23-13138

United States Court of Appeals for the Eleventh Circuit

AMERICAN ALLIANCE FOR EQUAL RIGHTS,

Plaintiff-Appellant,

v.

FEARLESS FUND MANAGEMENT, LLC, FEARLESS FUND II, GP, LLC, FEARLESS FUND II, LP, FEARLESS FOUNDATION, INC.,

Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

BRIEF FOR AMICI CURIAE STATES OF NEW YORK, COLORADO, CONNECTICUT, DELAWARE, HAWAI'I, ILLINOIS, MAINE, MARYLAND, MASSACHUSETTS, MINNESOTA, NEVADA, NEW JERSEY, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, WASHINGTON, AND WISCONSIN, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF APPELLEES AND AFFIRMANCE

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Dated: December 13, 2023

CERTIFICATE OF INTERESTED PARTIES AND COPRORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 through 26.1-3, the undersigned counsel for Amici Curia, the States of New York, Colorado, Connecticut, Delaware, Hawai'i, Illinois, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, Oregon, Pennsylvania, Rhode Island, Vermont, Washington and Wisconsin, and the District of Columbia certifies that she believes the Certificate of Interested Persons set forth in the Brief of Defendants-Appellees Fearless Fund Management, LLC; Fearless Fund II, GP, LLC; Fearless Fund II, LP; and Fearless Foundation, Inc. (filed Dec. 6, 2023, 11th Cir. Dkt. No. 63) is complete, subject to the Certificates of Interested Persons filed by other amici since that time and subject to the following further additions:

Commonwealth of Massachusetts, Amicus Curiae;

District of Columbia, Amicus Curiae;

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The undersigned will enter this information in the Court's web-based CIP contemporaneously with the filing of this Certificate of Interested Persons.

Respectfully submitted this 13th day of December 2023.

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INTEREST OF AMICI CURIAE

Pursuant to Federal Rule of Appellate Procedure 29(a)(4), the States of New York, Colorado, Connecticut, Delaware, Hawai'i, Illinois, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and Wisconsin, and the District of Columbia file this brief as amici curiae in support of defendants-appellees Fearless Fund Management LLC; Fearless Fund II, GP, LLC; Fearless Fund II, LP; and Fearless Foundation, Inc. (collectively, "Fearless Foundation"). Like thousands of other private charities around the country, Fearless Foundation provides grants, training, and mentorship to individuals and companies that have historically been denied access to capital and excluded from full participation in social and economic life.

Among these programs is the Fearless Strivers Grant Contest. Though structured as a "contest," the program, as its name suggests, is a mechanism for making grants to businesses run by Black women to effectuate Fearless Foundation's charitable mission of helping Black

women entrepreneurs access capital.[1] Grant recipients are not parties to a commercial transaction: Fearless Foundation provides recipients with funding and mentorship to help them grow their business but takes no equity stake in their company and does not otherwise receive goods, services, or any other benefits in exchange. Rather, the grant program is designed to help close the gap that Black women face with respect to venture capital funding and is part of a well-established American tradition of philanthropic giving aimed at helping specific racial, ethnic, or religious groups participate fully in the social and economic life of the nation.

The primary responsibility for overseeing and regulating charities and other philanthropic organizations in this country rests with the States. Because of that responsibility, amici States have both a sovereign

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[1] Fearless Fund, *Fearless Strivers Grant Contest* (n.d.). As other amici have explained, Black women have historically been denied access to small business loans and other forms of financing, and they continue to face significant economic disadvantages compared to their white counterparts. *See generally* Amicus Br. of the Black Economic Alliance Foundation, ECF No. 60-1. *See also* Goldman Sachs, *Black Womenomics: Equalizing Entrepreneurship* (Feb. 9, 2022) (providing data on Black women in the business community).

