No. 23-13138

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

AMERICAN ALLIANCE FOR EQUAL RIGHTS,
Plaintiff-Appellant,

v.

FEARLESS FUND MANAGEMENT, LLC ET AL.,
Defendants-Appellees.

On Appeal from the U.S. District Court for the
Northern District of Georgia, No. 1:23-cv-34241 (Thrash, J.)

BRIEF OF PROFESSOR ROGER COLINVAUX AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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American Alliance for Equal Rights v. Fearless Fund Mgmt., LLC et al.
No. 13-13138

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rules 26.1-1 and 26.1-2(b), the undersigned counsel represents that, in addition to the Certificates of Interested Persons already filed, the following have an interest in the outcome of this appeal:

1. Colinvaux, Professor Roger, *Amicus Curiae*
2. DuBois, Rene H., *Counsel for Amicus Curiae Professor Roger Colinvaux*
3. Gomez, Armando, *Counsel for Amicus Curiae Professor Roger Colinvaux*

The undersigned counsel further represents that *Amicus Curiae* Professor Roger Colinvaux is an individual, non-corporate party.

Respectfully submitted,

December 13, 2023

/s/ Armando Gomez
Armando Gomez
Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*[1]

Roger Colinvaux is a Professor of Law at The Catholic University of America, Columbus School of Law and an internationally recognized expert in the tax law of nonprofit organizations. His scholarship focuses on the nonprofit sector and public policy, including reform of charitable giving laws, tax-exempt status, nonprofit advocacy activity and philanthropy. Before joining the faculty of the Columbus School of Law, he was counsel to the U.S. Congress, Joint Committee on Taxation from 2001 to 2008. He has previously filed joint amicus briefs in the U.S. Supreme Court, the U.S. Court of Appeals for the Tenth Circuit and this Court, and has testified before the U.S. Congress on nonprofit issues.

Professor Colinvaux submits this brief to inform the Court of the important historical and regulatory context of charities and the significant harm likely to result from a ruling reversing the denial of Plaintiff-Appellant's preliminary injunction motion, including adverse consequences to longstanding charity law and the practices of the numerous charities that promote social welfare in the United States.

[1] Pursuant to Fed. R. App. P. 29, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief and no person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Defendant-Appellee Fearless Foundation ("Fearless") is a charity. For more than 100 years, charities have been allowed to develop their own view of the public good, consistent with broadly defined purposes, and to associate freely in pursuit of that good. As a charity, Fearless operates under a longstanding set of standards and requirements that do not apply to for-profit entities and other nonprofits. By law, charities such as Fearless generally are free to define and pursue their mission and disburse aid to beneficiaries of their choice in a manner that they believe best furthers their charitable purpose.

Fearless was launched in 2018 "to reduce racial and gender disparities in venture capital funding." Doc. 59 at 6.[2] Fearless's stated mission is to "bridge the gap in venture capital funding for women of color founders building scalable, growth aggressive companies."[3] As part of that mission, Fearless awards "grants and mentorship to Black women-owned small businesses, which historically have been disadvantaged in their ability to obtain funding." Doc. 59 at 1. Eliminating racial discrimination and prejudice has long been considered a lawful charitable purpose. 26 C.F.R. § 1.501(c)(3)-1(d)(2) (providing that the term "charity" includes the

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[2] Under Circuit Rule 28-5, references to the district court record are made using the format "Doc_ at _." Each docket entry cited in this brief is also contained in the Appellant's Appendix.

[3] Fearless Foundation, 2021 Form 990, Part I, Line 1, https://tinyurl.com/373vyvsf.

"promotion of social welfare by organizations designed to . . . eliminate prejudice and discrimination"). Accordingly, charities seeking to eliminate prejudice and discrimination may use race as a component of their charitable mission and provision of financial assistance.

Ignoring this important historical and regulatory context about charities, Plaintiff-Appellant American Alliance for Equal Rights (the "Alliance") seeks to reframe this case to be about alleged "racial discrimination in contracting." But this case fundamentally concerns a charity's freedom to decide to whom it provides aid (and in what form) in furtherance of its charitable mission—a core part of a charity's First Amendment expressive rights. Although the Alliance admits that Fearless could "donate" money to whom it chooses as an expressive act protected by the First Amendment, the Alliance takes the position that Fearless's "contest" is not protected expressive conduct because it is not a donation. The Alliance fails to recognize that charitable aid takes many forms, including cash payments, in-kind assistance, grants, loans and investments, most of which have contract-like features. Critically, the form a charity's aid takes, whether as a "donation," a "grant" or other type does not determine whether it is expressive conduct. Rather, what matters is the connection between the aid and the expression of a *charity's mission*.

