

**PBPA Podcast Transcript**  
**Race-Conscious Grantmaking & Programming:**  
**Navigating the Legal Landscape after Fearless Fund**  
**(58:13 minutes)**



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*Timestamps:*

General Background of Fearless Fund Case: 2:41

Background of Related Cases: 12:30

Deep Dive into Fearless Fund Case: 22:44

The Future of Race-Based Grant-Making: 38:07

Implications for Race-Conscious Programming: 46:25

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Sireesha ([00:00](#)):

Last year, the Supreme Court in a landmark decision ruled that most American colleges and universities are prohibited from considering race and student admissions. This summer, an appellate court provided another important decision related to race conscious decisions, and this one directly impacts Georgia Nonprofits. How might race-based grant making change going forward? Join us in this episode of the PBPA podcast as we talk about the fearless case's impact on the future of equity grants in Georgia, and the legal outlook for race conscious programming.

Sireesha ([00:47](#)):

Hello and welcome to the PBPA Podcast. In each episode of the PBPA Podcast, we explore legal questions relevant to Georgia nonprofits. I'm your host Sireesha Ghanta, Counsel and Education Director at the Pro Bono Partnership of Atlanta. PBPA strengthens our community by engaging volunteer attorneys to provide nonprofits with free business legal services. We provide numerous free resources via our website, including articles and webcasts specific to Georgia nonprofits and their business legal concerns. We also provide direct legal services to our clients. For more information on client eligibility requirements, to apply to be a client or to access our vast learning center, visit our website at [pbpatl.org](http://pbpatl.org). Before we jump into this episode's topic, keep in mind that this podcast is general information, not legal counsel, contact your attorney for guidance on your nonprofits' specific situation.

Sireesha ([01:58](#)):

Marquetta Bryan is a partner with Nelson Mullins where she practices in the area of labor and employment counseling and litigation. She also has extensive experience in education and contracts matters, and has served on the board of several nonprofits in the Atlanta area. Not only is she a dynamic attorney and dedicated member of the nonprofit community, but she's also a long-time volunteer with PBPA. I'm thrilled to be speaking with such a knowledgeable expert on this timely and important topic. Thanks for being here, Marquetta. Thank you so much for having me. I'm excited to join you and your listeners.

Sireesha ([02:41](#)):

So, Marquetta, just as brief background, in August of 2023, the Alliance for Equal Rights sued Fearless Fund in Federal court. They alleged that a grant program of the Fearless Foundation was discriminatory

in violation of federal law because the grant was only available to black women-run organizations. And then in September of this year, the Fearless Fund decided to settle the case and they shut down their Fearless Strivers grant program. Can you walk us through the history of the case and how did the parties get to the settlement?

Marquetta ([03:24](#)):

Absolutely. Thank you for that opening. So many of your clients, and many of your listeners are probably thinking we provide similar programs. The difference is they have not found themselves in litigation. So we hope that we can provide something today that gives them some guidance as they try to continue to do this work. So just to provide sort of an important background, many of us have probably heard the names of the founders, Arian Simone and Ayana Parsons, and they found it fearless fun, along with a number of others that were interested in the work they were doing to try to bridge that gap, uh, for women of color in venture capital. So this was a new idea, this was a big idea. This was close to me as I have several friends right here in Atlanta that were helping strategizing that were investors in this program that got concerned when this litigation, uh, came to a head.

Marquetta ([04:20](#)):

And so they established what was called the Fearless Strivers Grant Contest, and that awarded those grants to black women owned businesses. And so, as you stated, the American Alliance for Equal Rights filed a lawsuit against the Fearless Fund, claiming that that particular grant program to help those black women owned businesses violated a law that is called Section 1981 of the Civil Rights Act. And that particular law, and I'll talk about a little bit more in detail, uh, later in the podcast, but it pre prohibits generally racial discrimination in contracts. And so, as you stated, the initial complaint was filed, I'll just say the Alliance here in August of 2023. And they filed this complaint saying that because this grant was exclusively awarded to black women, that it violated this federal law that prohibited race discrimination in contracts. Now, this is probably surprising to some people because even though the laws were not created to protect a particular group, what most people are aware of is that the Civil Rights Act and the particular laws surrounding it were in place, and the legislative history was surrounded to protect folks of unrepresented, uh, underrepresented backgrounds, African Americans, black people.

Marquetta ([05:45](#)):

And so this was sort of a different spin to see this particular law applied here for a grant program exclusively for black women. And so the case was filed in federal court, and just to give the short summary of the legal proceedings, the district court denied the alliance's request for what they asked for was a preliminary injunction. And what that means is they're asking the court to put in place a tool that courts have to stop something from continuing to stop something from happening. And so they were asking the court to apply this preliminary injunction so that Fearless Fund could not continue this grant contest. And the court acknowledged that the Alliance Group had standing to sue what I, I mentioned that because I wanna talk a little bit more about standing later. It was so important in the case to me, but they said they had standing to sue and standing is a requirement, which means that if you bring a lawsuit against somebody, if you bring a lawsuit against a group, you have to show that you have an interest, um, in the outcome, that you are related in some way, that you're not completely unrelated to the outcome of what is happening here.

