

No. 23-13138

**In the United States Court of Appeals
FOR THE ELEVENTH CIRCUIT**

AMERICAN ALLIANCE FOR EQUAL RIGHTS,
Plaintiff - Appellant,

versus

**FEARLESS FUND MANAGEMENT, LLC,
FEARLESS FUND II, GP, LLC,
FEARLESS FUND II, LP,
FEARLESS FOUNDATION, INC.,**
Defendants - Appellees.

On Appeal from the U.S. District Court for the Northern District of Georgia
No. 23-cv-3424 (Hon. Thomas W. Thrash, Jr.)

**BRIEF OF COUNCIL ON FOUNDATIONS AND
INDEPENDENT SECTOR AS *AMICI CURIAE* IN
SUPPORT OF IN SUPPORT OF APPELLEES AND
AFFIRMANCE**

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No. 23-13138

**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

In accordance with Eleventh Circuit Rules 26.1-1 and 26.1-2, and Federal Rule of Appellate Procedure 26.1, *Amici Curiae* Council on Foundations and Independent Sector certify that, in addition to the persons and entities listed in the Certificate of Interested Persons and Corporate Disclosure Statement filed by Appellant American Alliance for Equal Rights on October 9, 2023; Appellees Fearless Fund Management, LLC, Fearless Fund II, GP, LLC, Fearless Fund II, LP, and Fearless Foundation on October 24, 2023; and *Amici Curiae* American Civil Rights Project, Manhattan Institute, and the Buckeye Institute on November 13, 2023, the following is a complete supplemental list of all persons and entities that have an interest in the outcome of this case:

- Council on Foundations, *Amicus Curiae*
- Independent Sector, *Amicus Curiae*
- Morgan, Lewis & Bockius LLP (Emily Cuneo DeSmedt and Stephanie Schuster), Counsel for *Amici Curiae* Council on Foundations and Independent Sector

Amici Curiae Council on Foundations and Independent Sector further state that both organizations are incorporated, nonprofit member organizations. Neither

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Council on Foundations nor Independent Sector have a parent company, and both are nonstock corporations.

Dated: December 12, 2023

Respectfully submitted,

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INTEREST OF AMICI CURIAE

Amici curiae Council on Foundations and Independent Sector are two of the largest membership organizations representing the interests of philanthropic organizations in the United States.

The Council on Foundations (“Council”) is a nonprofit membership organization that helps grantmaking foundations and corporations advance the greater good through philanthropy. Founded in 1949, the Council supports nearly 900 member foundations, nonprofits, grantmaking LLCs, and other organizations, whose unique missions cover the entire ideological spectrum. The Council’s goals are to build trust in philanthropy, expand pathways to giving, engage broader perspectives, and co-create solutions that will lead to a better future for all. The Council regularly advocates for the interests of the philanthropic sector before Congress and produces research on topics important to the sector.

Independent Sector is a national membership organization representing an equally diverse community of changemakers, nonprofits, foundations, and corporations working to strengthen civil society. Independent Sector’s community consists of hundreds of nonprofits, foundations, and private sector partners.

Amici’s members include community foundations, private foundations and nonprofits, religious nonprofits, independent and family foundations, public charities, and corporate grantmakers, each with their own missions. Examples of the

missions of the Council's members include "identifying, illuminating, and addressing barriers to health;" "reducing poverty and injustice, strengthening democratic values, promoting international cooperation, and advancing human achievement;" "supporting progress in religious and spiritual knowledge;" "creating a world where every person has the opportunity to live a healthy, productive life," and "helping children in need and guiding them to Christianity."¹ Examples of the missions of Independent Sector's members include advancing the arts in the United States; "support[ing] the safety, health, and spiritual strength of American Indian and Alaska Native children;" "improving public policy, informing the public, and invigorating civic life;" and "promot[ing] efforts to educate and empower people to protect the natural and human environment."²

Although the causes they support vary, *Amici*'s members share one primary goal: to use philanthropy to advance causes and issues they each view as fundamental to society. *Amici* thus have significant interest in this case, which threatens to chill the First Amendment right to express an ideal by donating to a community or cause. *Amici* submit that their unique, experienced perspective will

¹ See *Member Directory*, Council on Foundations, <https://cof.org/member-directory/non-members>.