To be sure, not all charitable spending or contracting necessarily is expressive of mission. Charities can and do engage in purely commercial transactions that are

not expressive in nature, such as contracting with vendors to assist the charity in performing its operations. But the manner of fulfilling a charity's mission, including the choice of who benefits and why, is a core expressive activity protected by the First Amendment.

* * *

It cannot be understated: this case is not just about the application of section 1 of the Civil Rights Act of 1866, 14 Stat. 27, codified at 42 U.S.C. § 1981 (hereinafter, "§ 1981"). At stake is potentially significant harm to charitable organizations and their freedom to fulfill their missions to further societal good under the broader law of charity. A ruling that implicates a charity's right to exercise its well-rooted freedoms to determine its mission or advance social welfare by eliminating the effects of racial discrimination could have chilling effects on the more than 1.3 million charities registered in the United States and the many more millions of people they serve.

Amicus curiae therefore encourages this Court to be mindful in any ruling of the role of charitable organizations in American society, the regulatory environment under which charities operate, the vast potential for uncertainty relating to providing charitable assistance to promote social welfare without risk of prosecution and the chilling of lawful charitable speech to the detriment of civil society.

ARGUMENT

I. UNDERSTANDING THE HISTORICAL AND REGULATORY CONTEXT OF CHARITIES IS CRUCIAL TO RESOLVING THIS CASE

The Alliance seeks to convince this Court that this case is about racial discrimination involving a "contract" between private parties. But the Alliance is challenging a *charity's* ability to fulfill its charitable purpose of, among other things, providing charitable aid for the public's benefit pursuant to longstanding charity law. Accordingly, understanding the historical and regulatory environment in which charities operate is critical to analyzing the legal issues presented in this case and the potentially broad, adverse implications that a ruling against Fearless would have on the work of charities across America.

A. America's Charitable Sector Is Robust and Rooted in the Freedom to Associate

Charities in America are a success story. From the early days of the Republic, Americans have joined together to form groups to pursue their ideals, help their communities and prepare for a brighter future. Alexis de Tocqueville, a key observer of the vitality of American charities, noted in Democracy in America that:

> Americans of all ages, of all conditions, of all minds, constantly unite. Not only do they have commercial and industrial associations in which they all take part, but also they have a thousand other kinds: religious, moral, intellectual, serious ones, useless ones, very general and very particular ones, immense and very small ones; Americans associate to celebrate holidays, establish seminaries, build inns, erect churches, distribute books, send missionaries to the Antipodes; in this way they create hospitals, prisons, schools. If, finally, it is a matter of bringing a

> truth to light or of developing a sentiment with the support of a good example, they associate.[4]

Another prominent observer, John Gardner, writing more recently, explained that the nonprofit sector "is the natural home of non-majoritarian impulses, movements, and values. It comfortably harbors innovators, maverick movements, groups which feel that they must fight for their place in the sun, and critics of both liberal and conservative persuasion."[5]

The freedom to associate is a bedrock principle protected under the First Amendment that allows groups to form freely as an expressive act, including for charitable purposes, without undue government restraint. The Supreme Court has thus long protected the right of association, emphasizing the importance of this right to ensure that the right to free speech is not lost when individuals join together to associate. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958) (explaining that it is "beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of" civil liberties such as the freedom of speech). The Supreme Court recognizes that protected association of

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[4] 2 Alexis de Tocqueville, *Of the Use That Americans Make of Association in Civil Life*, *in* Democracy in America, pt. II, ch. 5, 895, 896 (English ed., Liberty Fund 2012), https://oll.libertyfund.org/title/democracy-in-america-english-edition-vol-2.

[5] John Gardner, *Foreword* to Brian O'Connell, America's Voluntary Spirit – A Book of Readings, at ix (The Foundation Center 1983).

nonprofits furthers "a wide variety of political, social, economic, educational, religious, and cultural ends," and "is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority." *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2382 (2021) (cleaned up).

The result of this freedom and tradition is a robust charitable sector. There are well over 1.365 million registered charities in the United States, covering a wide array of groups, including hospitals, schools, churches, colleges and universities, social service providers, private foundations, research organizations, think-tanks, community foundations, religious organizations, scholarship funds and charitable trusts.[6] The charitable sector held over $5.5 trillion in assets and earned almost $2.7 trillion in revenue in tax year 2020, the most recent year available.[7] In 2022, Americans gave about $500 billion to charities, and private foundations alone

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[6] IRS, *Nonprofit Charitable and Other Tax-Exempt Organizations, Tax Year 2019*, Publication 5331 (Rev. 7-2023), https://www.irs.gov/pub/irs-pdf/p5331.pdf. Most churches are not included in these data because they are not required to register with the Internal Revenue Service ("IRS"). 26 U.S.C. § 508(c)(1)(A).