For sources available on the internet, complete URLs are in the Table of Authorities. All websites were last visited on December 13, 2023.

interest in ensuring that charities can continue to serve historically marginalized communities, and deep familiarity with how philanthropic organizations structure their donations to ensure that their contributions address the needs of those they seek to serve. Amici also have a significant interest in the proper interpretation of 42 U.S.C. § 1981. Originally passed as part of the Civil Rights Act of 1866 in the aftermath of the Civil War pursuant to Congress's authority to enforce the Thirteenth Amendment, § 1981 helps ensure that persons have equal rights to enter the kinds of economic relationships that are essential to participation in the marketplace.

Amici States file this brief to explain, based on their experience, that it would undermine the central purpose of § 1981 to interpret that statute to prohibit charitable giving that is part of the nation's long tradition of philanthropy aimed at helping historically excluded populations. This statutory point provides an adequate alternative basis for affirming the district court's denial of a preliminary injunction.[2]

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[2] This brief does not address the First Amendment question that was decided by the district court because, as explained below, there is no need to do so. If § 1981 does not apply to this case, principles of constitu-

(*continued on the next page*)

ISSUES PRESENTED

1. Whether 42 U.S.C. § 1981 should be interpreted to prohibit charitable grants aimed at helping historically marginalized communities, despite the existence of a substantial tradition of such giving at the time of the statute's enactment.

2. Whether 42 U.S.C. § 1981 should be interpreted to apply to charitable giving at all, when this statute was intended to facilitate the entry of marginalized persons and groups into economic life.

SUMMARY OF ARGUMENT

The American Alliance for Equal Rights is not entitled to a preliminary injunction prohibiting Fearless Foundation from implementing its grant program for Black women entrepreneurs because 42 U.S.C. § 1981 cannot be read to prohibit charitable grants to historically excluded populations. Indeed, § 1981 should not be interpreted to apply to charitable giving at all. This argument, although rejected by the district court, provides an alternative ground for affirming the decision of the

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tional avoidance counsel against the unnecessary decision of constitutional questions.

district court, and makes it unnecessary to consider, as the district court did, whether, if the statute prohibits such grants, the Foundation nevertheless would have a First Amendment right to make them.

First, § 1981 cannot be read to prohibit these grants because at the time of its enactment, similar grant programs were widespread and there is no indication that anyone believed those grant programs were put in jeopardy by this statute. This country has a long and well-established tradition of charitable giving to provide economic assistance to racial and ethnic communities that have historically been excluded from full participation in the marketplace. These grant programs trace their origins to the founding era, and became more formal, and more prevalent, during the nineteenth century, when philanthropic organizations and charitable trusts were formed under state laws to endow schools and hospitals and to provide financial assistance and other forms of aid to African Americans and new immigrants—populations often barred from established institutions. This tradition continued through the twentieth century and continues to this day to remedy the persistent effects of historic discrimination. It would be contrary to the purpose of § 1981, which was passed to enforce the Thirteenth Amendment, to interpret it

to prohibit relief aimed at the very population that Congress was trying to help in the statute.

Second, the statute should not be read to prohibit the grants at issue here because it should not be read to apply to charitable giving generally. Congress enacted § 1981 to outlaw discrimination that prevented African Americans from exercising basic economic rights, particularly the right to enter into commercial transactions. Congress was entirely silent with respect to charitable grants, however, and this silence is meaningful. Had Congress intended for § 1981 to apply to charitable giving as well as commercial transactions, it would have said so. But there is no indication that Congress considered charitable giving *itself*, however targeted to specific races or ethnic groups, to pose an obstacle to participation in economic life.

Because § 1981 should not be interpreted to limit the charitable giving at issue here, plaintiff cannot show a likelihood of success on the merits of its sole claim, and the denial of preliminary injunctive relief should be affirmed. This case should be resolved on this statutory basis alone, without consideration of any constitutional arguments.

ARGUMENT

SECTION 1981 DOES NOT REGULATE THESE CHARITABLE GRANTS

Originally enacted as part of the 1866 Civil Rights Act, 42 U.S.C. § 1981 prohibits private, race-based discrimination in the formation and enforcement of contractual relationships. Section 1981 must be read against the backdrop of this country's long tradition of private philanthropy, dating back to the colonial era, providing financial assistance and other forms of support to racial and ethnic communities that were historically excluded from full participation in the marketplace because of systemic discrimination. Congress understood this tradition and the work done by charities and other philanthropic organizations to provide essential services to newly freed African Americans and new immigrants when it enacted § 1981.

