against individuals on the basis of race.[5] The Court highlighted the difference between "status" and "message," noting that the First Amendment does not protect discrimination of the former and that if Fearless Fund's "refusal ['to entertain applications from business owners who aren't black females'] were deemed sufficiently 'expressive' to warrant protection under the Free Speech Clause, then so would be every act of race discrimination, no matter at whom it was directed."[6]

Irreparable Harm, Balance of Equities and Public Interest.

The 11th Circuit also found that AAER would suffer irreparable harm without an injunction because "each lost opportunity to enter [Fearless Fund's] contest … prevents [AAER's] members from competing at all—not just for the $20,000 cash prize but also for [Fearless Fund's] ongoing mentorship and the ensuing business opportunities that a contest victory might provide."[7]

Further, the Court noted that the balance of the equities weighs in AAER's favor because the burden of Fearless Fund changing its rules to comply with § 1981 "pales in comparison to the interest in rooting out race discrimination in all its forms" and that the public interest is served through the preliminary injunction by "vindicating § 1981's terms and aims by ensuring racial equality in contracting."[8]

Key Takeaways

The 11th Circuit's decision is only a preliminary injunction, and thus is not a final adjudication on the merits of AAER's claims. Nevertheless, the decision is a significant extension of the reasoning behind the Supreme Court's June 2023 affirmative action decision in *Students for Fair Admissions v. Harvard*, 600 U.S. 181 (2023) ("*SFFA*")

[2] *Eleventh Circuit Opinion* at 9-14.
[3] *Eleventh Circuit Opinion* at 27, 40 (Rosenbaum, J. dissenting).
[4] *Eleventh Circuit Opinion* at 17-18.
[5] *Eleventh Circuit Opinion* at 19, 24.
[6] *Eleventh Circuit Opinion* at 22-24.
[7] *Eleventh Circuit Opinion* at 25.
[8] *Eleventh Circuit Opinion* at 25-26.

to DE&I and affirmative action programs outside of the education context.[9]

Despite the limited precedential value and jurisdictional reach of the 11th Circuit's decision, plaintiffs, such as AAER, will likely feel emboldened by this decision (and *SFFA*) to bring similar suits against any program where race is an explicit factor considered in the process. AAER's public statements after the decision highlighted their belief that Fearless Fund's grant competition was only one example of programs that they view to be problematic and unjust.

Because Fearless Fund's Contest was found to fall under § 1981 based on a broad definition of contract (though analyzed under Georgia state law), regardless of the type of grant-making or investment program, if some sort of contractual agreement is formed (i.e. the applicant has to give up certain rights), and race is a basis for deciding who enters that agreement, then AAER (or similar plaintiffs) may bring a similar type lawsuit against such program.

Additionally, when adjudicating these suits, courts outside of the 11th Circuit may view this decision as important (though non-binding) precedent to consider when similar arguments are before them and may take the 11th Circuit's reasoning beyond the specific facts of the Fearless Fund case to other race-based business practices.

Finally, we note that the 11th Circuit decision is limited to the context of racial discrimination because § 1981 does not apply to other protected characteristics, such as sex or sexual orientation. However, it is possible plaintiffs may try to use this decision as a basis for arguing against similar programs aimed at other protected characteristics, and there are no guarantees as to how a court may rule in that instance.

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[9] In June 2023, the U.S. Supreme Court held that certain admissions programs that considered candidates' race in admission decisions violated the Fourteenth Amendment of the U.S. Constitution and Title VI of the Civil Rights Act of 1964. While these decisions, known collectively as *SFFA*, were not directly relied upon by the 11th Circuit, the 11th Circuit's decision in *Fearless Fund* seems to extend the Supreme Court's reasoning against affirmative action beyond the education context. For more information on *SFFA* and its implications, please refer to *How Boards Should Be Thinking About the Supreme Court's SFFA Affirmative Action Decision*, available at https://www.clearygottlieb.com/news-and-insights/publication-listing/how-boards-should-be-thinking-about-the-supreme-courts-sffa-affirmative-action-decision.