[7] IRS, *SOI Tax Stats – Charities & Other Tax-Exempt Organizations Statistics*, Table 1, Tax Year 2020, https://www.irs.gov/statistics/soi-tax-stats-charities-and-other-tax-exempt-organizations-statistics.

provided more than $105 billion of charitable assistance.[8] When it comes to charities, spirit of giving and volunteerism, America is an exemplar for the world.

B. The Government Supports Charities with Significant Tax Subsidies and a Hands-Off Regulatory Approach that Allows Charities the Freedom to Determine Their Mission and Choose Their Beneficiaries

Recognized as section 501(c)(3) organizations under the Internal Revenue Code ("Tax Code"), charities receive considerable financial support from the federal government.[9] Charities are exempt from federal income tax, 26 U.S.C. § 501(c)(3), and donations to charities are deductible by donors for federal income tax purposes. 26 U.S.C. § 170(a). The Supreme Court describes these tax benefits as federal government subsidies, *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 544 (1983), which amount to tens of billions of dollars each year (for exemption)[10] and $1.25 trillion over ten years (for charitable contributions).[11]

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[8] Giving USA, *The Annual Report on Philanthropy for the Year 2022* at 26, 31 (June 20, 2023).

[9] IRS, Publication 5331, https://www.irs.gov/pub/irs-pdf/p5331.pdf (government grants to nonprofit charitable and other tax-exempt organizations were second largest source of charitable revenue).

[10] Nathan Born & Adam Looney, *How Much Do Tax-Exempt Organizations Benefit From Tax Exemption?*, Tax Policy Center (July 2022), https://www.taxpolicycenter.org/sites/default/files/publication/164057/how_much_do_tax-exempt_organizations_benefit_from_tax_exemption.pdf.

[11] U.S. Dep't of the Treasury, Office of Tax Analysis, Tax Expenditures for Fiscal Year 2024, at Table 1 (Mar. 6, 2023),

(cont'd)

Government support for charities and the public good they provide is not just financial but is also philosophical. Consistent with the First Amendment, the government is not prescriptive when it comes to what may qualify as a charity. Under the Tax Code, the key requirement is that an organization be organized and operated exclusively for an exempt *purpose*. 26 U.S.C. § 501(c)(3). A charity is not required to conduct any particular activity. Instead, a charity qualifies based on its aspirations and whether it operates to further those aspirations (as opposed to furthering something else).

The purposes that allow for section 501(c)(3) exempt status are broad, and they are broadly construed.[12] Although the IRS determines what qualifies under section 501(c)(3), the IRS may not engage in viewpoint discrimination or assert any particular vision of the public good.[13] Rather, the IRS's role is to assess an

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https://home.treasury.gov/system/files/131/Tax-Expenditures-FY2024-update.pdf (estimating tax expenditures for corporate and individual federal income, estate and gift tax purposes for fiscal years 2022-32 with respect to the deductibility of charitable contributions to charitable organizations in (i) education, (ii) health, and (iii) other than education and health).

[12] James J. Fishman et al., *Nonprofit Organizations: Cases and Materials* 313 (6th ed. 2021). Section 501(c)(3) uses the words "charitable," "educational," "religious," "scientific" and "literary" to denote qualified exempt purposes. 26 U.S.C. § 501(c)(3).

[13] Restatement of Charitable Nonprofit Orgs. § 5.03 (2021) (explaining that "Section 501(c)(3) of the Internal Revenue Code was purposely drafted to be broad. It reflects Congress's view that the IRS is not meant to determine the

(cont'd)

organization's purpose, make sure it is organized and operated exclusively for an exempt purpose and screen for improper private benefits. *See* 26 C.F.R. § 1.501(c)(3)-1. In addition, charities are allowed to select their beneficiaries. Determining who is eligible for assistance, what causes to support and what not to support are core associational values at the heart of philanthropic freedom.

Thus, charitable tax benefits are often thought of as a subsidy for the private development of the public good.[14] The government, through tax subsidies, encourages individuals to form organizations that will meet a community need, as determined by the community, and not by the government. Although the government makes grants to many charities and subsidizes numerous causes directly through appropriated funds, the reasons for tax exemption and the charitable deduction are to promote free association for charitable ends through the formation of charitable organizations without substantive government input in or oversight of the organization's mission or the means fiduciaries use to achieve that mission.

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character of the charitable sector"); *see also Big Mama Rag, Inc. v. United States*, 631 F.2d 1030, 1040 (D.C. Cir. 1980).

