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# The U.S. Court of Appeals for the Eleventh Circuit Held That a Contest Providing Venture-Capital Funding Only to Black Female Applicants

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The U.S. Court of Appeals for the Eleventh Circuit held that a contest providing venture-capital funding only to Black female applicants is substantially likely to violate section 1981 of the Civil Rights Act of 1866, which prohibits race discrimination in the making of contracts. The 2-1 split decision in *American Alliance for Equal Rights v. Fearless Fund Management, LLC* (No. 23-13138, June 3, 2024) held that an organization devoted to "ending racial classifications and racial preferences in America" was substantially likely to prevail on its § 1981 claim to enjoin the restricted contest, and it remanded the case for entry of a preliminary injunction.

The *Fearless Fund* decision is the latest in a series of rulings in reverse-discrimination suits brought under the Constitution and civil-rights statutes – including the recent "Hello Alice" case, which involved a § 1981 challenge to another grant contest open only to Black-owned businesses. (We blogged about that case here.) The Eleventh Circuit's decision could cause promoters of DEI goals to deemphasize minority status (especially race) as a criterion and to focus more broadly on economic disadvantage, overcoming hardships, and other factors not specifically tied to race.

**Background**

The *Fearless Fund* litigation arose from the Fearless Strivers Grant Contest, which Fearless Fund Management (the "Fund") operates to award grants to small businesses owned by Black women. The contest is open only to Black women whose businesses are at least 51% owned by Black women. The Fund allegedly intends to convey a message that "Black women-owned businesses are vital to our economy" and to promote that message by supporting entrepreneurs who might otherwise lack access to capital necessary to launch their businesses.

American Alliance for Equal Rights (the “Alliance”) is a membership organization that purports to be “dedicated to challenging distinctions and preferences made on the basis of race and ethnicity.” The Alliance sued to enjoin the Fund from closing its contest, which purportedly excludes potential contestants from eligibility because of their race. The Alliance contended that the exclusion violates § 1981, which 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.”

The U.S. District Court for the Northern District of Georgia denied the Alliance’s motion for a preliminary injunction. Although the court agreed that the Alliance had standing to sue and that the contest constituted a contract for purposes of § 1981, it held that the Alliance was unlikely to prevail on the merits because the Fund had a First Amendment defense: the Fund “clearly intends to convey a particular message in promoting and operating its grant program,” and it carried out its message through expressive conduct by making grants to eligible contestants.

A panel of the Eleventh Circuit, in a split 2-1 decision, granted an injunction pending appeal, holding that the Fund’s “racially exclusionary program . . . [was] substantially likely to violate 42 U.S.C. § 1981.” The Eleventh Circuit, in another 2-1 ruling, has now reversed the denial of injunctive relief and remanded the case with instructions to enter a preliminary injunction.

**The Eleventh Circuit’s Decision**

The panel majority first agreed with the District Court that the Alliance had standing to sue. An organization may sue to vindicate the rights of its members, and several Alliance members (who were not Black women) had sufficiently alleged they had been “‘ready and able’ to apply for a grant in a specific and identifiable time frame” but had been prevented from doing so by the contest’s allegedly discriminatory rules. The majority rejected the Fund’s contention that the Alliance was required to identify those members by name to establish organizational standing.

The majority also agreed with the District Court that § 1981 applied to the Fund's contest. The contest rules constituted a contract – "a bargained-for exchange supported by good and sufficient consideration" – because "a winning entrant obtains [money] and valuable mentorship and, in return, grants [the Fund] permission to use its idea, name, image, and likeness for promotional purposes and agrees to indemnify [the Fund] to arbitrate any disputes that might arise." And as had the District Court, the majority rejected a "judge-made exception" to § 1981 for "remedial programs" because the contest "unquestionably create[s] an absolute bar to the advancement of non-black business owners."

But the majority disagreed with the District Court on the availability of a First Amendment defense to the § 1981 claim. The court observed that "the Supreme Court has clearly held that the First Amendment does not protect the very act of discriminating on the basis of race." While that Amendment might shield *expressions* of racist or anti-racist viewpoints, a "critical distinction [exists] between *advocating* race discrimination and *practicing* it." The majority held that the Fund's contest crossed that line by "refus[ing] to entertain applications from business owners who aren't 'black females.'" "If that refusal 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." The majority therefore ruled that the Alliance had established a substantial likelihood of success on the merits of its § 1981 claim.

The dissent opined that the Alliance lacked standing to sue because none of its members had shown "a genuine interest in actually entering the [Fund's] contest" if it were open to non-Black women.

**Implications**

The *Fearless Fund* decision is interesting both for its standing analysis and for its ruling on the substantive § 1981 issue.

The Alliance had sought only injunctive relief, not damages. The District Court and the Eleventh Circuit thus did not need to grapple with the standing issue in the "Hello Alice" case, *Roberts v. Progressive Preferred Insurance Co.* (N.D. Ohio May 21, 2024). In that case, the plaintiff had sought both retrospective relief (damages) and prospective relief (an injunction) for allegedly having been excluded from a grant contest open only to Black-owned small businesses. The *Progressive* court held that the plaintiff lacked standing to sue for damages arising from his alleged ineligibility to participate in the contest because he had not pled facts showing he would have been awarded one of the ten available grants under a race-neutral policy. Nothing in the Eleventh Circuit's analysis of standing to sue for *injunctive* relief is inconsistent with *Progressive*'s holding as to *damages*. In fact, the *Progressive* court expressly distinguished *Fearless Fund*'s standing analysis as applying only to *injunctive* relief.

On the merits, though, the *Fearless Fund* ruling seems to suggest that the majority of the Eleventh Circuit panel would have invalidated the contest in *Progressive* if those judges had ruled on the substance of the § 1981 claim asserted in that case. The *Fearless Fund* decision thus could heighten the scrutiny of remedial programs open only to members of a particular race.

The Eleventh Circuit analyzed the § 1981 claim only in the context of *racial* discrimination, which is what that statute addresses. The decision thus does not necessarily suggest how a court would approach a different type of reverse-discrimination claim based on some other legal theory (such as equal protection) and involving a different classification (such as gender, which is not subject to the strict scrutiny applicable to race-based classifications).

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