² See *Membership List*, Independent Sector (Dec. 2023), <https://independentsector.org/wp-content/uploads/2023/10/Membership-List-1223.pdf>.

help the Court grapple with the constitutional implications of the claims asserted in this case.³

SUMMARY OF ARGUMENT

Foundations and nonprofits have a First Amendment right to express their missions through charitable grants. *Amici* urge the Court to protect that constitutional right by affirming the District Court’s decision rejecting Appellant’s motion to enjoin Fearless Foundation’s expressive conduct.

Like most of *Amici*’s members, Fearless Foundation (the “Foundation”) is a 501(c)(3) nonprofit organization.⁴ It qualifies as a 501(c)(3) because it is organized and operates exclusively for charitable purposes, and no part of its net earnings benefit any private individual. *See* 26 U.S.C.A. § 501(c)(3). The Foundation’s charitable mission is to help eliminate the significant gap in funding that persists for women entrepreneurs of color in the United States. It pursues its mission, in part, by giving grants, tools, and mentorship to certain Black women business owners through its Fearless Strivers Grant contest (the “Grant Program”).

³ All parties have consented to the filing of this brief. No counsel for a party in this case authored this brief in whole or in part. No person or entity made any monetary contributions intended for the preparation or submission of this brief. To the extent that any party is a member of any *amicus* organization, it did not contribute towards payment of the fee for the preparation of this brief.

⁴ *See* Fearless Foundation, <https://www.fearlessfund.foundation/>.

Appellant argues that the Foundation's Grant Program violates Section 1981 of the Civil Rights Act. Section 1981 is a law that was enacted after the Civil War to guarantee recently emancipated slaves the same rights to make and enforce contracts "as enjoyed by white citizens." 42 U.S.C. § 1981. More than 150 years later, Black female entrepreneurs still do not enjoy the same opportunities as white entrepreneurs. The Foundation created its Grant Program to help close that gap. Now, Appellant asks the Court to enforce Section 1981 to either stop the Foundation from making grants to Black female entrepreneurs or force it to make grants to other groups it does not wish to support. Either remedy would violate the First Amendment.

This Court has already held that the First Amendment protects a foundation's right to express its mission through grantmaking. A foundation's decision to give—or not give—to a particular group conveys a message. Any effort to restrict a grant decision is therefore presumptively unconstitutional, and, at a minimum, must be narrowly tailored to serve a compelling state interest. The relief Appellant seeks flunks that test.

Neither forcing the Foundation to make grants to white entrepreneurs nor prohibiting the Foundation from making grants to underfunded Black female entrepreneurs would serve any compelling governmental interest. To the contrary, it would shut down private philanthropy that seeks to alleviate the very problem Section 1981 was enacted to prevent, and it would chill charitable organizations' long-recognized freedom to choose who benefits from their generosity.

ARGUMENT

I. The First Amendment Protects the Foundation’s Grant Program Because Charitable Grantmaking is Expressive.

Charitable grantmaking is expressive conduct that involves “a variety of speech interests” entitled to full rigorous First Amendment protection. *See, e.g., Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.*, 6 F.4th 1247, 1254 (11th Cir. 2021); *Riley v. Nat’l Fed’n of the Blind, Inc.*, 487 U.S. 781, 787-88 (1988). It is well-settled that the First Amendment protects expressive *conduct* as much as it protects the spoken or written word. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 404 (1989) (“The First Amendment literally forbids the abridgment only of ‘speech,’ but we have long recognized that its protection does not end at the spoken or written word.”); *Coral Ridge*, 6 F.4th at 1254 (“If we find that the conduct in question is expressive, any law regulating that conduct is subject to the First Amendment.”); *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1270 (11th Cir. 2004) (“The Constitution guarantees ... the right to engage not only in ‘pure speech,’ but [also] ‘expressive conduct.’”) (citing *United States v. O’Brien*, 391 U.S. 367, 376-77 (1968)).