Marquetta ([06:57](#)):

But the court acknowledged that they had standing to sue. And that section 1981, this particular law actually applies to the contest. I mentioned that because Section 1981 protects or prohibits racial discrimination in contracting. And so if you're hearing contest, I wanna just go into how the court sort of analogized this into a particular contract because of the requirements that people were made to abide by related to, um, if they were successful in this contest. But the court also noted that the First Amendment, uh, which is always mostly associated with freedom of speech, might also protect the contests as a form of expressive conduct. Um, and that the Alliance group had not demonstrated what is required to get this preliminary injunction, which is irreparable harm, that there is harm that it cannot overcome, um, and that it must go to the court because it does not have another remedy.

Marquetta ([07:59](#)):

Now, in June of third of 2024 this year, and so while that may sound like a long time, there's no sort of, um, deadline or timeline or calendar that courts have to follow in sort of deciding on these cases. They certainly sort of move for the administrative efficiency of justice. But June 3rd, 2024, there was an appeal to the 11th circuit. So there's litigation going on. The 11th circuit is the court, that is the Court of appeals for, that includes this federal District of Georgia and surrounding states. Now, the 11th Circuit actually reversed the District Court's decision. So remember the district court said, look, you've got standing to sue. Section 1981 applies, but you haven't been harmed in a way where we're going to stop this contest. The 11th Circuit said, we don't agree, um, and said that the contest did likely violate section 1981. So not just that it applied, but it actually violated this prohibition against racial discrimination.

Marquetta ([09:04](#)):

And it was also unlikely protected by the First Amendment, which was Fearless Funds argument. So the 11th Circuit actually entered the preliminary injunction to stop the contest that the Alliance group was actually requesting. And the court emphasized in that case that grants constituted contract. So that's how we get here with 1981 applying to the Fearless Funds contest. And so in upholding this injunction against the grant program, stating and agreeing that the grant program violates section 1981 or highly likely does it found that there is irreparable harm and that the program's restrictions. So the good that it was attempting to do in the black community for black women owned businesses was based on race, and it's not permissible under the law. Again, I said I wanted to mention standing if that's okay, because standing is a term and it's come into play where there's certain things that an entity that's bringing a lawsuit must show that it has.

Marquetta ([10:11](#)):

And in this case, these particular people in the Alliance group, they had not applied for a grant. And so typically you have to show that you have applied, that you've taken some action, um, and that you were harmed in the way maybe it you didn't win the contest, it wasn't granted to you, but the District court said you do have standing to Sue. And the court said that they had actually suffered that concrete injury because they were excluded from the grant contest because of their race. So the fact that they were not even available to apply because of the criteria that initial exclusion the court said that gave them standing. And the 11th Circuit actually affirmed that decision on standing. So that there's a, a discussion there on that because it is very, very important. And so what the Court of Appeals stated is its members had demonstrated injury in fact, because they were able and stood ready to apply, and the only thing that prevented them from doing so was their race.

Marquetta ([11:11](#)):

And so the court noted that the interest that the Alliance group had sought to protect were germane to its purpose. Um, and the court's analysis really focused on there as whether the members had a concrete plan to apply, which they said that they did. They didn't have to, uh, show a whole lot in this instance, but they actually said they did. And whether their exclusions constituted sort of a specific and personal harm. And the court said that that had been met, the standing had been met there. So the challenge to the Fearless Fund program could proceed. So standing has to be met before the court will accept the challenge. Um, and so really that's a, you know, I wanted to sort of explain that, um, as possible so that, so that our clients can understand. But that's really how we got here. Um, and so that decision really establishes that for Fearless Fund and other race-based grant programs, that those decisions could be highly scrutinized under section 1981 if they involve contractual elements. And most of the time they will. Especially if you've got a program where you're giving money, there's some criteria. There have to be some contractual elements for the purposes and goals of that grant to be reached.

Sireesha ([12:30](#)):

Yeah, that was an awesome synopsis there, Marquetta. Thank you for that. Is the fearless case is part of a movement or trend that's happening. A lot of organizations are being heavily funded to bring these lawsuits. And so I want to talk about kind of like, how this started. How did this begin? And..

Marquetta ([12:54](#)):

How did we get here?

Sireesha ([12:55](#)):

Yes. A lot of people were aware of the affirmative action case that came down last year. So let's talk about how did this start?

Marquetta ([13:03](#)):

That's when I think everyone's eyes started to to open. Right? I always like to start by saying the laws that are at issue in these cases are not new.

Sireesha ([13:13](#)):

That's true.

Marquetta ([13:14](#)):

These are laws that have been around for some time. We have utilized them, cases have been brought. We've argued them in the employment context and in other context as well. So, but for I think the lay person, the person that's not necessarily paying attention to what's happening in the courts, it sort of put it on the main stage. But scrutiny over sort of diversity, equity, and inclusion efforts has really evolved over time. If, if you're sort of paying attention. And to that point, we sort of had a catalyst in the students for fair admissions versus Harvard case. And that was a case that went to the Supreme Court. And that decision was issued in June of 2023. So just a couple of months before this complaint in Fearless Fund was filed. Um, and then people started to sort of pay attention and say, let me look at our program and let's watch what's going to happen with Fearless Fund, before we take any drastic steps to sort of stop the work that we're doing.