More generally, the context of both the Civil Rights Act of 1866 and subsequent civil rights legislation makes clear that Congress intended for the statute to regulate the kinds of commercial and economic agreements that characterize economic life in areas like housing, education, and employment. Congress did not intend, and the statute should not be

read, to bar charitable grants offered by private philanthropies, regardless of how those grants are structured.

A. By Enacting § 1981, Congress Did Not Intend to Prohibit the Growing Practice of Charitable Giving Aimed at Historically Marginalized Communities.

The United States has a long tradition of private philanthropic giving aimed at supporting the most vulnerable members of society, combatting the persistent effects of discrimination, and filling in gaps left by traditional institutions. Like Fearless Foundation, charities and foundations around the country routinely endow grants that provide funding, training, and mentorship to individuals from racial and ethnic communities that have historically been excluded from the market, as well as to the organizations that help those groups. These charities provide vital access to capital and other forms of support. Congress did not intend to suppress this tradition when it enacted § 1981 as part of the Civil Rights Act of 1866.

1. A substantial tradition of remedial charitable giving predated the enactment of § 1981 and persisted through the nineteenth century.

Charitable grant programs trace their origins to voluntary organizations established during the founding era.[3] Though philanthropy was primarily funded by wealthy individual donors during this period, financial contributions often flowed through private social clubs, joint-stock ventures, and mutual aid societies to provide education, health care, and other forms of assistance to the members of the community deemed to have the greatest need, subject to certain conditions.[4] These voluntary societies endowed a range of organizations, from religious schools to hospitals and orphanages to temperance societies, abolitionist groups, and other advocacy groups.[5] Although originally limited to mem-

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[3] *See* Robert A. Gross, *Giving in America: From Charity to Philanthropy*, *in Charity, Philanthropy, and Civility in American History* 29, 37-39 (Lawrence J. Friedman & Mark D. McGarvie eds., 2003)

[4] During this era, charitable giving was often restricted to groups who were considered "deserving" of aid, such as orphans or widows with young children. And assistance was often conditioned on the recipient taking certain steps, such as enrolling in school or abstaining from alcohol, to address what was believed to be the underlying cause of poverty. *Id*. at 39-41.

[5] *See* Benjamin Soskis, *A History of Associational Life and the Nonprofit Sector in the United States*, *in The Nonprofit Sector: A Research*

(*continued on the next page*)

bers of the majority race or dominant religious institution in a particular community, philanthropy evolved over time to embrace and even target marginalized racial, ethnic, and religious groups.

Charitable giving became more formalized during and shortly after Reconstruction. As a result of the so-called "Black Codes"[6] and later, of Jim Crow laws, African Americans were barred from attending schools and colleges that taught white students, prevented from purchasing property in certain areas, and were otherwise excluded from participation in economic life.[7] Because established institutions remained closed to African Americans, charities and other philanthropic organizations stepped in,

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Handbook 23, 30-35 (Walter W. Powell & Patricia Bromley eds., 3d ed., Stanford 2020); *see also* Wendy Gamber, *Antebellum Reform*, *in Charity, Philanthropy, and Civility*, *supra* n.3, at 129, 146-150 (discussing abolition).

[6] The Black Codes were statutes passed during and shortly after the Civil War that sought to recreate aspects of slavery and restrict the rights of the newly freed slaves "to make and enforce private contracts, to own and convey real and personal property, to hold certain jobs, to seek relief in court, and to participate in common life as ordinary citizens." *United States v. Vaello Madero*, 596 U.S. 159, 173-74 (2022) (Thomas, J., concurring) (quotation marks omitted).