Conduct is expressive so long as a “reasonable person would interpret [the conduct] as expressing *some* sort of message,” even if they would not “necessarily infer a *specific* message.” *Coral Ridge*, 6 F.4th at 1254 (emphases in original). In *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, for example, a food-sharing event was expressive because it communicated that “society can end

hunger and poverty if we redirect our collective resources from the military and war.” 901 F.3d 1235, 1238 (11th Cir. 2018). Even though no explanatory speech accompanied the event, it was expressive because a reasonable observer would interpret it as conveying “some sort of message.” *Id.* at 1243 (citing *Holloman*, 370 F.3d at 1270). The expressive conduct was providing food in a visible public space to convey a message of political solidarity. *Id.* at 1245.

For the same reasons, it is also well-settled that charitable grants are expressive because they are “inextricably intertwined with ... fully protected speech” of advocating for causes and ideals. *Riley*, 487 U.S. at 796; *see also*, *Coral Ridge*, 6 F.4th at 1254, *USA Entm’t. Grp. v. Israel*, No. 16-cv-60467, 2017 WL 4553441, at *4 (S.D. Fla. 2017) (First Amendment protects refusal to donate to someone); *Aiello v. Zisa*, No. 09-3076, 2009 WL 3424190, at *6 (D.N.J. 2009) (police officers’ refusal to donate to the political campaigns of fellow officers was expressive). Foundations and nonprofits, in particular, make grants to further their specific missions, express points of view on social issues and causes, and enhance core public values and services. *See All. for Open Soc’y Int’l, Inc. v. U.S. Agency for Int’l Dev.*, 430 F. Supp. 2d 222, 262 (S.D.N.Y. 2006), *aff’d*, 651 F.3d 218 (2d Cir. 2011), *aff’d sub nom. Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205 (2013).

This Court recently reaffirmed that an organization’s choice about where to grant money—and where not to—is expressive because it conveys a message about

which causes the organization wishes to support. *Coral Ridge*, 6 F.4th at 1254 (citing *Fort Lauderdale Food*, 901 F.3d at 1240; *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995)). In *Coral Ridge*, a religious organization argued that its exclusion from AmazonSmile Foundation’s charitable donation program due to its anti-LGBTQ+ views violated Title II of the Civil Rights Act of 1964, which prohibits places of public accommodation from discriminating based on religion, race, and other protected categories. *Coral Ridge*, 6 F.4th at 1250-51; *see also* 42 U.S.C. § 2000a *et seq.*

This Court rejected that argument, holding that the First Amendment protected Amazon’s refusal to donate to Coral Ridge because Amazon “engage[d] in expressive conduct when it decide[d] which charities to support through the AmazonSmile program.” *Id.* at 1254-55. The Court held that applying Title II to “essentially forc[e] Amazon to donate to organizations it does not support” would “modify the content of [Amazon’s] expression,” and Amazon’s speech itself. *Id.* at 1254-56. Thus, because Coral Ridge’s interpretation of Title II would infringe Amazon’s First Amendment right to engage in “expressive conduct,” this Court affirmed the dismissal of Coral Ridge’s Title II claim. *Id.* at 1255-56.

Appellant argues that the Grant Program is a “far cry from *Coral Ridge*” because “no contract was at issue” between Amazon and the organizations to which it donated in that case. That is plainly incorrect. First, the Foundation’s basic criteria

for its Grant Program (which are nonbinding on the Foundation) do not create contracts to which Section 1981 applies.⁵ But even if they did, Amazon indeed entered into agreements with the organizations it supported. *Id.* at 1250 (noting that AmazonSmile required the charities that received its donations to enter into “Participation Agreements” with Amazon, register as nonprofits, and pledge not to “engage in, support, encourage, or promote intolerance, hate, terrorism, violence, money laundering, or other illegal activities”). Those agreements did not strip Amazon of its First Amendment right to choose where to donate its money.