Marquetta ([14:12](#)):

But in a very harsh sort of summary, the students for Fair Admission versus Harvard case really effectively ended sort of race-based affirmative action in higher education. And when people sort of hear that, some people thought, well, there shouldn't have been affirmative action anyway. But if you sort of think about just programs and various programs that schools had to sort of relax criteria, uh, just because of some of the historical wrongs, um, that had been permeated throughout underrepresented communities with people of certain races and ethnicities, these affirmative action, um, elements and programs were put in place to, to really try to give these students and people sort of an equal playing field try to equal the playing field. And so now courts have said, you're not given an equal playing field. You're harming everybody else. And so that is sort of the outcome of students for fair admissions versus Harvard.

Marquetta ([15:11](#)):

And so that ruling had a ripple effect sort of leading to these increased challenges against DEI programs in various sectors, including nonprofits. And that was put on the main stage right here in Georgia because that is a Georgia program. And so I wanna say while Students for Fair Admission is a recent and prominent example, the the scrutiny of DEI initiatives has roots really in earlier legal battles as well. And I'll talk more about the Harvard case, but I just wanna mention a, a couple of others that sort of, if anybody's interested in this legal background, I'm sort of, sort of a nerd in that way, and I am <laugh>. But just to give a couple of others that we haven't heard of, um, that's Weber versus Kaiser Aluminum, and that challenged affirmative action in employment training programs. Right? And that's a 1979 case. And so that was arguing that racial preferences violated Title VII of the Civil Rights Act.

Marquetta ([16:06](#)):

And as an employment lawyer, I certainly have my ideas on how programs have been run. And, and I can't say that what, what I will say is that Title VII 1981, again, we have a legislative history that discussed, uh, the need and importance for these laws because of sort of the historical, um, wrongs and of, of various groups. If you favor one race over other, arguably, you know, there is discrimination in violation of those laws. I ha I have to add that. But then there's also Aran Constructors versus Pena. That's a 1995 case. And that's a Supreme Court case that scrutinized federal affirmative action programs that required any racial classification imposed by the federal government must be analyzed by standard of strict scrutiny. Now, we could have an entire podcast on sort of those constitutional reviews, but that strict scrutiny really means that courts and governments have to look at things in the highest possible classification of way to really make sure these programs aren't violating laws, no relaxed standards there.

Marquetta ([17:17](#)):

And so if we get to the current landscape as we talk about the students for fair admissions case, there are lots of cases out there, decisions that have been rendered in 2024 and 2023, not just in courts across the United States, but also before our administrative bodies. So there's still a number of cases being brought, a number of rulings that have been issued. But essentially in, in, in this decision, what it brought to life, the boldness, um, and it embolden activists and legal groups to, to basically have a pathway to challenge DEI efforts more broadly and said, Hey, sort of the door is open, courts are actually applicable and open to hearing us. And so for example, that's how we get to the Fearless Fine case, right? Yeah, that's true. Um, which was influenced by the legal principles that were established in the SFFA ruling. And so the cases that I've talked about, the cases that we are not mentioned by name here, but that collectively what they signal for our nonprofits is that there's more of a conservative shift

and say conservative shift because most of the challenges have sort of come from the conservative side of the aisle.

Marquette ([18:33](#)):

And when I say that that's not, you know, me politicizing things, but they're particular, uh, politicians who have sort of led these efforts, sent out letters to nonprofits. Some of our nonprofit clients may have received these, um, asking them inquiries about their programs, um, challenging their programs, requiring them to respond to information. But these cases do really signal more of a conservative shift in the legal landscape regarding sort of race-based initiatives. But just to sort of give this the key points in the students for fair admissions case, that was led by an individual by the name of Edward Blum. And what he argued is that Harvard's admissions policies discriminated against Asian-American applicants. So they were not bringing the case on behalf of sort of all others, but this was specifically related to Asian American applicants and the underlying law in that case was that it violated the equal protection clause of the 14th Amendment.

Marquette ([19:40](#)):

So a constitutional amendment that prohibits race discrimination and Title six of the Civil Rights Act of 1964. Title Six applies to, um, federal funding recipients, particularly education institutions as well, but not only education institutions, but entities receiving federal funding. And so Title six also prohibits race discrimination and some other forms of discrimination as well. But this was not under 1981 like Fearless Fund, but Equal Protection Clause of 14th Amendment and Title Six now in June of 2023. Just to sort of get you to the Supreme Court jumping ahead here a bit, uh, the Supreme Court ruled that Harvard's race conscious its mission policies, which they did have because they were conscious of the role that race had played in students attempting to enter and matriculate through Harvard and get into to college. And so other schools and higher education institutions had these sort of race conscious admission policies as well, but they ruled that they were unconstitutional, which means they violate these laws.

Marquette ([20:51](#)):

And the court held that these policies Act actually failed to meet that high standard, that strict scrutiny standard that is required for race-based classifications that was determined to apply well before the two thousands. Right? And so that's why I gave sort of those other cases. And what that decision did is effectively ended affirmative action in college admissions. And it required colleges and universities to really, really think about race neutral ways to achieve diversity. And so the Fearless Fund Litigation shares some similarities with students in fair admissions case, primarily in its challenge to race-based initiatives. Um, because even though we've got the American Alliance for Equal Rights, which is also led by this same person, uh, Edward Bloom, who sued the Fearless Fund, so that's not a coincidence, um, arguing that it's grant program for black women entrepreneurs violated Section 1981. Uh, but similar to the students of Fair Admission case, the courts found that <inaudible> funds race specific criteria also violated federal anti-discrimination laws.