[14] Tax Policy Center, Briefing Book, *Key Elements of the U.S. Tax System – Taxes and Charitable Giving*, https://www.taxpolicycenter.org/briefing-book/who-benefits-deduction-charitable-contributions ("The charitable deduction subsidizes charitable giving by lowering the net cost to the donor. If the tax deduction spurs additional giving, charitable organizations can provide more services.").

The result of this hands-off regulatory framework is a charitable sector with a wide range of missions, viewpoints and ideas about how to secure a public benefit.[15] This regulatory approach to charitable organizations is what has fulfilled the promise that de Toqueville observed in the 19th century: dynamism and pluralism in America's charities.

C. Eliminating Racial Prejudice and Discrimination Is a Recognized Charitable Purpose

What qualifies as charitable has not remained static and does not exist in a vacuum.[16] An important authoritative source of the meaning of charitable is found in regulations promulgated by the U.S. Department of the Treasury in 1959. Those regulations broadly construe the term "charitable" in its "generally accepted legal sense" and not limited by the listing of other purposes in section 501(c)(3). 26 C.F.R.

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[15] Benjamin Soskis, *Charitable Cause Pluralism and Prescription in Historical Perspective*, Urban Institute (Oct. 27, 2023), https://www.urban.org/research/publication/charitable-cause-pluralism-and-prescription-historical-perspective (choose "download report").

[16] Restatement of Charitable Nonprofit Orgs. § 1.01 (2021) (recognizing that that there is a clear intent under charity law that valid charitable purposes will evolve over time to reflect the varying conditions, characters, interests, and needs of society and different communities); Staff of the Joint Comm. on Tax'n, Historical Development and Present Law of the Federal Tax Exemption for Charities and Other Tax-Exempt Organizations 63 (JCX-29-05) (Comm. Print Apr. 19, 2005) [hereinafter "Joint Committee Print"] ("Charity is an evolving concept, as its definition depends in part upon contemporary standards."), https://www.jct.gov/CMSPages/GetFile.aspx?guid=91d1c71d-866b-4423-84a7-0f1ec352edf8.

§ 1.501(c)(3)-1(d)(2). Using the term "charitable" in its legal sense is significant because it places the meaning of "charity" on a historic footing to include not just charity in the ordinary sense (helping those in distress) but also "activities that are intended to benefit the general welfare or public interest."[17] Under this definition, "charitable" includes:

> Relief of the poor and distressed or of the underprivileged; advancement of religion; advancement of education or science; erection or maintenance of public buildings, monuments, or works; lessening of the burdens of Government; and promotion of social welfare by organizations designed to accomplish any of the above purposes, or (i) to lessen neighborhood tensions; (ii) to eliminate prejudice and discrimination; (iii) to defend human and civil rights secured by law; or (iv) to combat community deterioration and juvenile delinquency.

26 C.F.R. § 1.501(c)(3)-1(d)(2).

Most relevant here is the idea that "promotion of social welfare" by an organization "designed . . . to eliminate prejudice and discrimination" is charitable. When this regulation was promulgated, the United States was wrestling with the consequences of Jim Crow racial discrimination, segregated schools and under-enforcement of civil rights laws, which until *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), had not been construed by courts to apply to private acts of

[17] Joint Committee Print at 62.

discrimination.[18] Nonetheless, even before these cases, the Treasury Department determined that charities formed with the purpose of eliminating discrimination and prejudice have a charitable purpose in the legal sense. T.D. 6391, 24 Fed. Reg. 5217 (June 26, 1959).

The regulatory definition of charity has thus served as the basis for judicial decisions and IRS rulings on charitable status since the 1950s. Accordingly, charities have been formed to address and remedy racial discrimination preventing Black people from gaining access to economic, educational and other benefits enjoyed by Whites. And the IRS has long recognized that discrimination *in favor of a race or minority group* can serve a charitable purpose depending on the organization's mission. *See* IRS Gen. Couns. Mem. 39082 (Nov. 30, 1983) (recognizing that an individual has great personal freedom to choose the beneficiaries of his or her accumulated wealth and reasoning that whether a racial restriction "actually fosters racial discrimination" requires "an examination of the facts and circumstances on a case-by-case basis"). For example, a "Whites only" scholarship generally would "foster racial discrimination" in a negative and harmful way, and therefore not be considered charitable, but a "Whites only" restriction for White students to attend a

[18] That case involved 42 U.S.C. § 1982, a companion to § 1981, and the Supreme Court subsequently extended its reasoning to § 1981 in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975).

minority-majority institution might be valid because it might actually discourage racial discrimination in education. *Id.* Accordingly, the IRS consistently approves scholarships that are restricted to Black students because such scholarships do not foster racial discrimination but remedy failures in education to provide equal opportunities for Black and White students.[19] Along similar lines, a private foundation may provide scholarships based on the recipient's ethnic group. 26 C.F.R. § 53.4945-4(b)(5).