The expressive conduct that the First Amendment protects is a Foundation’s selection of its grantees. *Id.* at 1255 (“In the same way that the Council’s choice of parade units was expressive conduct, so too is Amazon’s choice of what charities are eligible to receive donations through AmazonSmile.”). Even if the Foundation *had* entered into contracts with its grantees, Courts have never held that the First Amendment only protects charitable donations that do not produce any contracts. *See, e.g., Sec’y of State of Maryland v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 967 n.16 (1984) (protecting charities’ First Amendment right to enter into certain contracts with professional fundraisers because law prohibiting such contracts was

⁵ *See, e.g., Moya v. Chrysler Corp.*, 465 F. Supp. 1189, 1190 (E.D. Mo. 1979) (Section 1981 did not apply to company’s exclusion of non-profit from its charitable payroll deduction plan because the voluntary decision to donate through the payroll deduction did not create a contract).

“a direct restriction on the amount of money a charity can spend on fundraising activity,” and therefore “a direct restriction on protected First Amendment activity.”); *see also, e.g., Riley*, 487 U.S. at 783 (“A speaker’s rights are not lost merely because compensation is received.”); *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2316-17 (2023) (“Nor, this Court has held, do speakers shed their First Amendment protections by employing the corporate form to disseminate their speech.”).

II. The First Amendment Protects The Foundation’s Right To Limit Eligibility For Its Grant Program To Women Of Color.

Forcing the Foundation to alter the eligibility requirements for its Grant Program would therefore infringe the Foundation’s First Amendment freedom of expression. The Foundation’s mission is to provide capital, community, and mentorship to women of color entrepreneurs because it believes women of color “are the unrecognized economic powerhouses of our world.”⁶ Its Grant Program, through which it voluntarily grants resources to the women of color who still have disproportionate difficulty accessing funding, is critical to that mission.⁷

The Foundation’s grants are an expression of solidarity, aimed at affecting political and social change. Appellant’s argument that the Grant Program is not

⁶ *Mission Statement*, Fearless Foundation, <https://www.fearlessfund.foundation/>.

⁷ *See also Vision Statement*, Fearless Foundation, <https://www.fearlessfund.foundation/> (“Our goal is to create a world where woman of color have equal access to the resources and support they need to succeed in business.”).

charitable because “the words charity, donation, and the like appear nowhere in [the Foundation’s] materials” completely ignores the Foundation’s history, mission statement, and status as a 501(c)(3) nonprofit foundation. Context matters. *See Fort Lauderdale Food*, 901 F.3d at 1241 (“History may have been quite different had the Boston Tea Party been viewed as mere dislike for a certain brew and not a political protest against the taxation of the American colonies without representation. . . . the circumstances surrounding an event often help set the dividing line between activity that is sufficiently expressive and similar activity that is not.”). Black women entrepreneurs, the Foundation says, are unjustly underfunded. Like the food-sharing event at issue in *Fort Lauderdale Food*, 901 F.3d at 1238, the Foundation has created the Grant Program to further its message that society must “redirect” its “resources” to level the playing field for Black women and engender a fairer society overall. *See id.* The money is the message.

The Foundation does not need to explain how its grant decisions relate to its mission. Even if the connection was less apparent, this Court already held in *Coral Ridge* that *any* choice about where to grant money is expressive.⁸ *Coral Ridge*, 6 F.4th at 1245 (noting that a reasonable person would interpret Amazon’s statement

⁸ In this regard, the Foundation’s grant decisions are different than the school admissions and hiring decisions at issue in *Runyon v. McCrary*, 427 U.S. 160 (1976), and *Burwell v. Hobby Lobby Stores*, 573 U.S. 682 (2014), respectively, because unlike grant decisions, neither school admissions decisions nor hiring decisions are inherently expressive.

that it relied on the Southern Poverty Law Center to determine which charitable organizations are eligible to participate in AmazonSmile as conveying “some sort of message” about the organizations it wishes to support).

III. Construing Section 1981 To Force The Foundation To Donate To All Businesses Would Violate the First Amendment.

Because philanthropy is expressive, it is entitled to the highest level of First Amendment protection. It is “a basic First Amendment principle that ‘freedom of speech prohibits the government from telling people what they must say.’” *All. for Open Soc’y Int’l, Inc.*, 570 U.S. at 213 (quoting *Rumsfeld v. Forum for Acad. and Inst. Rights, Inc.*, 547 U.S. 47, 61 (2006)). This is true even if—indeed, *especially if*—the government disagrees with the message an organization conveys. *Johnson*, 491 U.S. at 414 (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”); *303 Creative*, 143 S. Ct. at 2320 (noting the “Court’s enduring commitment to protecting the speech rights of all comers, no matter how controversial”); *Riley*, 487 U.S. at 790–91 (“The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it.”).