Marquette ([22:00](#)):

So different laws we'll talk about, you know, what that looks like. But the broader impact is that race-based criteria, race-based decision making, has now been found twice to have violated those federal anti-discrimination laws. And so both cases really highlight increasing legal scrutiny. We get to the Supreme Court, we get to the 11th Circuit Court of Appeals. Those aren't, you know, small courts. Those aren't small feats when we have to think about the way that litigation progresses. Um, and so the both

cases really show and highlight and just underscore the ongoing legal debates over race conscious policies and affirmative action practices.

Sireesha ([22:44](#)):

Even though both cases, and when I say both cases, um, I'm talking about the Fearless Fund case and the students for fair admissions case, there were both about race being used in decision making, as you mentioned, to address historic and cultural inequities. But the college admissions case is based on, sounds like very different law ...

Marquetta ([23:05](#)):

Yes, it is.

Sireesha ([23:06](#)):

...than the Fearless Fund case. Tell us more about that.

Marquetta ([23:09](#)):

Sure. So the Fearless Fund case, um, is based on section 1981 of the Civil Rights Act. And so we just mentioned briefly those laws so that we didn't leave you with sort of an incomplete background, but we want to sort of talk about the differences in those laws. So Section 1981 is a federal law, so both dealt with federal laws. That means that these are not laws that are created by the states or municipal levels, but by the federal government, either by United States statutes or by our United States Constitution. So Section 1981 of the Civil Rights Act is codified in a federal statute, and it ensures that all individuals in the United States, not just some individuals have equal rights under the law, particularly concerning contractual relationships. What does that mean? And so I, I'll just go ahead and it's short. So what it says is that Section 1981 guarantees that all persons have the same right to make and enforce contracts as white citizens.

Marquetta ([24:18](#)):

Which is why I think people were so surprised when the Fearless Fund case sort of turned on. Well, that's exactly what it seemed like these founders were attempting to do, is to make sure that other persons, black women particularly had the same right to make and enforce contracts as white citizens. But the court said, well, wait a minute, but it's, everybody has to be able, and that includes white citizens. So it doesn't say that white citizens shouldn't have the same rights. It just says everybody else should have the same rights. So if there's criteria in place with contractual similarities, contractual elements, and there are groups that are excluded from making those contracts, that is how the court got to section 1981 being violated. And so that means making contracts, performing contracts. So remember the Alliance Group said, we stood ready to make a contract, we stood ready to apply, and we could not do that.

Marquetta ([25:21](#)):

So we didn't even have the right to make it perform it, to have it terminated. If you say that we didn't meet the criteria or violate the rights, because the only criteria here is race, um, but just to enjoy all the benefits, privileges, and terms and conditions of contractual relationships. Now the law does that protects against both governmental and non-governmental discrimination. That is important because sometimes people hear about these laws and think, well, Fearless Fund is a private non-profit entity. It doesn't have to be a governmental entity for section 1981 to apply to the work that it's doing. So that

means that a private entity like Fearless Fund, a nonprofit like our clients, the ones that you all help, they cannot impair rights protected under Section 1981 as well. And so the historical context there was, of course, it was originally enacted as a part of the Civil Rights Act of 1866.

Marquette ([26:23](#)):

I give this for my history buffs, like including my children who will be made to listen to this, right? But it was designed to ensure that newly freed slaves had the same rights as other citizens. So there was some thought process there, and it was later reenacted and codified in its current form. Um, so this Section 1981, even though we don't hear about it a lot in the employment context, I see a lot of plaintiffs bringing cases in the employment context as well. Those work contractual relationships, um, even at, at-will states, and I know that's a term that we've talked about with many of your listeners, but it also applies in retail financing. So if you go get a bank loan, there's a contractual element there. If you go get a car loan, a house, a mortgage, and so just want to, you know, show how that applies sort of in our, in our daily lives.

Marquette ([27:15](#)):

But we're not thinking about that. There's this law out there called Section 1981 that's to protect us and prohibit discrimination in, in that contracting. But it really covers any kind of contractual transaction where you can think of where race discrimination might occur. Now, we've sort of talked about what if, you know, like a business that refuses to serve customers, a nonprofit group group that refuses to allow an entity of a certain race to apply. That's how we get to sort of a 1981 violation, whether people sort of agree with the decision or not, and whether we sort of look at whether these are the types of decisions that could have been made before 2023 or not, we know that we are, we're certainly seeing them increasingly now. And so it, any individual can file a lawsuit under section 1981 if they believe their rights have been violated.

Marquette ([28:15](#)):

Um, and the law, and this will become more important later as we discuss some other things, but the law provides for compensatory damages. So harms emotional distress, pain and suffering, anything that we can think of. And punitive damages, which means that somebody's done something bad. And, and that means that the court should allow damages because this was just a really bad thing in cases of intentional discrimination. So, but Section 19 1 18 81 sort of overlaps with some other, um, discrimination laws like Title vii, like Title VI, that we will sort of talk about. So we've got Fearless Fund primarily involved with Section 1981, but students for Fair Admission, on the other hand, dealt with equal protection clause I mentioned before and Title VI of the Civil Rights Act. And so that case challenged the race-based admissions as we talked about. But the legal basis of that is there are differences in how those legal principles apply depending on the context and the nature of the alleged discrimination.