[7] *See id.*; *see also* David C. Hammack, *Failure and Resilience: Pushing the Limits in Depression and Wartime*, *in Charity, Philanthropy, and Civility*, *supra* n.3, at 263, 267-68.

often to establish and fund schools and universities on the condition that the institution receiving funding focus on specific courses of study or adhere to other requirements that reflected the donor's beliefs and priorities.[8] Philanthropic organizations also funneled money to the Freedmen's Bureau, which was established by Congress during the Civil War to provide certain benefits, including education, to newly emancipated slaves.[9] *See* Act of Mar. 3, 1865, ch. 90, 13 Stat. 507. African-American communities and churches also founded private societies, funded by small donations, to provide financial assistance to African-American soldiers

[8] *See* Roy E. Finkenbine, *Law, Reconstruction, and African American Education in the Post-Emancipation South*, *in Charity, Philanthropy, and Civility*, *supra* n.3, at 161, 161-68. The Peabody Education Fund was the earliest such organization, and was established in 1867, one year after 42 U.S.C. § 1981 was first enacted. Several other organizations followed closely behind, including the John F. Slater Fund for the Education of Freedmen in 1882. *Id*. at 167-68. One of the first philanthropic trusts, the General Education Board, was established in 1902 with financial support from various donors, including John D. Rockefeller, to invest in education for African Americans. *Id*. at 168.

[9] *Id*. at 161-68; *see also* Soskis, *A History of Associational Life*, *in The Nonprofit Sector*, *supra* n.5, at 36.

who fought in the Civil War and their families, who often faced a heightened risk of being attacked or lynched.[10]

In the decades following Reconstruction, these private charitable organizations, often centered around Black churches, helped African Americans arriving in northern cities find housing and work and funded education throughout the country.[11] Charities and other philanthropic organizations helped fund community centers, hospitals, and businesses in African-American neighborhoods that were unable to access funding through the traditional banking system.[12]

During the same period, immigrant communities formed ethnically and religiously-focused charitable networks, centered around places of worship, to provide basic services to new immigrants, who were often denied loans and lines of credit from traditional banks and were barred

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[10] *See* Kathleen D. McCarthy, *Women and Political Culture*, *in Charity, Philanthropy, and Civility*, *supra* n.3, at 179, 191 (discussing the formation of soldiers aid societies to help black soldiers and their families); *see also* Equal Justice Initiative, *Lynching in America: Targeting Black Veterans* (2017) (noting the unique risks faced by Black soldiers).

[11] McCarthy, *Women and Political Culture, supra,* at 188, 191.

[12] Hammack, *Failure and Resilience, in Charity, Philanthropy, and Civility*, *supra* n.3, at 267-68.

from soup kitchens, hospitals, orphanages, and schools aimed at serving more established white communities.[13]

For example, between 1848 and 1860, Jewish communities in New York City established nearly one hundred philanthropic associations to provide health care, housing, and education to new Jewish immigrants from Germany and other Eastern European countries.[14] This included the establishment of "Jews' Hospital in New York," later known as Mount Sinai, under New York's 1848 charity law to "provide medical and surgical aid to persons of the Jewish persuasion." *See Mount Sinai Hosp. v. Hyman*,

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[13] Specifically, many of these organizations were aimed at new Catholic immigrants, who were excluded from established voluntary organizations and subject to discrimination. *See, e.g.*, Mary J. Oates, *Faith and Good Works: Catholic Giving and Taking*, *in Charity, Philanthropy, and Civility*, *supra* n.3, at 284-86; McCarthy, *Women and Political Culture*, *in Charity, Philanthropy, and Civility*, *supra* n.3, at 186-87. Even when charities were open to Jewish and Catholic immigrants, those charities often reflected the anti-immigrant sentiments of established communities and forced immigrant children to assimilate by abandoning their traditional religious and cultural practices. *See* Jeremy Beer, *The Philanthropic Revolution: An Alternative History of American Charity* 46-51 (2015). This resulted in the establishment of ethnically homogenous institutions, such as orphanages, schools, and hospitals. Oates, *supra*, at 284-86; *see also* Elizabeth McKeown, *Claiming the Poor*, *in With Us Always: A History of Private Charity and Public Welfare* 145, 146-147, 149 (Donald T. Critchlow & Charles H. Parker eds., 1998).