The First Amendment protects expression not only from unconstitutional laws, but also unnecessary litigation that chills speech. “This is why federal courts have emphasized the importance of resolving First Amendment cases at the earliest

possible junction.” *Green v. Miss USA, LLC*, 52 F.4th 773, 800 (9th Cir. 2022). For, “[u]nless persons ... desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-censors.” *McBride v. Merrell Dow & Pharms. Inc.*, 717 F.2d 1460, 1467 (D.C. Cir. 1983).

The relief Appellant seeks is not content-neutral. Because a decision about where to donate always expresses a message, directing an organization to make grants to particular individuals alters its speech. Prohibiting the Foundation from directing its generosity to Black- women- owned businesses, or forcing it to donate equally to non-Black-owned businesses would indisputably dilute, if not completely impede, the Foundation’s expression of its message. *Riley*, 487 U.S. at 795 (“Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech.”); *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (compelling newspaper to print an editorial reply “exact[s] a penalty on the basis of the content of a newspaper”); *Green*, 52 F.4th at 786 (“Speech must be viewed as a whole, and even one word or brush stroke can change its entire meaning.”) (quoting *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890, 909 (2019)).

In *Hurley*, the Supreme Court held that forcing an organization to permit “one banner” from an LGBTQ+ organization in a parade of 20,000 participants changed the entire parade’s expressive content. *Green*, 52 F.4th at 786 (citing *Hurley, supra*, 515 U.S. at 573). Here too, forcing the Foundation to redirect its resources from

underfunded Black female entrepreneurs to white entrepreneurs would impermissibly compel the Foundation to express a sentiment that conflicts with its entire mission. It would be no different than forcing a Christian foundation to match all of its donations to churches with equal donations to synagogue and mosques.

IV. Enjoining the Foundation’s Grant Program Would Not Serve a Compelling Government Interest.

Because enjoining the Grant Program would “force [the Foundation] ‘to utter what is not in [its] mind’” about a question of political significance, an injunction would violate the First Amendment *per se*. See *303 Creative LLC*, 143 S. Ct. at 2317 (citing *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 634, 63 S.Ct. 1178 (1943)). And even if it did not, strict scrutiny, at a *minimum*, would apply. See *Riley*, 487 U.S. at 795; see also *Nat’l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371-73 (2018) (regulations that compel organizations to “alter[] the content of [their] speech” are subject to strict scrutiny) (quoting *Riley*, 487 U.S. at 795). Under strict scrutiny, Appellant would bear the burden of proving that the injunction it seeks is “narrowly tailored to serve compelling state interests.” *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015); *Green*, 52 F.4th at 791. Appellant has *not even tried* to show that it could meet that burden. Instead, Appellant has belatedly argued that it seeks content-neutral relief, so intermediate scrutiny applies, which is plainly incorrect for the reasons set forth above.

Even if Appellant had tried to satisfy strict scrutiny, Appellant could not show that injunctive relief would be narrowly tailored to serve a compelling interest. No doubt, preventing discrimination is a compelling interest. Indeed, the Foundation’s own mission is to combat the discrimination Black women face in venture capital. But that does not end the inquiry. While “antidiscrimination laws are generally constitutional, ... a ‘peculiar’ application that require[s] speakers ‘to alter their expressive content’ [i]s not.” *See 303 Creative LLC*, 143 S. Ct. at 2315 (“[P]ublic accommodations statutes can sweep too broadly when deployed to compel speech.”); *Riley*, 487 U.S. at 792 (citing *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 755 (8th Cir. 2019)); *see also Christian Legal Soc’y v. Walker*, 453 F.3d 853, 863 (7th Cir. 2006) (“[T]he Supreme Court has made it clear that antidiscrimination regulations may not be applied to expressive conduct with the purpose of either suppressing or promoting a particular viewpoint.”); *Claybrooks v. ABC*, 898 F. Supp. 2d 986, 933 (M.D. Tenn. 2012) (“[T]he First Amendment can trump the application of antidiscrimination laws to protected speech.”) (citing *Hurley*, 515 U.S. at 568).