Marquette ([29:19](#)):

Now, does that mean that the students in the Harvard University case could not have brought a claim under 1981? They probably could have, but the court didn't sort of necessarily have to get there because it pulled from the Equal Protection Clause and it pulled from Title vi. Um, and so the equal Protection Clause, now we, we pull from there because that is related to sort of a quasi governmental actor, um, governmental actors, federal funding recipients that sort of have these similarities and characteristics sort of related to governmental actors and things. So there's a, there's a method in a



strategy for why certain laws are used and why certain laws are asserted forth as theories. But what we have here from the Alliance group and its founder is they have really tried to sort of cover the gamut, um, of Title Six and equal protection in 1981. So if we were confused before, if any of those were sources that courts could say that programs violated, we now see that courts have upheld challenges to in under all three of them. Well,

Sireesha ([30:33](#)):

Now that leads me to another question, Marquette. So the Students for Fair Admission case, that went all the way up to the Supreme Court. Yes. Um, but the Fearless Fund case that was actually settled, yes. There was no, there was no final decision made.

Marquette ([30:47](#)):

That is correct.

Sireesha ([30:49](#)):

So what does that mean?

Marquette ([30:51](#)):

Oh, that means a lot, right? It is. And so seeing how, I mean, very frankly, we were shaken in the legal community, right?

Sireesha ([31:01](#)):

That's right.

Marquette ([31:02](#)):

And in the higher education institution world, in the employment world, sort of by this decision, we know the implications of legal decisions, especially legal decisions that reach the Supreme Court. All decisions don't reach the Supreme Court. So we can't sort of determine when the Supreme Court will decide to take a case and set legal precedent that we know how difficult it is until a another Supreme Court. And we know that that's now how Supreme Court Justices are chosen. You, you're not getting a new justice every year. So chances are today in this lifetime, and, and it may sound exaggerated, if there's a Supreme Court decision, it's unlikely that it's going to be overturned. So there are far reaching implications of that. And so the Fearless Fund case settle after that 11th Circuit Appeals opinion. So we've got the decision for the 11th circuit that upheld the injunction against the program.

Marquette ([32:03](#)):

And so that is already alone a significant legal precedent because Fearless Funds settle does not mean that the underlying legal precedent is underscored. It is still in place. It is still the law of Georgia and the surrounding states that are a part of this 11th Circuit jurisdiction. And its precedent for how race-based initiatives are viewed under federal anti-discrimination laws. So now we've got 11th circuit precedent, and we've got Supreme Court precedent, which is the law of the land. So in 11th Circuit and in other circuits that have said there are risks associated with these programs no matter how you cut it. So we've got a settlement in Fearless Fund, which really actually gave them freedom to sort of look at how they could continue their program without setting legal precedent and necessarily sort of stifling, we don't know how serious or egregious or completely their own programs and those of others.

Marquette (33:05):

So I, you know, I'm certainly was not involved in any conversations, but I would think that thinking of their program and all of the others that were coming behind them and across the United States, that this was the best decision. Um, so there's probably a, a, a thank you, right, that folks are thinking like, thank you for not creating this precedent, but it sort of allows them to modify their grant program, um, but still sort of make it more legally compliant and still aiming to do the work that they set out to do. So to support their mission to support underrepresented groups. Mm-Hmm. <affirmative> the settlement. I have not seen the terms, but there are all kinds of things that we can think of that go into that, right? Are there program adjustments? Is there guidance for other nonprofits? Um, but if the case had not settled, this is the important thing, right?

Marquette (33:56):

That's true. If it had not settled, it could have led to several potential outcomes each with very, very significant implications for DE&I initiatives, if the, so upholding the injunction, right? So if courts ultimately uphold the injunction, it sets the precedent, which it has that race specific grant programs violate the law. So we have that, what that has led to. And so with that law that is in place, we do have to reevaluate DE&I programs, I know we'll talk more about that. And it does increase legal scrutiny and challenges because there's a favorable decision. One of the other outcomes could have been that the injunction was overturned. We don't know that that would've been the case. And so, you know, if you're looking into a crystal ball and you've got this kind of litigation in front of you and you've got the decision that you have now at the 11th circuit, uh, what lawyers sort of look at as the standards that courts tend to have to follow in terms of whether they're going to change the decision of a lower court, that's a hard decision, right?

Marquette (34:59):

But, but there's a potential outcome. We don't know if it would've been one, but if the injunction had been overturned, it would've allowed the Fearless Fund to continue its grant programs. Considering the analysis of the 11th Circuit Court of Appeals. I don't think that the Fearless Fund founders and their council probably thought that that's what was coming next. Um, and an appeal is extremely expensive, right? It's extremely expensive, it's very time consuming. So we wouldn't be talking about sort of a settlement that happened, but we would still very much be hearing about this litigation today. And then there's the, so if there's an appeal and it actually reaches Supreme Court Review, um, the decision could have far reaching conclusions and implications. As I stated, this is the law of the land. And what we would've had is not just the precedent that courts can look to as guides, because now the decision is sort of limited to the 11th Circuit Court of Appeals, including Georgia, but we would've set a national precedent.