[14] Soskis, *A History of Associational Life*, *in The Nonprofit Sector*, *supra* n.5, at 31.

92 A.D. 270, 272-73 (N.Y. App. Div. 1st Dep't 1904) (quotation marks omitted).[15] Toward the end of the nineteenth century, Jewish immigrants arriving from Russia set up separate mutual aid societies to offer unemployment insurance, healthcare, and burial services to members of their community.[16]

Catholic parishes similarly established charitable organizations to invest in new immigrant communities, and charitable giving through the Catholic Church was often aimed at specific immigrant communities.[17] For example, in the 1840s, groups of Catholic bishops, including one led by John Hughes of New York, established a series of independent charities to fund and oversee schools, orphanages, and hospitals to serve Irish immigrants who were arriving in the United States.[18] Over time, Catholic institutions were also established to provide assistance to immigrants from Italy and Eastern Europe, many of whom lived in

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[15] *See also* Soskis, *A History of Associational Life*, *in The Nonprofit Sector*, *supra* n.5, at 31.

[16] *Id.*

[17] *See, e.g.*, McCarthy, *Women and Political Culture*, *in Charity, Philanthropy, and Civility*, *supra* n.3, at 186-87.

[18] Soskis, *A History of Associational Life*, *in The Nonprofit Sector*, *supra* n.5, at 32.

ethnically homogenous neighborhoods and sought assistance to maintain their traditions, often in their native language.[19]

In the western United States, Chinese, Japanese, and Mexican immigrants established mutual aid societies and credit unions to help new immigrants from their home countries access credit, housing, and employment.[20] These organizations were particularly essential in the second half of the nineteenth century, when anti-immigrant sentiment led to significant restrictions on immigrant-owned businesses and eventually, to the Chinese Exclusion Act.[21]

Philanthropy targeted at specific racial, ethnic, and religious communities which historically had been denied access to established institutions expanded again after World War II. For example, the Civil

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[19] Oates, *Faith and Good Works*, *in Charity, Philanthropy, and Civility*, *supra* n.3, at 284-86; *see also* McKeown, *Claiming the Poor*, *in A History of Private Charity and Welfare, supra* n.13, at 146-147, 149.

[20] Soskis, *A History of Associational Life*, *in The Nonprofit Sector*, *supra* n.5, at 32.

[21] *See* Chinese Immigration and the Chinese Exclusion Acts, *Milestones in the History of U.S. Foreign Relations*, U.S. State Department Office of the Historian (n.d.); *see also* Mae M. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* 37-48 (2014 ed. 2004) (discussing racial animus toward Asian immigrants on the West Coast during this time period).

Rights Movement depended on mutual aid in the form of small donations and volunteer labor to help individuals participating in sit-ins and marches, and on money from foundations such as the Ford Foundation to help finance the NAACP's legal challenges to segregation.[22]

2. Interpreting § 1981 to prohibit this charitable tradition would undermine rather than promote the purposes of the statute.

When Congress originally enacted § 1981 pursuant to its authority to effectuate the Thirteenth Amendment's prohibition against "all badges and incidents of slavery in the United States." *The Civil Rights Cases*, 109 U.S. 3, 20 (1883), it legislated against the background of the early years of the tradition described above. When Congress passed the Civil Rights Act of 1866, it would have been well aware that philanthropic organizations around the country were directing aid to both newly-freed African Americans and newly-arrived immigrants, to provide basic services and help them access the market. *See supra* at 9-16. Both religious and philanthropic organizations also assisted the Freedmen's Bureau, which Congress created in 1865 to benefit former slaves, and

[22] Soskis, *A History of Associational Life*, *in The Nonprofit Sector*, *supra* n.5, at 57-59.

then expanded in 1866, shortly after the passage of the 1866 Civil Rights Act. *See* Act of Mar. 3, 1865, ch. 90, 13 Stat. 507; Freedmen's Bureau Bill, ch. 200, 14 Stat. 173 (1866).[23] Congress also would have been aware that at least some of these charities couched their grant programs in contractual terms. *See, e.g.*, *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 630-35, 643-47 (1819) (charitable trust establishing an endowment for a university was protected under the Contracts Clause). Had Congress intended for § 1981 to squelch private charitable efforts aimed at helping these marginalized groups—despite Congress itself sharing the same goals—it would have said so in the statutory text.