Put differently, while prohibiting discriminatory conduct is a compelling interest, that interest does not automatically justify prohibiting, altering, or compelling *expressive conduct*. *See 303 Creative LLC*, 143 S. Ct. at 2314–15, 2320 n.6 (“context matters and ... very different considerations come into play when a[n anti-discrimination] law is used to force individuals to toe the government’s

preferred line when speaking (or associating to express themselves) on matters of significance”). “[U]nder appropriate circumstances, anti-discrimination statutes of general applicability must yield to the First Amendment.” *Claybrooks*, 898 F. Supp. 2d at 996.

Thus, when determining whether to apply an antidiscrimination law to restrict expression, “the First Amendment demands a more precise analysis.” *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021) (citing *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 430–32 (2006)); see *Nat’l Inst. of Fam.*, 138 S. Ct. at 2376 (“[p]recision . . . must be the touchstone” of any law regulating free speech) (quoting *NAACP v. Button*, 371 U.S. 415 (1963)). Rather than rely on “broadly formulated interests,” courts must “scrutinize[] the asserted harm of granting specific exemptions to particular [] claimants.” *O Centro*, 546 U.S. at 431, 126 S.Ct. 1211. The question, then, is not whether the state has a compelling interest in enforcing non-discrimination laws (we agree it does). The question is whether, in this particular context, the state has a compelling interest in applying Section 1981 to infringe expressive conduct protected by the First Amendment.

It does not. Courts have repeatedly held that the First Amendment protects expressive conduct, even if it is discriminatory. Most recently, the Supreme Court held that the First Amendment protected a designer’s right to refuse to design wedding websites for gay couples because wedding website design is expressive.

303 *Creative*, 143 S. Ct. at 2308, 2321-22. The Supreme Court held in *Hurley* that the First Amendment protected an organization's right to exclude LGBTQ individuals from their parade because the parade was expressive. *Hurley*, 515 U.S. at 571-72, 578. The Ninth Circuit held that the First Amendment protected an organization's decision to exclude a transgender woman from a beauty pageant because "the Pageant's message [could not] be divorced from the Pageant's selection and evaluation of contestants." *Green*, 52 F.4th at 780. And in *Claybrooks v. ABC*, 898 F. Supp. 2d 986 (M.D. Tenn. 2012), the court held that the First Amendment barred a Section 1981 race discrimination claim challenging ABC's decision to select only white men as contestants for *The Bachelor*. The Court held that forcing ABC to make race-neutral casting decisions would regulate the show's creative content, so plaintiffs' Section 1981 claim needed to yield to the producers' First Amendment right to control that content. *Id.* at 1000.

Here, the question would be whether it would serve a compelling government interest to enjoin a 501(c)(3) foundation's expressive charitable grant decisions under Section 1981. It plainly would not. In fact, prohibiting or mandating charitable donations under anti-discrimination laws would threaten to stifle a tradition of freedom and autonomy in American philanthropy that fostered just shy of \$500 billion in donations to causes, organizations, and individuals in 2022. See Giving USA, the Annual Report on Philanthropy. No court has *ever* identified a compelling

interest that would justify restricting a charitable organization's First Amendment right to choose where it donates its money.

Enjoining the Grant Program would violate the First Amendment *per se*, and even if strict scrutiny applies, Appellant cannot satisfy its burden of identifying a compelling interest that would justify the injunction it seeks. Prohibiting the Foundation from using its private funds to help the same underserved group that Section 1981 was enacted to protect would not serve any government interest. The Court should reject Appellant's effort to interfere with the Foundation's charitable grants and affirm the District Court's decision protecting the First Amendment right of foundations and nonprofits to express their missions and ideals through philanthropy.

CONCLUSION

This Court should affirm the District Court's decision to protect the First Amendment right of an organization to express a message or point of view through grantmaking, and reject Plaintiff's attempt to use Section 1981 to prevent Fearless from expressing a mission that is consistent with its history and purpose.

Dated: December 12, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 4,027 words, excluding the parts exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface in Times New Roman, 14-point font.

Dated: December 12, 2023

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