Relatedly, the IRS has found that activities focused on eliminating discrimination of Black people or other specific minority groups to be in furtherance of a charitable purpose:

- Making loans to minority homeowners to purchase homes in formerly all white neighborhoods. Rev. Rul. 68-655, 1968-2 C.B. 213.
- Conducting training programs for the exclusive benefit of a single minority group consistent with federal policy goals. Rev. Rul. 77-272, 1977-2 C.B. 191.

[19] *See* IRS Priv. Ltr. Rul. 201132026 (May 19, 2011), https://www.irs.gov/pub/irs-wd/1132026.pdf; IRS Priv. Ltr. Rul. 201104049 (Nov. 5, 2010), https://www.irs.gov/pub/irs-wd/1104049.pdf; IRS Priv. Ltr. Rul. 200116045 (Jan. 19, 2001), https://www.irs.gov/pub/irs-wd/0116045.pdf; IRS Priv. Ltr. Rul. 201638025 (June 20, 2016), https://www.irs.gov/pub/irs-wd/201638025.pdf. Although private letter rulings are not binding, 26 U.S.C. § 6110(k)(3), "they may constitute 'persuasive authority' because they represent the views of the IRS, which is charged with administering the Tax Code." *McKenny v. United States*, 973 F.3d 1291, 1300 n.6 (11th Cir. 2020).

- Recruiting and educating members of minority groups to further their efforts in obtaining entry into apprenticeship programs. Rev. Rul. 75-285, 1975-2 C.B. 203.

- Providing aid to minority-owned businesses to promote the social welfare of the community. Rev. Rul. 74-587, 1974-2 C.B. 162, *amplified*, Rev. Rul. 81-284, 1981-2 C.B. 130.[20]

- Educating the public about integrated housing and constructing new housing in areas where minority groups could not obtain housing because of local racial discrimination. Rev. Rul. 70-585, 1970 C.B. 115.

Unfortunately, anti-Black discrimination in America and the effects of past discrimination remain widespread.[21] As a result, charities and private foundations of many types are committed to eliminating discrimination, and consistent with the broad meaning of charity fashioned over decades, sometimes take race into account in grant-making or designing their programs and pursuing their goals.[22] So while it is true that use of a racial classification as a basis for providing assistance necessarily

[20] This ruling is consistent with the IRS's position that "depending on their structure, minority assistance programs may result in the relief of the poor or promotion of social welfare" so as to be charitable. IRS Gen. Couns. Mem. 38841 (Apr. 22, 1981).

[21] Janis Bowdler & Benjamin Harris, *Racial Inequality in the United States*, U.S. Dep't of the Treasury (July 21, 2022), https://home.treasury.gov/news/featured-stories/racial-inequality-in-the-united-states (recognizing the origins and persistence of racial inequality in the United States and the impacts on Black Americans and other minorities).

[22] *See* Cheryl Dorsey et al., *Racial Equity and Philanthropy* 16–17, The Bridgespan Group (May 2020), https://www.bridgespan.org/getmedia/05ad1f12-2419-4039-ac67-a45044f940ec/racial-equity-and-philanthropy.pdf.

excludes some races, what matters in charity law is not who is excluded, but whether the charity serves a charitable purpose in defining who is included. This is not to suggest that a charity could use race as a factor in dispensing disaster relief, for example. In practice, racial considerations will rarely be relevant or utilized, but in defining the terms of that mission itself, and what is or is not charitable, in some instances race is a relevant factor to charitability.

D. A Charity that Seeks to Eliminate Racial Discrimination Is Not Contrary to Fundamental Public Policy

In addition to meeting the regulatory definition of "charitable," a charity's purpose may not be contrary to fundamental public policy. *Bob Jones University v. United States*, 461 U.S. 574 (1983). *Bob Jones* considered whether schools with anti-Black racially discriminatory admissions and marital policies for students could be charitable. *Id.* The schools' policies failed this test, and the Supreme Court upheld the IRS's revocation of their section 501(c)(3) statuses.

But the Supreme Court was careful to cabin the "contrary to fundamental public policy" test, holding that "a declaration that a given institution is not 'charitable' should be made only where there can be no doubt that the activity involved is contrary to a fundamental public policy." *Id.* at 592. The Supreme Court found that the discriminatory policies were clearly at odds with a firm federal government policy against racial discrimination in education. *Id.* at 598. In doing so, the Supreme Court relied on the history of anti-Black discrimination in the United

States and highlighted the critical role anti-Black discrimination in education played as a primary means of causing social harm, and the Supreme Court's own prior landmark rulings that paved the way for desegregation in education. *Id.* at 593–94 (citing *Brown v. Board of Education*, 347 U.S. 483 (1954) and *Runyon v. McCrary*, 427 U.S. 160 (1976)).