Similarly, as charitable grants aiding these populations became more prevalent over time, Congress could have amended § 1981 to address them.[24] Or it could have passed a separate statute to regulate charitable giving directly, as it did with various other contractual or quasi-contractual

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[23] *See also* Finkenbine, *Law, Reconstruction, and African American Education*, *in Charity, Philanthropy, and Civility*, *supra* n.3, at 161-67.

[24] Congress has previously amended the text of § 1981 to clarify that its protections extended to the "enjoyment of benefits, privileges, terms, and conditions" of a contractual relationship and barred retaliation against a contractual counterparty on the basis of race. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

relationships.[25] *See, e.g.*, 42 U.S.C. § 3601 et seq. (housing); 42 U.S.C. § 2000e et seq. (employment); 42 U.S.C. § 2000a (public accommodations). Yet Congress has taken no such measures.

Accordingly, interpreting § 1981's directives as prohibiting philanthropic giving intended to *help* African Americans and other historically marginalized communities enjoy those same "fundamental rights which appertain to the essence of citizenship," including by providing capital to small businesses, runs contrary to both Congress' stated intent and the foundations of its authority to promulgate the statute. *See The Civil Rights Cases*, 109 U.S. at 22.

Fearless Foundation's grant programs, like hundreds of thousands of charitable programs throughout this country's history, focus on filling a gap left by the market—in this case, the lack of funding, mentorship, and training available to Black women entrepreneurs. In doing so, the Foundation is acting within a charitable tradition that continues to this day, with charities and foundations across the country using philanthropy

[25] Congress has addressed charitable giving directly in the context of the Internal Revenue Code, but not in the context of any civil rights statute. *See, e.g.*, 26 U.S.C. § 501.

as a mechanism to meet the needs of racial and ethnic communities that have historically been denied access to education, health care, capital, and other resources. For example, in New York, organizations like Brooklyn Org and Robin Hood have established grant programs to fund essential services and address urgent needs in communities of color that have historically been underserved.[26] In Illinois, the Chicago Community Trust has taken a similar approach, funding grants to neighborhood organizations focused on addressing the needs of African-American, Latinx, and immigrant communities.[27] More recently, in 2022, the Goldman Sachs Foundation launched a grant program to support nonprofits led by Black women in order to address the persistent effects of historic discrimination against African Americans.[28] Section 1981 should not be interpreted as requiring an end to this vibrant American philanthropic tradition, which

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[26] *See* Brooklyn Org, *About Us* (n.d.); Robin Hood, *What We Do* (n.d.).

[27] Chicago Community Trust, *Our History* (n.d.) (discussing funding to various organizations, including the Chinese American Service League and an accelerator focused on Black and Latinx communities).

[28] Goldman Sachs Foundation, *One Million Black Women* (n.d.).

has precisely the same purpose as § 1981 itself. That interpretation would undermine rather than promote the purposes of § 1981.

B. More Generally, Congress Did Not Intend § 1981 to Regulate Charitable Giving.

Even aside from charitable giving targeted at historically marginalized groups, like the grant program at issue here, there is no evidence that Congress meant § 1981 to regulate any form of charitable giving. It almost certainly did not. The Civil Rights Act of 1866, ch. 31, 14 Stat. 27, 27-30, which included what is now 42 U.S.C. § 1981, served as a model for the Fourteenth Amendment,[29] and granted all persons equal rights to make and enforce contracts. Although the statute did not define the term "contract," its context and history make clear that Congress did not intend for § 1981 to extend to grants provided by private charities and foundations, regardless of the structure of those grants.

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[29] Several sections of Civil Rights Act of 1866, including § 1981, were reenacted in 1870 after the passage of the Fourteenth Amendment, though the statutory text remained unchanged. *See The Civil Rights Cases*, 109 U.S. 3, 16 (1883). The Supreme Court has explained that § 1981 effectuates the Thirteenth Amendment's protections. *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413 (1968).