Marquette (36:00):

So a ruling for the Supreme Court would've provided clear guidance, immovable guidance on the legality, um, or illegal of race-based initiatives nationwide that courts everywhere would've had to follow the impact on affirmative action. We've got the students of fair admissions versus Harvard case that was sort of limited to the higher education context, but employment context, other contexts were already relying on that case and the Fearless Fund case to sort of challenge other race-based and affirmative action initiatives. But had Fearless Fund case reached Supreme Court Review, that decision could influence other areas of affirmative action and race conscience policies beyond grant programs, which would probably make it a little bit difficult if you're arguing for the legality or validity of one of

these programs without sort of a supreme coordin nationwide bump and stump, right? In these programs. There's some, some more room for argument whether it's successful or not, but we don't have a hammer decision that says this applies to other programs.

Marquetta (37:10):

Um, and again, with this being under Section 1981 related to contracts, I've already given some examples of how far reaching the use of Section 1981 is in arguing race discrimination. So it could have far reaching impacts, but so each of those outcomes, short of settlement, really does have significant implications of how far organizations, um, can go at implementing their programs and promoting diversity. I think that the nonprofits that you all serve should consider settlement a good thing. Um, at least in this case, if they're sort of looking at it, I think they should consider this a good thing for them because it gives guidance on how courts interpret similar programs, um, what they need to do to sort of help navigate their legal risks more effectively. Um, and just gives them some, some awareness of what's going on in the state of DE&I programs.

Sireesha (38:07):

So let, let's talk about that a little more Marquetta, because so many of our nonprofits work specifically to uplift specific racial communities, either as their sole mission or as part of their general mission, right? So what can nonprofits do if they seek to continue to offer? And in this case, let's talk specifically about grants. If they decide they want to continue to offer race-based grants.

Marquetta (38:35):

I'll start with sort of my overarching general premise, and I do a lot of DE&I counseling to nonprofits that have that exact question. Can we still focus on our mission? Can we still give grants to the communities that we want to support and help thrive? And I believe that nonprofits can continue, and I'll add a caveat here to make race-based grants, but they've gotta very, very carefully navigate the legal frameworks of that, which means that in the same way that they may have legal counsel to help them look at other areas, they have to realize that they need help. They can't be out on the DE&I grant making vote alone for this. Um, and so it does require some creativity, some thoughtfulness, and how are you really getting to work towards your mission, make these grants, and I'm calling them race-based, even though we won't ex, we don't advise that they explicitly call them race-based.

Marquetta (39:34):

So there has to be sort of a development and massaging of what I call, um, sort of the messaging right across the board, the messaging of the person. So we're not changing the purpose, but how do we convey it and unpopular opinion. I think that is something that probably we should have always been careful of in light of these laws that are not new in light of the purposes of these laws. Um, and, and the spirit of the laws, even though we know when they were put in place and why, why that is, but to just sort of, we have to do more to respond to this imbalance in racial inequity and discrimination. And we can't do that by taking these sort of extreme toll by enacting programs that look like we are discriminating against others. And well, and, and I know that people say the counter argument is it's, it's been done, it's always done, uh, when people of underrepresented races and ethnicities and communities are denied admission to things and when they don't get jobs.

Marquetta (40:37):

But what we see is that we were very, very proud of the work that we were doing in communities. And when I say we, I say the, the nonprofits I sort of identify in that space of putting forth and having the opportunity to help our communities, right? Help communities that look like, and, and so that pride became very vocal, uh, and we wanted to advertise it, and we wanted to make sure that people knew the good work that we were doing, um, and not intentionally intending to discriminate, but thinking this is something that's going on, you know, for time eternal. And so why is it different, right? When we do it not expecting a challenge, but our work has to be narrowly tailored to identifying the imbalance. So I give an example of, you know, I, like I said, I work with nonprofits. Let's say we've got a nonprofit that wants to give very generically grant monies to people who are interested in uplifting the black community.

Marquetta ([41:39](#)):

And the criteria becomes only black people can apply. The question that I ask there is, when you limit your criteria and your applicant base to only black people, how do you really get to your mission of knowing that only the black people that apply are the ones that are interested in uplifting the black community? And so I understand that there's an assumption there, but don't you think it might even be better for your program, your mission, if you were able to ask questions exclusive of race that allowed you to dig a little bit deeper in figuring out how can you actually demonstrate and show that you are have experience or you're interested in uplifting the black community because you may actually get more information that is actually more helpful to you getting to that mission. And so in sort of being more narrowly tailored to identify the goal and the historical imbalance, I think our outcomes might actually be better.

Marquetta ([42:38](#)):

So we don't have to stop the work, but we do have to be more compliant. The laws aren't going away, these court decisions are not going away. And so we cannot ignore the compliance piece of the good work. And I think that's something that is not necessarily always at the forefront of the work that the nonprofits are doing. They're doing such great work, they're getting their hands dirty. But there is a compliance piece that always has to be at sort of the forefront, the back and the side of, of strategies and minds and plan and plans and, and to the point of plans. Nonprofits can even develop sort of action plans. I won't call 'em affirmative action plans, but the action is affirmative, um, that sort of address those specific racial imbalances. And then they look at that plan and figure out how do they tailor their missions, um, their grant programs to make sure that they are actually addressing what they find.