Obviously, a test for charitability that depends on a court's, or the IRS's, open-ended and subjective assessment of public policy would open the door to viewpoint discrimination and would undermine the pluralistic purposes of charitable tax benefits. Nevertheless, *Bob Jones* is sometimes misunderstood as opening just such a door, essentially permitting the IRS, or a court, to revoke the tax-exempt status of entire classes of section 501(c)(3) organizations in the wake of constitutional rulings that have nothing to do with charity.

Here, the Alliance urges this Court to sound the death knell for at least certain types of charitable work under the guise of claims of racial discrimination against non-Blacks, and suggests that doing so is in the "public interest" in upholding "racial equality." Alliance Brief at 35–36. Yet in the charity law context, *Bob Jones* supports the notion that actions intended to *remedy* societal discrimination against Blacks may be charitable. Removing barriers to education faced by Blacks is remedial in nature and designed to provide equal opportunity. Similarly, Fearless's charitable program is remedial in nature and intended to address the disparity in investment in

Black women-owned businesses brought about by the legacy of racism. *See* Fearless Brief at 51–60. This is also consistent with the idea of freedom in the philanthropic context: outside of the narrow circumstances in *Bob Jones*, charities by and large are left alone to develop their own ways to fix social problems.[23]

II. DETERMINING WHETHER A CHARITY ENGAGES IN PROTECTED EXPRESSION REQUIRES CONSIDERATION OF A CHARITY'S MISSION AND THE CONTEXT IN WHICH ITS CHARITABLE ACTIVITY OCCURS

By seeking to characterize Fearless's charitable activity as unprotected "conduct," the Alliance ignores Fearless's mission and purpose and the context and environment in which it provides charitable aid. A charity's freedom to express its views and beliefs through charitable activities, such as donating or granting money, is part and parcel of its stated mission or purpose. In that regard, determining expressive conduct under the First Amendment in the context of charities requires consideration of both the charity's mission and the means it uses to express and fulfill its charitable purpose.

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[23] The Alliance's attempt to invoke *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181 (2023) ("SFFA"), as supporting its position misses the mark. SFFA was a case about affirmative action in higher education. Although the universities were section 501(c)(3) organizations, the core issue concerned the selection criteria for admissions to an educational program for which students paid tuition. The case was not about selection criteria for scholarships, grants or any form of charitable assistance. Rather, it was about access to a basic good, education, which is, if not a fundamental right, a foundational component of economic success and human prosperity.

A. Donating for a Charitable Purpose Is a Form of Protected Expressive Speech

The First Amendment protects expressive activity, but sometimes what counts as expressive is not clearly defined. Yet in the context of charities, there is little doubt that donative activity is a form of speech—both the act of donating to a charity, and the spending of those donations by a charity for a charitable purpose. *See Buckley v. Valeo*, 424 U.S. 1 (1976) (expenditure of money is protected speech); *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980) (finding that charitable solicitations "involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment"); *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988) (holding that any commercial component of charitable solicitation that is "inextricably intertwined" with the charitable purpose is entitled to full First Amendment protection); *Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.*, 6 F.4th 1247, 1256 (11th Cir. 2021) (holding that foundation's choice of which charities it would donate money to was protected expressive conduct), *cert. denied*, 142 S. Ct. 2453 (2022).

In fact, charitable spending is the expressive realization of association. A charity often is little more than a pooling of charitable donations for spending on purposes, priorities and ideas supported by donors and other supporters—an

associative activity. In other words, when a charity spends money to articulate its mission, the charity is expressing its core vision.

This is not to suggest that all charitable spending or contracting necessarily is expressive of mission. Charities engage in contracts for a host of reasons, often purely commercial ones. For example, a charity that operates as a service provider may contract with vendors to assist it in providing services, such as a hospital that enters into contracts to secure medical supplies and equipment. These are commercial contracts for goods and services, which may be necessary for the charitable mission to operate, but they are not expressive of the charity's mission.[24]

Further, the Supreme Court has made clear that the First Amendment right of expressive association is not limited to individuals but also inheres in corporations. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 687 (1978) (holding that "corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis").[25] And the Supreme Court also has made clear that the First

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[24] The Alliance relies on Professor Volokh's statement that "as a general matter, a decision not to do business with someone, even when it is politically motivated (and even when it is part of a broader political movement), is not protected by the First Amendment," *see* Alliance Brief at 16, but that statement is irrelevant here because it concerns conduct in the business context, not expressive conduct associated with providing charitable assistance.