Section 1981 was intended "to protect a limited category of rights, specifically defined in terms of racial equality" so as to permit African Americans to fully participate in economic and social life, as a means to eliminate the badges and incidents of slavery, such as the right to engage in commerce and access public accommodations. *See General Bldg. Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 384-85 (1982) (quotation marks omitted); *see also Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 722 (1989). These were the "great fundamental rights" protected at common law, such as the right to buy, sell, and inherit property and enter commercial transactions. *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 432 (1968); *See also The Civil Rights Cases*, 109 U.S. at 22. In other words, the statute was meant to eradicate both public and private discrimination that "saddled" African Americans with "onerous disabilities and burdens" that effectively closed the door to any kind of economic activity that would allow African Americans to participate fully in the marketplace. *Jones*, 392 U.S. at 426.

Consistent with this intent, the Supreme Court has repeatedly interpreted § 1981 to apply to commercial transactions and public accommodations. *See, e.g.*, *See Comcast Corp. v. National Ass'n of Afr. Am.-*

Owned Media, 140 S. Ct. 1009 (2020) (contracts for media companies for airtime on broadcast networks); *Jones*, 392 U.S. 409 (sale of residential property); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 236-37 (1969) (privately-owned park and playground). The Court has not suggested that the statute might also apply to charitable giving.

So too, in enacting and reenacting § 1981, Congress made no mention of charitable giving. This is perhaps not surprising given the lack of evidence that charitable giving itself—even when focused on particular racial, ethnic or religious groups—was viewed as posing any obstacle to full participation in economic life or as invading the rights to participate in the marketplace, own property, or access places of public accommodation. And as discussed above (at 17-19), Congress certainly would have been aware of the work done by philanthropic organizations around the country in this era to address the very harms that Congress sought to remedy by passing § 1981. Yet Congress has not taken any steps to rewrite the statute to apply to this sector, and amici are aware of no authority, apart from the district court decision here, extending § 1981 to charitable grants by a private philanthropic organization. Consequently, there is no basis to apply § 1981 to charitable giving solely because a

particular charity chose to use the language of contract to formalize the terms of a particular grant program. A grant program like this is simply not the sort of contract that § 1981 protects.

Because § 1981 cannot properly be read to include charitable grants like the one at issue here, plaintiff American Alliance for Equal Rights cannot show a likelihood of success on the merits of the sole claim it seeks to advance.[30] It is therefore not entitled to a preliminary injunction and the decision below can be affirmed on that ground.

C. This Court Should Not Reach the Constitutional Arguments Raised by the Parties.

Because the statutory grounds for affirmance discussed above are dispositive, this Court need not consider the First Amendment arguments raised by the parties. *See New York City Transit Auth. v. Beazer*, 440 U.S. 568, 582-83 (1979). "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that [a court] ought not pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Serv. Inc. v. McLaughlin*, 323 U.S. 101, 105

[30] To be sure, charities like Fearless Foundation are still bound by other provisions of both state and federal law, which may separately provide a private plaintiff with a cause of action against a charity.

(1944). While there is support for the constitutional argument advanced by Fearless Foundation, *see Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.*, 6 F.4th 1247, 1252-53 (11th Cir. 2021), the proper interpretation of the statute forecloses plaintiff's right to relief; this Court need not, and should not, reach any constitutional defenses to liability. *See Hagans v. Lavine*, 415 U.S. 528, 543 (1974).

CONCLUSION

For the foregoing reasons, this Court should affirm the decision below and deny plaintiff's motion for a preliminary injunction.

Dated: New York, New York
December 13, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Emily Paule, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 4,693 words and complies with the typeface requirements and length limits of Rules 29 and 32(a)(5)-(7) and the corresponding local rules.

/s/ *Emily Paule*

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was filed electronically with the Court's CM-ECF system on December 13, 2023. Service will be effectuated by the Court's electronic notification system upon all parties and counsel of record.

Dated: New York, New York
December 13, 2023

/s/ *Anagha Sundararajan*
Anagha Sundararajan