Marquetta ([43:34](#)):

So where possible, I would say that nonprofits can use non race-based criteria. I've had some great success in advising nonprofits on how to do that. We can look at things like income, geographic location, um, without directly involving race. And thereby, you know, all we can do is try to be smart about reducing legal risk and legal exposure so that we have more chances of the work being done. Um, and then there's a documentation element I always ask when I sort of review applicant materials, websites, um, materials that go out to funders. What kind of documentation are you keeping? Are you being transparent about your goals? Are you telling funders one thing? But you know, your websites and applications are are saying something different. So there has to be a meeting of the minds in all of the messaging. It needs to be consistent and it needs to meet up.

Marquetta ([44:29](#)):

So I advise sort of maintaining documentation and being transparent about the goals and the criteria. These are the goals and these are the criteria that we have determined will absolutely help us get there. And I think if we really sit back and think about this, if it's just exclusively raised, and we know that we're not suggesting that in the Fearless Fund, it was just exclusively race because you had to be a, a black women-owned business and you've gotta show some things that you're able to, uh, sustain this program. You, you've got sort of the business footings and foundations that make you successful, much like the criteria that you all look at when you're accepting clients, right? For your programs. It's not people who got a desire to have a nonprofit and they're a brand new nonprofit. They don't have anything in place, but there's gotta be sort of foundation in place.

Sireesha (45:16):

Yes, that's right.

Marquetta (45:18):

And I think that our nonprofits can do the same things in making sure that they achieve those similar goals. In looking at that, but I can't say it enough. Um, regularly consult with legal counsel, someone that you trust, someone that you work with, you have to ensure compliance is there. And just with the involving landscape of law and regulations, your counsel can really help you adapt your programs and meet legal standards while still achieve your mission. My my goal when I'm working with a client in this context is really to always try to keep them at, yes, if this is what you tell me you wanna do, then that's what I, I wanna help you work on. I don't wanna get in and say, Nope, let's nix it. Let's open this up to everybody. Let's not think about your mission. And so trust your legal counsel to really talk you through what your goals are, be open and honest about what you've been doing and where you're trying to go. And I think that that will really help more nonprofits continue the work without sort of being gun shy on, um, putting these grants out for application and actually awarding these grants and seeing the missions come to fruition.

Sireesha (46:25):

Those are great suggestions for the grant making process for any race conscious grant making. But what about race-based programming? Has that been impacted by this? Or if not, do you think it might be something that's on the radar that nonprofits need to keep in mind?

Marquetta (46:45):

Yes. Yes, yes and yes. <laugh>, you know, we, we've talked about specifically in the form of grants, but the race-based grant is one example. Example because the race-based programming, so let's say for instance, it's not about, um, the issuance of some monetary amount to help another program sort of fund their own mission. But what if it is housing, right? What if it is access to educational opportunities? What if it's access to some program that you or I may not be able to look at right away and say it benefits in a monetary way, but the way the courts have looked at standing spec, specifically in the Fearless Fund case, if we've got an educational program, I think we should expect a, a challenge that is as far reaching to say in this race-based program, you did not allow me to, you know, have my toddler apply for your reading development program.

Marquetta (47:46):

And so that's gonna deny them an opportunity to attend college later. I know it sort of sounds extreme, right? I mean, but I think when we look at these court opinions, courts are sort of suggesting, and we've

seen other cases develop in the employment context and others where courts say the harm is already done by the discrimination. And what courts have shown us in the fearless fund case and the students of fair admission is that the discrimination happens at the point of exclusion. So absolutely, race-based programs will be impacted as well. So we have to be careful not just with the contractual elements that come in the grant making, but I think we have to be careful and pro be proactive, right? About how we're complying and considering compliance in other race-based programs as well. In that sense, I think nonprofits have to just reassess full scale all of their diversity, equity and inclusion initiatives, grant making programs, race-based support programs, benefits programs, particularly any of those that involve race-based criteria.

Marquetta ([48:51](#)):

That may be that you've got a internship, we want to support a black student from a historically black college, right? They can only be our intern. We know that HBCUs, for example, are not limited to attendance by black students. And so what are we trying to get to there? Do we just wanna support a black student? Do we wanna support a student in an HBCU? Do we, are we looking for somebody that can bring a certain element or experience to our program? That's why we've gotta reassess and really look at what we're trying to accomplish there. So there are far reaching implications of these cases and, and what they say is that nonprofits in all of the programs really now have to sort of look at alternative ways to achieve diversity, to achieve diversity, equity and inclusion in their programs by looking at something other than non-racial factors.

Marquetta ([49:47](#)):

Um, we've already talked about how these decisions go beyond admissions, how they go beyond grant making. And so what we know is that our nonprofits, I know that you all do a lot of work and tell them about what they're, how they're looking at their policies. You all have certain materials and templates to help them with that. But I suggest that nonprofits look at their policies and practices across the board to, I'll summarize it by saying, sort of aligning with these rulings. And that may involve looking at all programs, revising application processes. I go back to this sort of messaging of, of criteria messaging is consistent across the board and, and actually training staff, right? Training those who might talk to the public, training your board members and developing new strategies to promote diversity and promote your programs and continue programs without explicitly considering race.

Sireesha ([50:43](#)):

And looking ahead, what trends do you anticipate in the legal landscape surrounding DEI and race-based initiatives? I think you've already spoken to that a good deal, but any closing thoughts as nonprofits are looking ahead?