[25] Although the corporate right of expressive association more commonly arises in the context of nonprofit associations, *see Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (holding that the Boy Scouts' freedom of expressive association was *(cont'd)*

Amendment precludes efforts to dictate the subjects about which corporations—including religious, charitable or civic organizations—may speak when addressing the public. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 785 (1978).

In short, charities are associations founded to fulfill a mission that is recognized and subsidized by the federal government. The manner of fulfilling that mission and the choice of who benefits and why, and the way in which aid is disbursed, are core expressive activities.

B. Charitable Aid Takes Many Forms, but the Form of Aid Should Not Govern Whether Its Provision Constitutes Expressive Speech

The Alliance's focus on the form of charitable aid that Fearless uses to support its beneficiaries is misguided. The form of aid should not govern whether it constitutes expressive speech.

Charitable assistance takes many forms. Social services charities often provide in-kind assistance, which can include meals, shelter and disaster relief, in addition to cash payments. But charities can provide charitable assistance in vastly different ways. Private foundations, for example, provide charitable assistance

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violated by a state law requiring the organization to admit a homosexual scoutmaster) and *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235 (11th Cir. 2018), for profit expressive corporations also have this right. *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023) (holding that an expressive for profit organization could refuse to provide website design services that conflicted with the corporation's mission, as articulated through the belief's of the corporation's founder).

through grants to organizations or to individuals. Grants can be unrestricted, that is without any conditions as to use, or more commonly, come with restrictions about the time and manner of spending the grant. As a point of reference, in 2022, private foundations issued $105 billion in assistance, a significant portion of which was by grant.[26] Grants also can include loans and investments. 26 C.F.R. § 53.4945-4(a)(2). Program-related investments, for example, are transactions where a foundation provides capital to a charitable beneficiary while expecting a return on the investment.[27] Foundations using these tools typically believe that an investment can be a more effective way of achieving a charitable end than through cash contributions. The Tax Code specifically allows program-related investments to count as charitable activity for purposes of a private foundation's mandatory annual payout obligation. 26 U.S.C. §§ 4942, 4944(c).[28]

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[26] Giving USA, *The Annual Report on Philanthropy for the Year 2022*, at 44 (June 20, 2023).

[27] *See* IRS, *Program-Related Investments* (last updated Dec. 4, 2023), https://www.irs.gov/charities-non-profits/private-foundations/program-related-investments.

[28] Some charities provide services for a fee, which is different from determining who receives charitable aid or assistance. Fees for services are more in the nature of a commercial transaction in the marketplace for the particular services provided and are reported separately on a charity's annual information return. This distinction between charitable aid and paid for services matters in contextualizing *SFFA*, which, as noted above, focused on the manner of selecting students who, in the absence of a scholarship, would pay tuition, and not selecting the beneficiaries of charitable assistance.

Yet the form that charitable assistance takes, whether by gift, contract, grant, loan or investment, should not be the determining factor in deciding what is permissible expressive activity. *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557 (1995), illustrates this principle. In *Hurley*, the Supreme Court said that a parade was a "form of protected expression" and therefore to force the parade organizers to authorize a float celebrating gay Irish-Americans violated their First Amendment expressive rights. *Id.* at 558. The Alliance argues that Fearless's "contest" is not expressive like a parade, *see* Alliance Brief at 17, but the parade in *Hurley* is analogous to the design of a charitable program. Like a parade, some participants in a charitable program categorically are included and others are excluded. This is a necessary part of expressing a mission to deliver charitable assistance (or to have a parade) consistent with the organizer's beliefs.[29]

The Alliance's argument that the form of Fearless's charitable assistance precludes a finding of expressive speech is acontextual and dangerous from the perspective of philanthropic freedom. The argument directly calls into question a charity's freedom to define its mission, including the beneficiaries of charitable

[29] *Claybrooks v. ABC, Inc.* is also analogous. 898 F. Supp. 2d 986, 999 (M.D. Tenn. 2012). There, the court held that casting decisions were "part and parcel of the Shows' creative content." *Id.* Designing a charitable program of assistance of course is not theater, but it similarly involves making determinations about who to cast in the role of charitable beneficiary.

assistance, within the confines of charity law. Fearless's charitable program may be characterized as a "contest," but it is effectively a grant that is awarded pursuant to a selection process. Although the program has race-based criteria to qualify, that criteria is directly connected to Fearless's mission. Fearless is a tax-exempt section 501(c)(3) public charity eligible for tax-deductible charitable contributions by donors who support its mission. Those financial supporters, through Fearless, are associating to do precisely what Fearless said it would do.

