Democracy Dies in Darkness

Appeals court blocks Fearless Fund from awarding grants to Black women

A panel of the 11th Circuit, reversing a lower-court ruling, says the venture capital firm may not issue the $20,000 grants while the legal case plays out.

By Julian Mark and Taylor Telford

Updated June 3, 2024 at 5:16 p.m. EDT | Published June 3, 2024 at 3:41 p.m. EDT

A panel on the U.S. Court of Appeals for the 11th Circuit ruled Monday that an Atlanta-based venture capital firm should be temporarily blocked from issuing grants reserved for businesses owned by Black women, saying that doing so would probably discriminate against business owners of other races.

The ruling comes after Fearless Fund, a VC firm dedicated to funding businesses founded by women of color, was sued last August by a group led by affirmative-action opponent Edward Blum. Blum's cases against Harvard and the University of North Carolina culminated with the Supreme Court overturning race-conscious college admissions last summer.

The federal appeals court in Atlanta reversed a lower-court decision that the fund could proceed with its grant contest amid the litigation.

The case is being closely watched because of its possible implications for race-conscious programs in the private sector, particularly in the world of grant-giving and foundations. Observers have identified the case as a central legal battle over civil rights and affirmative action, with support pouring in from groups on both sides of the issue.

"This is the first court decision in the 150+ year history of the post-Civil War civil rights law that has halted private charitable support for any racial or ethnic group," Jason Schwartz, a lawyer with Gibson, Dunn & Crutcher, which is representing Fearless Fund, said in a statement emailed to The Washington Post. "The dissenting judge, the district court and other courts have agreed with us that these types of claims should not prevail."

Schwartz added that Fearless Fund and its legal team are "evaluating" their options and that "this is not the final outcome in this case."

The fund can appeal the decision to the full 11th Circuit or petition the U.S. Supreme Court for review. If the fund doesn't appeal, the case would move back down to trial court.

The appeals panel ruled 2-1 that allowing the $20,000 awards to be issued under the fund's Fearless Strivers Grant Contest would be "substantially likely" to violate a federal statute that prohibits racial discrimination in contracts. The panel also ruled that the plaintiffs, who were not identified by name in their legal complaint, had standing to proceed with their case.

The judges in the majority, Kevin Newsom and Robert Luck, were appointed by President Donald Trump. The dissenting judge, Robin Rosenbaum, was appointed by President Barack Obama.

"The American Alliance for Equal Rights is grateful that the court has ruled that the Fearless Fund's racially exclusive grant competition is illegal," Blum said in an emailed statement. "Our nation's civil rights laws do not permit racial distinctions because some groups are overrepresented in various endeavors, while others are underrepresented."

Ishan Bhabha, a partner at law firm Jenner & Block, said that Fearless Fund's case highlights the fact that racially exclusive programming has always presented a higher level of risk for organizations. Such programs were becoming less common amid the growing pushback over diversity, equity and inclusion (DEI) initiatives, he said, a trend he expects to continue.

Many companies are already tweaking their DEI policies to guard against legal challenges, said Bhabha, who predicts the next wave of DEI lawsuits may challenge policies that are racially neutral on the face but ultimately still affect people along racial or ethnic lines.

"I see organizations looking critically at their own programming and trying to figure out, 'How can we continue to achieve DEI goals while reducing legal risk?'" Bhabha said. "Really, what we're talking about here is how do you best structure programs within the confines of the law and a newly dynamic legal environment?"

The majority brushed aside the fund's arguments that a contest solely for Black women was a form of protected expression under the First Amendment and therefore exempted from the Civil Rights Act of 1866, a Reconstruction-era law that prohibits discrimination in contracts. Newsom and Luck also rejected the fund's argument that it was a valid program meant to remedy racial imbalances in the venture funding world. Moreover, they rejected the fund's claim that the three plaintiffs lacked standing because they are not identified by name in the lawsuit.

The plaintiffs, all female entrepreneurs who are not Black, are identified as "Owner A," "Owner B" and "Owner C."

Arian Simone, chief executive of Fearless Fund, called the decision "devastating" in a statement emailed to The Post.

"America is supposed to be a nation where one has the freedom to achieve, the freedom to earn, and the freedom to prosper," Simone said. "Yet, when we have attempted to level the playing field for underrepresented groups, our freedoms were stifled."

In her dissent, Rosenbaum focused on the issue of standing, comparing the plaintiffs to “floppers” in a soccer game — players who fake an injury to draw a penalty against the other team. She suggested that the plaintiffs do not have a genuine stake in the issues in the case and that “as American Alliance has portrayed its members’ alleged injuries, it has shown nothing more than flopping on the field.”

But Newsom, who wrote the majority opinion, shot back. “We’re talking about real-live, flesh-and-blood individuals who were excluded from the opportunity to compete in Fearless’s contest solely on account of the color of their skin,” he wrote in the majority opinion. “Respectfully, victims of race discrimination — whether white, black, or brown — are not floppers.”