Marquetta ([50:56](#)):

Sure. I think as we have a landscape that is so static and evolving so rapidly, that is influenced by so many recent court rulings, history, political climate, we can read decisions and see ongoing political and social debates, things aren't silent. Um, I think that there a number of things that our nonprofits want to keep up on and, and watch out for. I think the recent court decisions show us that our nonprofits now will be required to and, and in the uncertain future. Um, until we see sort of a change in things, I think they have to just sort of understand that they're navigating a much more complex legal environment and doing the work. We love to sort of wrap our arms around our nonprofits and talk in terms of the fuzzy and sort of coddling context. And so now you sort of feel like a mama bear, right?

Marquetta ([51:57](#)):

With your nonprofit babies saying, unfortunately, we've gotta do a little bit more and I've gotta send you out into this complex legal world, right? To, to look at something different. So now you have to do your mission and think like corporations, right? That can be heavily fined and employers and really look at a complex legal environment to make sure that they're DEI initiatives comply with anti-discrimination laws, not just 1981, um, to look at, but to, to keep in mind even if certain constitutional amendments and, and statutes as we talked about based on number of employees and things like that don't apply to them, I think they should keep them in mind and know what they are. They should have an idea on how they might apply if they grow. Um, and again, I think in responding to the legal challenges, there's going to be, I think an increased shift across industries and across institutions of society to more race neutral criteria.

Marquetta ([52:55](#)):

What we may see is, you know, I think data will show us how that's really impacting and if we'll see sort of the historical ties change from the legislative reasons and societal reasons that that certain laws were put in place, that certain programs are put in place. And I think we'll have to, you know, at that point, if we see that our clients that nonprofits are serving are harmed, then you all might sort of look at how you challenge make those legal challenges, right? How you advise them on how to access their rights. But again, I think we're going to see a greater shift towards race neutral policies. You may start reading policies and criteria for programs that you formally recognize, and there may seem to be no mention explicitly of race at all, but sometimes the criteria may look like there's no consideration of it.

Marquetta ([53:46](#)):

And I think the goal is that while race may sort of be an underlying sort of decisive factor that we have to look at other areas of history and society, graphic diversity, we know that there are areas that need to be served where the concentrations of populations are set up in a certain way. But I think we're gonna see a continued shift towards race neutral policies. Several states have introduced and passed legislation for legal changes. If we've had anybody listening that's in one of those Florida and other states that have very explicit state legislation restricting and banning race-based DEI initiatives, then you need to know that you've gotta be up and aware on where courts are going and where your states are going and making laws. And so these laws are varying very widely and some states are imposing strict limitations, but other states are offering more flexibility to try to sort of cure.

Marquetta ([54:43](#)):

Um, some of the issues that we're seeing with these courts initiatives and federal agencies like the Equal Employment Opportunity Commission are continually giving guidance on DEI programs, how they can be implemented within the bounds of existing laws. I don't know if that type of guidance will continue, uh, because we know that with every political administration there's new leadership, there are new focuses, but there are, there's some past criteria that can be accessed from the internet, some, some helpful articles and guidance, but I think we have to pay attention to legal and regulatory changes as well. And, and I think the key is really staying abreast on what's happening in this changing legal landscape. Um, making sure that you have a way of knowing what is happening, but also paying attention to the fact that we're not just talking about race. These should apply with broader diversity initiatives of as well that encompass multiple dimensions, gender, disability, LGBTQIA plus status.

Marquetta ([55:43](#)):

And so all of these we have to take a look at for the populations that we serve. And unfortunately, I don't think this is the end of the litigation that we will see, uh, we may not see it immediately, but there are cases across the country that are being filed. Um, and so I think we will still see litigation challenging DEI initiatives. I can't say you know, necessarily in great numbers, but there are activist groups that were very, very active, um, in the midst of the students for fair admission and the fearless fund cases that were gearing up. And then they sort of got kind of quiet. Some people thought they went away. I thought they were sort of going back to watch the litigation to regroup. But I think we will still see opposition to race conscious policies. So I think time will tell, um, as to, you know, what groups are doing and how they're working to defend and their positions. But I think we have to be as creative and aggressive in defending and promoting our DEI efforts because they are so important. And I do wanna emphasize for social equity and organizational success. And we want you to be able to, to go forth with the missions for which you were founded and purposed.

Sireesha ([56:54](#)):

That is great guidance. Thank you so much, so much Marquita. And I like that analogy you used about the Mama bear and we at PVPA definitely feel that way. And so we at PVPA will do what we can and we'll be working hard to keep our nonprofits updated as this legal landscapes evolves so that we can guide the nonprofits and they can continue to work towards the missions that they have been working on. Marquita, thank you so much for sharing your time and expertise with us today.

Marquetta ([57:27](#)):

Thank you. And thank you for the continued great work that you all do.

Sireesha ([57:30](#)):

Thank you! We hope that you found this episode of the PBPA Podcast to be informative and helpful. We add new episodes every month with short conversations about general, yet important legal information for Georgia nonprofits. Remember that this is not legal counsel. Talk to your attorney about your organization's specific concerns. Thanks for tuning into the PBPA Podcast. And to all nonprofits listening out there, thank you for all the good work you continue to do in our community.