In any event, the Alliance's assertion that one form of aid (i.e., a donation) clearly is expressive[30] and is allowed, but the other (i.e., a "contest" or "contract") is not, fails to consider the context of Fearless's charitable program. In the charitable context, a contract could very well be a deliberate expressive act of the charity. For example, assume that a charity designs a grant program to end child poverty and writes grants on the condition that the funds be used to reduce child poverty. Further assume that the grant to a charitable beneficiary is a "contract" for purposes of § 1981. Is the grant expressive? Certainly, the relevant condition—relief of child poverty—is an expression of the core mission of the charity. However, if this Court were to adopt the Alliance's suggestion that the purported "contract"—in this case

[30] The Alliance itself suggests that Fearless is "free . . . to limit its donations . . . to black women." Alliance Brief at 22. As a matter of charity law, a charity that made "donations" "to black women" with, for example, a purpose to eliminate discrimination or prejudice, could be charitable (*see supra* Section I.C.).

the "contest"—is not expressive and that there is no First Amendment defense to a § 1981 action, the logic of the Alliance's argument could extend to many forms of charitable assistance, including grants, loans and program-related investments entered into for charitable expressive purposes. Yet, just as Amazon's exercise of its freedom of charitable choice in making donations to other charities is expressive activity (*see Coral Ridge*, 6 F.4th 1247), so are making grants to individuals, loans to businesses, program-related investments and similar kinds of assistance. These are all forms of charitable spending and activities expressive of mission.

C. The Alliance Misapplies the "Ordinary Observer Test" in the Charitable Context

The Alliance misapplies the "ordinary observer" test in arguing that Fearless's charitable activity is not "inherently expressive." Alliance Brief at 16. Merely considering whether "conduct would inherently convey a message to an ordinary observer without further explanation" devoid of context, as the Alliance urges, *id.*, is too simplistic to capture the expression and consideration of a *charitable* program. In particular, the Alliance contends that an ordinary observer would not know that Fearless's "contest" was "sending a message about the importance of black women in the economy." *Id.* But that assumes that the message is interpreted or considered without the factual context and surrounding circumstances about Fearless's charitable program. When viewed in context of Fearless's charitable work and stated mission, an ordinary observer would recognize Fearless's grants to its chosen

beneficiaries as sending an inherent expressive message consistent with Fearless's mission.

III. RULING AGAINST FEARLESS IN THIS ACTION WOULD THREATEN CHARITIES' ABILITIES TO FULFILL THEIR MISSIONS AND HARM CIVIL SOCIETY

Contrary to the Alliance's position, this is not just a case about alleged "racial discrimination in contracting" under § 1981; it is about whether a post-Civil War civil rights statute may be used to attack the mission, not just the "contracts," of a charitable organization. A ruling reversing the denial of the Alliance's preliminary injunction motion would have significant consequences far beyond this case.

First, to the extent this Court's ruling could be read broadly to capture all forms of charitable assistance as constituting a "contract" subject to antidiscrimination laws such as § 1981, such a ruling would induce a high degree of uncertainty in the charitable operations of untold numbers of charities and charitable programs and could chill the charitable efforts of many of the Nation's more than 1.3 million charities and tens of billions in grants awarded by foundations each year (over $105 billion in 2022).

Second, a ruling limiting Fearless's freedom to decide to whom it provides charitable assistance would also jeopardize longstanding Treasury regulations and IRS rulings that have for decades supported, with significant tax subsidies, charities that may use race or other classifications to eliminate the effects of discrimination

in society. It would also deal a blow to the century's-old freedom of charitable organizations to determine their mission and advance a pluralistic and dynamic civil society, long-admired as a unique and invaluable characteristic of American society.

Fearless is a charitable organization recognized under section 501(c)(3) with a mission to "bridge the gap in venture capital funding for women of color founders building scalable, growth aggressive companies."[31] As a charity, Fearless uses its grant program to exercise its freedom to decide how best to disburse charitable assistance to its chosen beneficiaries in furtherance of its mission. That White people are not eligible for Fearless's aid makes sense in the context of its mission.

CONCLUSION

This Court should affirm the district court's denial of the Alliance's motion for a preliminary injunction.

[31] Fearless Foundation, 2021 Form 990, Part I, Line 1, https://tinyurl.com/373vyvsf.

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CERTIFICATE OF COMPLIANCE

This document complies with the word limit set forth in Fed. R. App. P. 29(a)(5) because it contains a total of 6,431 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). Further, this documents complies with the typeface of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2023, the foregoing brief was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit and served through the CM/ECF system upon all counsel of record in this case.

I further certify that five (5) paper copies of this brief were transmitted to the Clerk by overnight delivery on this 13th day of December, 2023.

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